

NO. A04-2221

State of Minnesota
In Court of Appeals

KELLY EVE BROWN,

Appellant,

v.

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

Respondents.

APPELLANT'S REPLY BRIEF

Albert T. Goins (#126159)
Joanna L. Woolman (#0342452)
GOINS & WOOD, P.C.
301 Fourth Avenue South
378 Grain Exchange Building
Minneapolis, MN 55415
(612) 339-3848

Jason J. Kuboushek (#0304037)
IVERSON REUVERS, LLC
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200

Attorneys for Appellant

Attorneys for Respondents

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STATEMENT OF THE LEGAL ISSUES

1. Is Officer Duerksen entitled to official immunity as to Appellant’s tort claims, and is the City of Bloomington entitled to vicarious official immunity?
2. Is the City of Bloomington entitled to statutory immunity?
3. Has Appellant established sufficient facts in material dispute with respect to her emotional distress?
4. Did the trial court err in dismissing Appellant’s Minnesota Human Rights claims?

STATEMENT OF THE CASE

Respondents moved for summary judgment on or about January 6, 2003. An oral argument regarding summary judgment was heard before the Honorable Judge Marilyn Brown Rosenbaum, United States District Court, District of Minnesota, on September 1, 2004. The district court, Honorable Judge Marilyn Rosenbaum, ordered summary judgment on September 23, 2004. This is an appeal of the district court’s judgment granting summary judgment. Appellant makes her appeal pursuant to Rule 103.03 of the Minnesota Rules of Civil Appellate Procedure. Appellant now replies to Respondents’ brief.

STATEMENT OF THE FACTS

BACKGROUND

Appellant, Kelly Brown, was shot by Bloomington police officer Daniel Duerksen at her home in December of 2000. Brown suffers from a plethora of emotional and mental illness issues and a chemical dependency. On the evening in question, Bloomington officers had responded to a call via “911” that a woman was threatening herself or another with a knife. Upon arriving at the scene, Officers encountered Ms. Brown, who was at the rear door of her trailer home – apparently holding a knife to her own throat. Officer David Duerksen was commanded to bring less lethal (beanbag) rounds loaded and deployed in his shotgun. After several commands to come out, Ms. Brown came out through glass doors, in a state of emotional distress, and Officer Duerksen, believing that he deployed “less than lethal” shotgun rounds, shot Appellant with a potentially lethal slug round from Bloomington Officer Duerksen’s shotgun. Officer Duerksen had in fact negligently loaded a lethal slug into the chamber of his shotgun, as opposed to the “less than lethal” round he intended to load. This misloaded lethal shotgun round caused severe injury to Ms. Brown.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

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

Summary judgment may be granted only if, after taking the view of the evidence most favorable to the nonmoving party, the movant has clearly sustained his burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Dempsey v. Jaroscak*, 290 Minn. 405, 188 N.W.2d 779 (Minn. 1971).

In the case before the district court, there were genuine issues regarding the negligence of Officer Duerksen (and his co-Respondent Taylor) regarding the improper deployment of the less lethal weapon by its improper loading; the firing of the second shot, at all – whether lethal or less lethal; and improper training of Bloomington officers – constituting negligent supervision; as to City of Bloomington’s liability for Officer Duerksen’s negligence; as to whether Appellant established a prima facie case for emotional distress; and as to the underlying facts of Appellant’s Minnesota Human Rights Claim. Because of these

legitimate issues of factual dispute, the trial court erred in granting Respondents' motion for summary judgment.

II. OFFICER DUERKSEN IS NOT ENTITLED TO OFFICIAL IMMUNITY AS TO APPELLANT'S TORT CLAIMS, INCLUDING NEGLIGENCE, AND THE CITY OF BLOOMINGTON IS NOT ENTITLED TO VICARIOUS OFFICIAL IMMUNITY

To determine whether official immunity applies requires the court to focus on the nature of the particular act in question. *Larsen v. Indep. School Dist. No. 314*, 289 N.W.2d 112, 120 (Minn. 1979). The particular act in this case was the proper loading and deployment of less lethal munitions in the form of the shotgun requested by the lead officers at the trailer home scene. Appellant contended that she already showed, as a matter of law, that the actions of Defendants were "plainly incompetent" therefore; their actions are not protected by official immunity, and whether or not their actions were malicious is inapposite in these circumstances. See *Dokman v. Hennepin County*, 637 N.W. 2d 286, 292 (Minn. Ct. App. 2001). Even if the Officer's actions were not plainly incompetent--they are not entitled to immunity because they were not discretionary, they were ministerial actions.

To define the proper scope of official immunity, the Minnesota Supreme Court distinguishes between discretionary duties, which are not immunized, and ministerial duties, for which the officer remains liable. *Rico v. State*, 472 N.W.2d 100 (Minn. 1991). The Minnesota Supreme Court has defined a ministerial duty

as, “one that is absolute, certain, and imperative, involving merely the execution of a specific duty arising a fixed and designated facts.” *Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651 (Minn. 2004). As set forth in the record, Officer Duerksen admits he exercised no deliberation or judgment in loading his shotgun.

The Minnesota Supreme Court in *Williamson v. Cain*, 245 N.W.2d 242, (Minn. 1976) has discussed the difficulty in determining what actions are ministerial.

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

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

trial court erred in failing to properly analyze the officers' acts leading to the injury to Kelly Brown. As the Supreme Court held in *Anderson v. Anoka Indep. Sch. Dist. No. 11*, 678N.W.2d 651 (Minn. 2004), the mere existence of some degree of judgment or discretion will not necessarily confer common law official immunity; rather, the focus is on the nature of the act at issue. The nature of the act in question was bringing or deploying less lethal munitions to the scene of the confrontation—therefore, **Officer Duerksen's action in misloading the shotgun would be no less negligent or actionable if he had handed the shotgun to another fellow Bloomington officer and he/she then fired the lethal slug round.** Because the trial court failed to engage in the proper immunity analysis, this Court may review it de novo and reverse its findings. (Application of official immunity is a legal question reviewed de novo.) (*Anderson*, *infra.*).

Further, the actions of Officer Duerksen, in using force that was not the least necessary force as required by law are not protected by official immunity. Officer Duerksen exercised no discretion in availing himself of the use of “lethal force;” his testimony shows that he intended to employ “less lethal.” See Trial Transcript pp. 117, 120; Defts. Memorandum at page 5, Exhibit D Appellant’s Appeal Brief. Further, there remains a significant summary judgment fact dispute as to whether Duerksen’s second shot--the lethal slug round--was necessary, at all. The testimony of Ms. Brown’s experts draws into factual dispute whether Ms. Brown was shot in the rear of her body as opposed to the front (by the lethal round) as Duerksen insists. The best available evidence from the experts is that

Ms. Brown was shot in the rear of her behind--a position of retreat or submission.

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

Respondent's erroneous contention that the officers are entitled to official immunity, and their reliance on *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998) in support of such contention are wholly misguided. In *Nelson*, the officer was involved in direct, physical contact with Mr. Nelson. Mr. Nelson reached for the officer's gun, and the officer shot Mr. Nelson twice in self-defense. There is no doubt that the officer's instant discretionary reaction, in that case firing two shots, was appropriate when a suspect was physically touching the officer and reaching for the officer's gun. However, the facts in this case are very different. Here, Officer Duerksen's action in loading the shotgun preceded the immediate confrontation. Further, and most importantly, Appellant was not using the sort of immediate deadly force that the suspect in *Nelson* was. Here, Appellant had a knife, which was not an immediate threat to Officer Duerksen, or any other officer at the scene -- but rather a threat to Appellant herself. The facts in *Nelson* support the conclusion that 1) the officer was facing immediate, deadly harm from the barricaded Mr. Nelson, 2) he made a discretionary decision to apply deadly force and fire his weapon. In the present case, the facts do support such conclusion

because 1) Officer Duerksen was not facing immediate, deadly harm, and 2) he had time to return to his vehicle, properly load his weapon (which is a simple, ministerial task he had done hundreds of times before). These actions were not the sort that the *Nelson* court envisioned when concluding that an officer's decision to fire two rounds were discretionary or necessary.

Respondent's further rely on *Dokman v. County of Hennepin*, 637 N.W. 2d 286 (Minn. App. 2001) to support their contention that the officers are entitled to official immunity. Again, reliance on this case is inapposite. In *Dokman*, officers received a call from Mrs. Dokman that her husband was threatening to commit suicide. The officers arrived at the scene and Mr. Dokman refused to come out of the house or to communicate via telephone. After nine hours, officers shot chemical munitions in the house. Because officers eventually made a discretionary decision to shoot chemical munitions in the house, Respondent's argue this suggests that Officer Duerksen was also acting with discretion when he decided to shoot Appellant Brown. However, the issue is not whether Officer Duerksen should have shot Appellant Brown once with less lethal ammunition, but instead whether he was negligent when he misloaded his gun with lethal instead of non-lethal ammunition – a purely ministerial act. Beyond the fact that in the present case Appellant Brown came out of the house upon officers' arrival, unlike Mr. Dokman who stayed in his house for more than nine hours, Officer Duerksen did make an improper discretionary decision to use force. However, Appellant's injury resulted from the misloading of his weapon with lethal force (as opposed to

non-lethal force, which is what was called for), which was not discretionary, it was routine, ministerial, and a clear example of his negligence.

Furthermore, the trial court plainly failed to acknowledge that official immunity is narrowly drawn and construed. Moreover, this Court has ruled the Municipal Tort Claims Act provides for a more narrow immunity than the State Tort Claims Act. See *Loftus v. Hennepin County*, 591 N.W. 2d 514 (Minn. Ct. App. 1999). Because statutorily-created immunities, such as pursuant to Chapter 466 are to be narrowly interpreted and construed, this fact exaggerates the erroneous nature of the trial court decision--especially in the summary judgment context. The court below failed to even analyze this issue.

Additionally, the party asserting immunity bears the burden of showing that he, she or it are entitled to the particular immunity asserted. ("The party asserting an immunity defense bears the burden to demonstrate that it is entitled to that immunity.")(See *Habeck v. Ouwerson*, 669 N.W.2d 907 (Minn. Ct. App. 2003). Once again, the trial court demonstrated that it did not consider this evidentiary limitation on the assertion of official immunity when it ignored the record admissions of Officer Duerksen and the expert testimony all militating against a determination in favor of official immunity. Duerksen readily admitted that he exercised no deliberation or judgment the improper loading of his weapon and the testimony of Duerksen and Brown supports Brown's assertion that she was falling and turning away when he shot the second (mistakenly loaded) lethal slug round. Because the City of Bloomington and Duerksen failed in meeting that burden of

showing their entitlement to immunity, and because the court below failed in holding them to that burden in the summary judgment context, the judgment must be reversed.

Likewise, the Respondents claim that because Officer Duerksen is entitled to official immunity, the City of Bloomington is therefore entitled to vicarious official immunity pursuant to *Weiderholt v. City of Minneapolis*, 581 N.W.2d 312,316 (Minn. 1998). This is erroneous. If, in fact, Officer Duerksen was entitled to official immunity then *Weiderholt* may be apposite; however, Ms. Brown has clearly shown that Officer Duerksen's ministerial actions were not those for which official immunity applies.

Because Officer Duerksen negligently loaded his gun with lethal force, a clearly ministerial task, he must be denied official immunity and must be held accountable for his negligent mistake, which seriously injured Appellant Brown. Further, there remains a summary judgment fact dispute as to whether Officer Duerksen acted with malice (in violation of a known right) in firing a second round, at all--in light of the entry position of Ms. Brown's wound at or near the rear of her thigh. Because Officer Duerksen is clearly not entitled to official immunity for his actions, the City of Bloomington may not claim vicarious official immunity for Officer Duerksen's actions. The decision of the trial court failed to address this and must be reversed. Therefore, Appellant's claims for negligence and her other intentional tort claims against the officers, including Duerksen and the City of Bloomington, should be remanded for trial on the merits.

III. THE CITY OF BLOOMINGTON IS NOT ENTITLED TO STATUTORY IMMUNITY FOR APPELLANT'S NEGLIGENT SUPERVISION CLAIM

As Respondents correctly state, under the Minnesota Tort Claims Act, a municipality is subject to liability for the torts of its officers acting within the scope of their employment, for any claim based upon performance or the failure to exercise or perform a duty. Minn. Stat. Section 466.03, subd. 6. Not all acts involving the exercise of judgment by agents of the government are protected as discretionary functions, and the critical question is whether the challenged governmental conduct involved a balancing of policy objectives. *Nusbaum v. County of Blue Earth*, 422 N.W. 2d 713 (Minn. 1988). For those cases in which the actions involved professional judgment, such as determining where to place a speed-limit sign as in *Nusbaum*, versus balancing of policy objectives, statutory immunity does not apply. *Id.*

In *Nusbaum*, the decision by state traffic engineers where to put a speed-limit sign, which resulted in a negligence action against the state for misplacement of speed-limit signs, was not protected by statutory immunity because it did not require any balancing of policy, but rather a professional decision. Like *Nusbaum*, this case did not involve a balancing of policy objectives, as Respondent's assert. Instead, it involved a judgment or professional decision by an officer within the scope of his employment. Here, Officer Duerksen loaded his weapon with the wrong kind of ammunition. This was an action involving the carrying out of a

plain Bloomington police department policy--not the balancing of policy objectives. Therefore, City of Bloomington cannot escape liability for this mistake under their claim of statutory immunity.

IV. APPELLANT ESTABLISHED A PRIMA FACIE CASE OF EMOTIONAL DISTRESS SUFFICIENT TO SURVIVE SUMMARY JUDGMENT

In order to survive summary judgment in the trial court, Appellant must establish a prima facie case for her intentional infliction of emotional distress claims and her negligent infliction of emotional distress claims.

To establish a claim for intentional infliction of emotional distress Appellant must show: 1) The officers' conduct was extreme and outrageous; 2) the conduct was intentional and reckless; 3) the conduct caused emotional distress; and 4) the emotional distress was severe. *Stead-Bowers v. Lanley*, 636 N.W. 2d 334, 342 (Minn. App. 2002)(citing *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983).

To establish a claim for negligent infliction of emotional distress Appellant must show: 1) she was in a zone of danger of physical impact; 2) she reasonably feared for her own safety; and 3) she suffered severe emotional distress with physical manifestations. *Stead-Bowers v. Lanley*, 636 N.W. 2d 334,343 (Minn. App. 2002).

Appellant testified in her deposition as to the outrageousness of Officer Duerksen's conduct, specifically, that he shot her with lethal force with no

justification. For most people, getting shot with a bullet, when no deadly force is necessary, constitutes a shocking and outrageous action. Further, given that Officer Duerksen intended to use non-lethal force, shooting a live, deadly round was outrageous, in addition to being unreasonable and negligent conduct. Appellant stated in her Complaint that Defendants' outrageous conduct caused her severe emotional distress.

With respect to Appellant's claim for negligent infliction of emotional distress. Appellant was clearly in the zone of danger. Appellant was not asked about the physical manifestations of her emotional distress during her deposition by Respondent's counsel, so their assertion that she did not present evidence sufficient to satisfy the requirements of her prima facie case is incorrect. There is ample evidence in the record of the severe distress suffered by Appellant both resulting from the physical injury and her psychological harm. Appellant stated with sufficient specificity in her deposition that Defendants' actions caused her severe emotional distress, with physical manifestations to survive summary judgment on this claim.

V. APPELLANT ESTABLISHED SUFFICIENT DISPUTE AS TO MATERIAL FACTS REGARDING HER MINNESOTA HUMAN RIGHTS CLAIM TO SURVIVE SUMMARY JUDGMENT

In her complaint, Appellant alleges violations of the Minnesota Human Rights Act, Minnesota Statute Section 363.3, subd. 4 (2000). This statute prohibits discrimination against any person in the access or admission to, full

utilization of, or benefit from any public service because of the person's race, color, national origin and disability. Specifically, Appellant alleges that Defendants acted in a hostile, discriminatory and illegal fashion by failing to provide adequate emergency response services to her as a mentally-disabled person.

Although Respondent's suggest that this claim was "frivolous", and that Appellant's was referring to her disparate treatment as a woman, Appellant takes very seriously her mental disability. In fact it was this severe mental disability, namely severe depression, that led to her being involved at all with the Bloomington Police Department in this case. She called the Bloomington Police to help her in what was probably the worst and lowest moment of her life, when she was about to kill herself. Instead of providing adequate emergency response to Appellant in her time of need, Officer Duerksen shot Appellant with lethal force, causing severe injury, and even further mental anguish. For this reason, Appellant believes that not only is her MHRA claim is valid, but that the trial court did not adequately consider the facts supporting this claim and erred in their dismissal as a result.

CONCLUSION

The trial judge erred when she found that Ms. Brown's claims against the officer's should be dismissed based on official immunity. In defining the scope of official immunity, the Minnesota Supreme Court distinguishes between discretionary duties, which are immunized, and ministerial duties, for which the

officer remains liable. *Rico v. State*, 472 N.W.2d 100 (Minn. 1991). The Minnesota Supreme Court has defined a ministerial duty as, “one that is absolute, certain, and imperative, involving merely the execution of a specific duty arising a fixed and designated facts.” *Anderson v. Anoka Hennepin Independent School Dist.* 11, 678 N.W.2d 651 (Minn. 2004). Here, no discretion was exercised in bringing less lethal to the scene of the confrontation.

In the present case, the negligent act of Officer Duerksen in failing to properly load his shotgun with “less than lethal” force was a ministerial, as opposed to discretionary act, and therefore not the type of act that official immunity would protect. Further, there is expert evidence that Duerksen acted plainly incompetently. Lastly, there is a major factual dispute before the Court regarding the firing of the second shot. If Kelly Brown was turning and falling to the ground as Dr. Lindsay Thomas stated, then Duerksen acted with malice or in violation of a known right. Therefore, he is not entitled to official immunity under any analysis of the facts. Immunities are narrowly construed and especially so in the summary judgment context. And, the proponent of immunity must bear the legal and evidentiary burden of showing entitlement to immunity--not vice versa. The party asserting an immunity defense bears the burden to demonstrate that it is entitled to that immunity. *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661, 664 (Minn.App.1999).

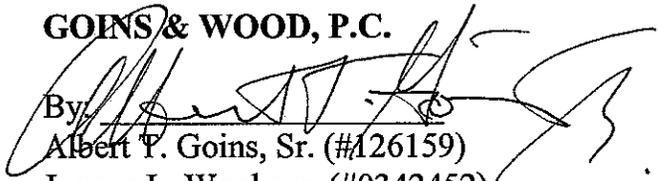
Further, the trial court erred when they found that Ms. Brown’s claims against the City of Bloomington should be dismissed based on statutory immunity.

Ms. Brown believes she established a prima facie case for emotional distress, despite the trial court's dismissal of this claim. Finally, the trial court did not pay enough attention to the particular facts concerning Ms. Brown's claim under the Minnesota Human Rights Act, and erred in dismissing this claim.

Kelly Brown asks this Court to find that Respondents' actions were not entitled to official immunity, and to reverse after de novo review the trial court judgment dismissing her claims.

Respectfully submitted,

GOINS & WOOD, P.C.

By: 
Albert P. Goins, Sr. (#126159)

Joanna L. Woolman (#0342452)

301 4th Avenue South

378 Grain Exchange Building

Minneapolis, MN 55415

Telephone: (612) 339-3848

ATTORNEYS FOR

APPELLANT

KELLY BROWN

DATED: 9/14/2005