

MINNESOTA STATE LAW LIBRARY

NO. A04-2221

---

State of Minnesota  
**In Court of Appeals**

---

Kelly Eve Brown,

*Appellant,*

vs.

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.*

---

**RESPONDENTS' BRIEF AND APPENDIX, VOLUME I**

---

Jon K. Iverson (#146389)  
Jason J. Kuboushek (#0304037)  
IVERSON REUVERS  
9321 Ensign Avenue South  
Bloomington, MN 55438  
(952) 548-7200

*Attorneys for Respondents*

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

*Attorneys for Appellant*

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF LEGAL ISSUES .....	1
STATEMENT OF CASE .....	3
STATEMENT OF FACTS .....	5
STANDARD OF REVIEW .....	15
ARGUMENT .....	15
I.    BLOOMINGTON POLICE OFFICERS DUERKSEN AND TAYLOR ARE ENTITLED TO OFFICIAL IMMUNITY .....	15
II.   THE CITY OF BLOOMINGTON IS ENTITLED TO STATUTORY IMMUNITY .....	25
III.  BROWN CANNOT ESTABLISH A PRIMA FACIE CASE OF EMOTIONAL DISTRESS .....	28
IV.  THERE IS NO EVIDENCE TO SUPPORT BROWN’S MINNESOTA HUMAN RIGHTS ACT CLAIM AGAINST THE CITY .....	31
CONCLUSION .....	32

**TABLE OF AUTHORITIES**

	<u>Page</u>
Minn. Stat. § 363.03, subd. 4 (2000) .....	31
Minn. Stat. § 466.02 .....	25
Minn. Stat. § 466.03, subd. 6 .....	25
Minn. Stat. §609.06 .....	11
Minn. Stat. § 609.066, Subd. 2 .....	11
<i>Minn. Rule 6700.1000, Subpart 1</i> .....	12
<i>Minn. Rule 6700.1000, Subpart 3(C)</i> .....	12
<i>Davis v. Hennepin County</i> , 559 N.W.2d 117 (Minn. App. 1997) .....	16
<i>Dokman v. County of Hennepin</i> , 637 N.W.2d 286 (Minn. App. 2001) ..	1, 15, 16, 18
<i>Dornfield v. Oberg</i> , 503 N.W.2d 115 (Minn. 1993) .....	1
<i>Elwood v. Rice County</i> , 423 N.W.2d 671 (Minn. 1988) .....	1, 17, 19, 22
<i>Fear v. Independent School Dist. 911</i> , 634 N.W.2d 204 (Minn. App. 2001) ...	1, 27
<i>Fisher v. County of Rock</i> , 596 N.W.2d 646, 652 (Minn. 1999) .....	26
<i>Gleason v. Metropolitan Council Transit Operations</i> , 582 N.W.2d 216 (Minn. 1998) .....	15
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	22
<i>Hubbard v. United Press Int’l, Inc.</i> , 330 N.W.2d 428 (Minn. 1983) .....	1, 28, 29

	<u>Page</u>
<i>In re Alexandria Accident of Feb. 8, 1994</i> , 561 N.W.2d 543 (Minn. App. 1997) .....	1, 27
<i>Janklow v. Minn. Bd. Of Exam'rs</i> , 552 N.W.2d 711 (Minn. 1996) .....	16
<i>Johnson v. County of Dakota</i> , 510 N.W. 2d 237 (Minn. App. 1994) .....	23
<i>Johnson v. Morris</i> , 453 N.W.2d 31 (Minn. 1990) .....	15
<i>Johnson v. State</i> , 553 N.W.2d 40 (Minn. 1996) .....	1, 26
<i>Kelly v. City of Minneapolis</i> , 598 N.W. 2d 657 (Minn. 1999) .....	17
<i>Lang v. City of Maplewood</i> , 574 N.W.2d 451 (Minn. App. 1998) .....	2, 31
<i>Leaon v. Washington County</i> , 397 N.W.2d 867 (Minn. 1986) .....	1, 30
<i>Leonzal v. Grogan</i> , 516 N.W.2d 210 (Minn. App. 1994) .....	1, 17, 19, 22, 24, 25
<i>Maras v. City of Brainerd</i> , 502 N.W.2d 69 (Minn. App. 1993) .....	1, 27, 28
<i>Nelson v. County of Wright</i> , 162 F.3d 986 (8th Cir. 1998) .....	18
<i>Nusbaum v. Blue Earth County</i> , 422 N.W.2d 713 (Minn. 1988) .....	26
<i>Pletan v. Gaines</i> , 494 N.W.2d 38 (Minn. 1992) .....	1, 16, 22
<i>Quill v. Trans World Airlines, Inc.</i> , 361 N.W.2d 438 (Minn. App. 1985) .....	1, 29
<i>Rehn v. Fischley</i> , 557 N.W.2d 328 (Minn. 1997) .....	15
<i>Reuter v. City of New Hope</i> , 449 N.W.2d 745 (Minn. App. 1990) .....	22
<i>Rico v. State</i> , 472 N.W.2d 100 (Minn. 1991) .....	22, 25

	<u>Page</u>
<i>State by Beaulieu v. City of Mounds View</i> , 518 N.W.2d 567 (Minn. 1994) .....	2, 24, 31
<i>State by Woyke v. Tonka Corp.</i> , 420 N.W. 2d 624 (Minn. App. 1988) .....	30
<i>Stead-Bowers v. Lanley</i> , 636 N.W.2d 334 (Minn. App. 2002) .....	28, 29
<i>Watson v. Metro. Transit Comm'n</i> , 553 N.W.2d 406 (Minn. 1996) .....	15
<i>Wiederholt v. City of Minneapolis</i> , 581 N.W.2d 312 (Minn. 1998) .....	24

## STATEMENT OF LEGAL ISSUES

### **I. WHETHER BLOOMINGTON POLICE OFFICERS DUERKSEN AND TAYLOR ARE ENTITLED TO OFFICIAL IMMUNITY FOR ALL CLAIMS?**

*The trial court ruled in the affirmative.*

*Apposite Authorities:*

*Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992).  
*Elwood v. Rice County*, 423 N.W.2d 671 (Minn. 1988).  
*Dokman v. County of Hennepin*, 637 N.W.2d 286 (Minn. App. 2001).  
*Leonzal v. Grogan*, 516 N.W.2d 210 (Minn. App. 1994).

### **II. WHETHER THE CITY OF BLOOMINGTON IS ENTITLED TO STATUTORY IMMUNITY FOR PLAINTIFF'S NEGLIGENT SUPERVISION CLAIM?**

*The trial court ruled in the affirmative.*

*Apposite Authorities:*

*Johnson v. State*, 553 N.W.2d 40 (Minn. 1996).  
*Fear v. Independent School Dist. 911*, 634 N.W.2d 204 (Minn. App. 2001).  
*In re Alexandria Accident of Feb. 8, 1994*, 561 N.W.2d 543 (Minn. App. 1997).  
*Maras v. City of Brainerd*, 502 N.W.2d 69 (Minn. App. 1993).

### **III. WHETHER BROWN CAN ESTABLISH A PRIMA FACIE CASE OF EMOTIONAL DISTRESS?**

*The trial court did not rule on this issue.*

*Apposite Authorities:*

*Dornfield v. Oberg*, 503 N.W.2d 115 (Minn. 1993).  
*Leaon v. Washington County*, 397 N.W.2d 867 (Minn. 1986).  
*Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428 (Minn. 1983).  
*Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438 (Minn. App. 1985).

**IV. WHETHER THE HUMAN RIGHTS CLAIM WAS PROPERLY DISMISSED?**

*The trial court ruled in the affirmative.*

*Apposite Authorities:*

*State by Beaulieu v. City of Mounds View, 518 N.W.2d 567 (Minn. 1994).  
Lang v. City of Maplewood, 574 N.W.2d 451 (Minn. App. 1998).*

## STATEMENT OF CASE

This matter stems from a domestic dispute involving an intoxicated woman with a knife. Bloomington Police Officers responded to a mobile home where Appellant Kelly Brown was holding an elderly man hostage with a knife, threatening to kill anyone who approached her. Brown exited the mobile home while brandishing the knife and continually refused to drop the weapon. In fear of officer safety and in order to alleviate the threat of death and/or great bodily harm, Bloomington Police Officer Daniel Duerksen fired two shots; a less-lethal round and a live slug round. Brown suffered injuries to her left thigh. She was subsequently taken into custody and arrested for Second Degree Assault.

Brown was found not guilty of the criminal assault charge. She next commenced this lawsuit alleging a litany of federal and state tort claims against these Bloomington Respondents in state court. The City removed the case to federal court and following discovery, moved for summary judgment before the Honorable Joan Ericksen. Prior to the hearing Brown abandoned her claims for false arrest, malicious prosecution, negligent hiring and negligent retention. Judge Ericksen dismissed the civil rights claims with prejudice and did not exercise jurisdiction over the pendent state tort claims. Brown's remaining claims for assault, battery, intentional infliction of emotional distress, negligent infliction of

emotional distress, negligence, negligent supervision, and violations of MHRA were remanded to State Court.

On September 1, 2004, Defendants brought a Motion for Summary Judgment before the Honorable Marilyn Rosenbaum based upon official and statutory immunity, no evidence to support a prima facie case of emotional distress and no evidence to support a Human Rights Act claim. On September 23, 2004, Judge Rosenbaum dismissed all remaining claims. Brown is appealing Judge Rosenbaum's Order.

## STATEMENT OF FACTS

On December 1, 2000, Appellant Kelly Eve Brown (hereinafter "Brown") was drinking alcohol, had not taken her anti-depressant medication, and was severely depressed. *AA-34-35, 37.* At 2:02 a.m., Bloomington Police Dispatch received a 9-1-1 telephone call from a female who stated: "Go ahead, tell 'em....That you're held hostage 'cause I'm gonna cut your fuckin' throat." *AA-31, 66.* A male voice immediately said, "Oh, fuck," and then there was a dial tone. *AA-66.* Police Dispatch advised Bloomington Police Officers of a domestic dispute occurring at 10225 Lyndale Avenue in Unit Number Nine, where the female was threatening to cut the male's throat. *AA-66.*

Bloomington Officers Michael Taylor and Todd Bohrer were the first to arrive in the area of the trailer park. *AA-120, 148.* The officers parked their squad cars some distance away from the mobile home and approached on foot. *AA-149.* While walking up to the residence, Bloomington Police Officer Jerry Wukawitz arrived on the scene. *Id.* When the officers arrived at Unit No. 9, they approached the steps and listened to the voices inside the trailer home to determine how many people were inside and the content of the conversations. *AA-120, 150.* While listening, the officers heard female and male voices, later identified as Kelly Eve Brown and Jim Luban. *Id.* Specifically, the female was yelling and screaming at the male. *Id.*

Officer Bohrer went up the steps of the deck and approached the door, while Officer Taylor remained near the top of the steps. *AA-121, 150*. When Officer Bohrer looked through the window on the door, Brown was approximately five feet from him facing the back of the trailer. *AA-121-122*. He heard Brown say, "Why you hiding in the closet, you chickenshit." *AA-122*. Seconds later, Brown turned towards the door where Officer Bohrer was standing and rushed towards it, brandishing a large kitchen knife with a ten-inch blade, in her left hand. *AA-122-123*.

Brown held the door shut and had the knife held up to the window. *AA-124*. Officer Bohrer identified himself several times as a police officer and told her he was there to help; however, Brown continued to scream at him. *Id.* She threatened, "Get the F out of here. If you try to come in here, you're just going to run into my knife. I will kill myself." *AA-125, 152*. Brown continued to hold the knife in her hand the entire time. *Id.* It appeared to the officers Brown was under the influence of drugs or alcohol. *AA-152*.

Brown also yelled at Mr. Luban. *AA-152*. A couple of times, Mr. Luban came up behind Brown and put his hand on her shoulder to try and calm her down; however, Brown turned around, pushed him and stated, "Jim, get the fuck out of here." *AA-126*. Officer Bohrer perceived Brown as a threat to Mr. Luban; therefore, he did not want to leave the area. *Id.* Mr. Luban was looking at Officer

Bohrer and Officer Bohrer mouthed for him to go to the back door. *AA-126-127.*

Mr. Luban nodded his head in affirmation and walked down the hallway of the trailer. *AA-127.*

During negotiations, other officers arrived and set up a perimeter. *AA-153.* For approximately four to five minutes, Officer Bohrer attempted to talk to Brown and calm her down because she was frantic and irrational. *AA-125, 152.* He repeatedly told Brown to "Step out of the trailer." *AA-49.* Brown specifically heard the officers order her to step out of the trailer three to four times. *AA-38.* However, Brown refused to come out of the house. *AA-153.*

Officer Bohrer stated to Officer Taylor he thought they needed less-lethal munition because Brown was not calming down. *AA-154, 181.* Officer Taylor relayed this message to Officer Wukawitz, who requested any officer who had not yet arrived at the scene to bring a less-lethal shotgun. *AA-154.* Officer Daniel Duerksen stated he would bring the less-lethal munition. *Id.*

Officer Duerksen arrived at the scene at 2:06 a.m., with a less-lethal shotgun. *AA-181.* After parking his squad car, he unloaded four .00 buckshots, colored red, that were in the tube of the shotgun. He put them into his pants pocket. *AA-188.* Officer Duerksen approached the trailer and made contact with Officer Wukawitz, who was on the east side of the trailer. *AA-181, 188.* Officer Duerksen attempted to find a vantage point; however, due to the height of the

trailer, he could not obtain an accurate shot. *AA-182*. Officer Duerksen walked to the south side of the trailer where Officers Bohrer and Taylor were located. *Id.* Officer Bohrer was at the top of the deck and Officer Taylor was on the steps. *Id.* Officer Duerksen heard a lot of yelling and screaming, and specifically heard Officer Bohrer instruct Brown to drop the knife. *AA-183*.

Officer Duerksen approached Officer Taylor from behind and tapped him on the shoulder to inform him he was there. *AA-155*. Officer Duerksen took four additional red .00 buck shells contained in the side sleeve of the shotgun and handed them to Officer Taylor. *AA-188*. Officer Duerksen then took a less-lethal round, which was on the stock of the shotgun and held it between his thumb and forefinger. *AA-189*. He showed it to Officer Taylor, who confirmed it was a less-lethal round, and proceeded to chamber it into the shotgun. *Id.* Pursuant to firearm training, Officer Duerksen “topped off” the shotgun and chambered two slug rounds into the shotgun. *AA-189, 192*. At that time, he believed he was loading less-lethal munition, not slug rounds. *Id.* Less-lethal munition and slug rounds are the same color. *AA-165-166*. The only difference is less-lethal munition is marked “less-lethal.” *Id.*

Because Brown refused to calm down; refused to comply with the officers’ orders and because negotiations were breaking down, Officers Taylor and Duerksen made the decision to back away from the door to a place of concealment

where they could possibly bring in more officers or a SWAT team if necessary. They advised Officer Bohrer of the same. *AA-127, 154-155, 184*. Because Officer Duerksen had the less-lethal shotgun, he stepped aside and allowed Officers Bohrer and Taylor to step around him. *AA-184*. Officer Duerksen was the last person to step away from the stairway. *Id.* Officer Bohrer stepped to the left of the stairs and Officer Taylor stood directly to the right of Officer Duerksen. *AA-130, 156*. Officers Taylor and Duerksen were approximately ten feet from the bottom steps. *AA-41, 156*.

As the officers were taking position, Brown exited the trailer holding the knife with her right hand and holding it to her throat. *AA-38*. There was no question she knew the police were out there. *AA-47*. When she exited, the officers instructed and commanded her: "Drop the knife. Drop the knife. Drop the knife." *AA-38*. Officer Taylor drew his weapon, pointed it at Brown and yelled at her to stop and drop the knife. *AA-157*. Officer Bohrer also aimed his gun at Brown. *AA-130*. Brown refused and did not drop the knife. *AA-39*. Brown was standing outside the front door on the deck that was approximately three feet off the ground. *AA-40-41*. The officers were ten feet away. *AA-41*. Officer Duerksen, based upon training, knew the kill zone for a person with a knife is 21 feet or less and Brown was within that range. *AA-107*.

Officer Taylor hollered for Officer Duerksen to shoot at Brown because he believed she was going to kill him or his partners. *AA-158-159*. Officer Duerksen, who also was fearful for his safety and that of his partners, fired one less-lethal round at Brown within two to three seconds of Brown exiting the trailer. *AA-186*.

After being hit with the less-lethal round, Brown claims she twisted and fell to her right. *AA-44-45*. She alleges as she was falling, she was dropping the knife and was shot a second time. *AA-45*. Brown did not have a chance to drop the knife before the second shot was fired. *AA-53*. When Officer Duerksen fired the two rounds, Brown describes: "It was boom, boom. There was no in between. I was shot with a bean bag, shot with a live round within seconds." *AA-44*.

After Brown was shot the second time, she fell on the deck and the officers ran towards her. *AA-45*. Brown heard one of the officers ask, "Where is the knife?" and another officer said, "I kicked it away." *AA-45-46*. Officer Taylor specifically ran onto the deck and kicked the knife across the deck to ensure she was incapacitated and was not going to come back up with the knife. *AA-162*. Brown was handcuffed. She does not claim any unnecessary force was used when the officers handcuffed her. *AA-54*. Officer Taylor realized she was bleeding from her thigh and started to administer aid. *AA-163*. Brown was transported to the hospital for treatment. *Id.*

According to Brown, she was a danger to herself on December 1, 2000. AA-57. She also admits it was fair for the officers to shoot her with the less-lethal round because she was trying to hurt herself. AA-54. However, Brown claims it was not fair for the officers to shoot her a second time. AA-56.

Detective Thomas Rainville, of the Hennepin County Sheriff's Department, investigated this incident and read the police reports of Officers Wukawitz, Taylor, Bohrer and Duerksen. AA-382. Based upon these reports, Detective Rainville determined there was probable cause to charge Brown with Second Degree Assault. *Id.* He completed a criminal complaint and Assistant Hennepin County Attorney Charles Salter and Hennepin County District Court Judge Tanya Bransford signed it, concluding probable cause was present to allow the matter to proceed to a jury trial. *Id.* At the completion of the jury trial, Brown was found not guilty.

The Bloomington Police Department's Use of Force Policy is consistent with the Fourth Amendment of the United States Constitution and Minnesota State Statutes. AA-385-393. It states in part, "Officers shall have the discretion to use deadly force to the extent permitted by Minn. Stat. § 609.066, Subd. 2." AA-387. Furthermore, officers shall have the discretion to use non-deadly force, including less-lethal force, to the extent permitted by Minn. Stat. §609.06." *Id.* Less lethal

has the same meaning as non-deadly force and can be used interchangeably with that term. *Id.*

The policy contains rules to govern the use of force used by police officers. AA-388. “Officers shall limit their use of force to the least amount of force reasonably necessary to accomplish their intended objective, to overcome the resistance encountered, and to protect the safety of others. *Id.* In determining the degree of force which is reasonable under the circumstances, officers shall consider the following: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officer or others; (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight; and (4) whether the criminal or assaultive history of the suspect or location presents a situation in which quick control or compliance is needed. *Id.*

Peace officers in Minnesota are required to possess and carry a peace officer’s license, which is issued by the Peace Officers Standard and Training Board (“POST Board”). *Minn. Rule 6700.1000, Subpart 1.* Peace officers who have been licensed for at least 30 months are required to complete 48 hours of continuing education in order to retain an active license. *Minn. Rule 6700.1000, Subpart 3(C).*

Bloomington Police Officer Daniel Duerksen, POST Board license number 11063, possesses an active peace officer license. AA-394-398. He had been a

licensed peace officer for at least 30 months, and therefore, was required to complete 48 hours of continuing education. *Id.* Officer Duerksen had completed 152 hours of continuing education. *Id.* He completed a Use of Force training class on April 12, 2000, less than eight months before this incident, and completed a less-lethal training class on May 17, 2000, less than seven months before this incident. *AA-396.*

Bloomington Police Officer Michael Taylor, POST Board license number 11050, possesses an active peace officer license. *AA-399-401.* He had been a licensed peace officer for at least 30 months, and therefore, was required to complete 48 hours of continuing education. *Id.* Officer Taylor had completed 147 hours of continuing education. *Id.* He completed a Use of Force training class on April 12, 2000, less than eight months before this incident, and completed a less-lethal training class on July 1, 2000, exactly five months before this incident. *AA-400.*

During the less-lethal training class, the officers were taught the history of less-lethal munitions, classification/types of less-lethal munitions, less-lethal policy and the use of force continuum and deployment considerations. *AA-402-430.* The officers were also required to go to the firearms shooting range and spend time shooting less-lethal rounds from different distances and areas. *AA-403.* The

trainers put the officers into domestic situations and suicidal-type situations and the officers would react to the circumstances at hand. *AA-160.*

## **STANDARD OF REVIEW**

“On an appeal from summary judgment, this Court determines whether there are genuine issues of material fact and whether the district court erred in applying the law.” *Watson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 411 (Minn. 1996). Whether immunity applies is a legal question subject to de novo review. *Gleason v. Metropolitan Council Transit Operations*, 582 N.W.2d 216, 219 (Minn. 1998). The party claiming immunity has the burden of demonstrating facts showing it is entitled to immunity. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

## **ARGUMENT**

### **I. BLOOMINGTON POLICE OFFICERS DUERKSEN AND TAYLOR ARE ENTITLED TO OFFICIAL IMMUNITY.**

#### **A. Overview.**

Judge Rosenbaum correctly determined Officers Duerksen and Taylor are entitled to official immunity for Brown’s claims of assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and violation of the Minnesota Human Rights Act. Under Minnesota law, a public official is entitled to official immunity from state law claims when the official’s duties require the exercise of discretion or judgment. *Dokman v. County of Hennepin*, 637 N.W.2d 286, 296 (Minn. App., 2001) (citing *Johnson v. Morris*, 453 N.W.2d 31, 41 (Minn. 1990)). Generally, police officers are

discretionary officials. *Id.* The doctrine of official immunity is so broad as to “protect all but the plainly incompetent or those who knowingly violate the law.” *Id.* at 292. Where an officer could reasonably have believed his or her actions were lawful in light of the ensuing circumstances and the officer’s knowledge of the law, the officer’s actions will be protected by the doctrine. *Id.* at 293. Only when officials act outside the scope of their charged authority can they be deemed to have waived this immunity and be held personally liable. *Id.* at 296 (See generally *Janklow v. Minn. Bd. Of Exam’rs*, 552 N.W.2d 711, 715 (Minn. 1996)).

The Minnesota Supreme Court has confirmed the importance of the official immunity doctrine. Official immunity is provided because the community cannot expect its police officers to do their duty and then second-guess them when they attempt conscientiously to do it. *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992). Official immunity is intended “to protect public officials from the fear of personal liability that might deter independent action.” *Id.* (citing *Janklow*, 552 N.W.2d at 715).

Determining whether official immunity is available in a given context requires a two-step inquiry: “(1) whether the alleged acts are discretionary or ministerial; and (2) whether the alleged acts, even though of the type covered by official immunity, were malicious or willful and therefore stripped of the immunity’s protection.” *Dokman*, 637 N.W. 2d at 296 (citing *Davis v. Hennepin*

*County*, 559 N.W.2d 117, 122 (Minn. App. 1997), *review denied* (Minn. May 20, 1997)).

**B. The Decision to Use Force against Brown to disarm her of the weapon was a Discretionary Act.**

In determining whether conduct is discretionary for purposes of official immunity, the critical determination is whether the nature of the officers' actions was discretionary or ministerial. "Ministerial duties are absolute, certain, and imperative, [and] involv[e] merely execution of a specific duty arising from fixed and designed facts." *Kelly v. City of Minneapolis*, 598 N.W. 2d 657, 664 (Minn. 1999). Whether an act is discretionary is determined by the court as a matter of law. *Id.* The Minnesota Supreme Court in *Elwood v. Rice County*, 423 N.W. 2d 671, 677 (Minn. 1988) noted:

The law, in other words, calls for police in emergency situations to exercise significant independent judgment based on the facts before them. They are afforded a wide degree of discretion precisely because a more stringent standard could inhibit action. The need to protect police judgment and encourage responsible law enforcement is particularly compelling in the context of domestic disputes, which are notoriously volatile and unpredictable.

*Id.*

Courts have consistently determined police officers make discretionary decisions entitled to immunity. In *Leonzal v. Grogan*, 516 N.W.2d 210 (Minn. App. 1994), the Minnesota Court of Appeals analyzed the applicability of official immunity to a police officer's response to a 911 call. The court noted:

An officer responding to a report of an armed person threatening the life of a neighbor must weigh many factors and exercise significant independent judgment and discretion. Is the person dangerous? Are the alleged threats real and serious? What is the mental and physical state of the person asking for help? To what extent may the situation be dangerous for other persons? These questions must be resolved under emergency conditions with little time for reflection and often on the basis of incomplete information. Such circumstances require the exercise of discretion that compels application of official immunity.

*Id.* at 213.

In *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998), Jeremy Nelson was committed to Willmar Regional Treatment Center because he was chemically dependent and mentally ill. Nelson left the treatment center without permission and went to stay with his mother. A pickup order was issued for Nelson. Nelson and his mother got into an argument and she called 911 for help. She reported Nelson was screaming and threatening suicide. The deputy explained he needed to arrest Nelson and to handcuff him. Nelson resisted and during the struggle, the deputy hit Nelson on the head with his asp and Nelson reached for the deputy's gun. The deputy retained control of his gun and fired two shots, one of which hit Nelson in the chest. The Eighth Circuit found the deputy was entitled to official immunity because his decisions as an officer were discretionary and not willful or malicious. *Id.* at 991.

In *Dokman v. County of Hennepin*, 637 N.W.2d 286 (Minn. App. 2001) police received a call from Ms. Dokman stating her husband was threatening to

commit suicide. Officers arrived and Mr. Dokman would not cooperate and refused to come out of the house or communicate over the telephone. After nine hours, the officers shot chemical munitions into the house. Dokman told officers at the scene he had glass in one eye. The court stated, “[a]lthough the sheriff’s department has procedures for dealing with suicide threats, each situation is unique and requires officers to use their judgment and exercise discretion in deciding on a plan of action.” *Id.* at 296. The court found the officers’ actions were discretionary and they were entitled to official immunity.

Here, the City of Bloomington Police Dispatch received a 911 telephone call from a female who stated: “Go ahead, tell’em .... That you’re held hostage ‘cause I’m gonna cut your fuckin’ throat.” *AA-31, 66.* A male voice immediately said, “Oh, fuck,” and then there was a dial tone. *Id.* Dispatch immediately advised Bloomington Police Officers of a domestic dispute. Under *Leonzal*, the officers’ actions in responding to this report are discretionary and entitled to official immunity. *Id.*; *see also Elwood*, 423 N.W.2d at 678.

Furthermore, once the officers arrived on the scene, they were constantly evaluating the changing circumstances of the situation. Officer Bohrer initially observed Brown in the trailer home. *AA-247-249.* Brown was brandishing a large kitchen knife with a ten-inch blade. Officer Bohrer also observed Mr. Luban in the

home. AA-252. Officer Bohrer believed Brown was a threat to Mr. Luban and mouthed for Mr. Luban to go out the back door of the trailer. *Id.*

Officer Bohrer attempted to negotiate with Brown for four to five minutes. AA-251, 277. However, Brown was still frantic and irrational. Eventually, a decision was made to bring less lethal munitions to the trailer. The officers chose less lethal because it is used in situations where persons are threatening to take their own lives and not threatening anybody around them. AA-90. The decision was broadcast over the radio and Officer Duerksen stated he would bring the less lethal munition. AA-154.

While Officer Bohrer was negotiating with Brown, Officer Duerksen arrived on the scene and loaded the less lethal munitions into the shotgun. Because Brown refused to calm down, refused to comply with the officers' orders and because negotiations were breaking down, the officers made the decision to back away from the door to a place of concealment where they could possibly bring in more officers or a SWAT team if necessary. As the officers were exiting the deck, Brown exited the trailer holding the knife in her right hand and holding it to her throat. AA-38. The officers yelled at her to drop the knife, but she refused to do so.

It is undisputed at this point Brown was very close to Officer Duerksen. AA-51 ("point-blank range"). Officer Duerksen testified he was trained concerning a

21-foot kill zone in which a suspect can attack and stab an officer before the officer can remove his or her weapon and fire one round. *A-143*. Because Brown was still holding the knife, Officer Duerksen fired two rounds in quick succession, believing they were both bean bag rounds.

Brown described the incident as follows:

When they shot me with the bean bag and the knife went down and I twisted, I was shot boom, boom. Like I said before, it was boom, boom. There was no in between. I was shot with a bean bag, shot with a live round within seconds. I couldn't even quote how fast it went. Fast enough for me to get hit here, twist here and boom.

*AA-44*. When asked at what point she dropped the knife, she explained:

At the same time. I didn't get a chance to drop -- when I was twisting down, I was buckling down and the knife was dropping at the same time I was chance (sic). So I didn't have a chance to drop the knife.

*AA-53*. Officer Duerksen was also aware the safety of the male inside the trailer was in jeopardy, particularly if Brown re-entered the trailer with the knife.

Unquestionably, Officer Duerksen and the other officers were called on to exercise discretion in deciding the appropriate response to the domestic dispute and on handling a person approaching them with a knife. They were also responding “to [a] rapidly changing, dangerous circumstance of a unique domestic situation.”

*See Judge Rosenbaum's Memorandum, p.5.*

Brown's attempts to segment the situation or offer an after-the-fact review of the situation should be rejected. “Official immunity is provided 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*, 494 N.W.2d at 41. This rapidly changing and dangerous situation cannot be compared to a house moving situation. *See Brown’s Appellate Brief*, p. 31. Rather, the totality of the circumstances show this situation is more akin to the *Leonzal* and *Elwood* cases. Accordingly, Brown’s negligence claims against the Defendants are barred by official immunity.

**C. There is No Evidence the Officers’ Actions Were Willful and Malicious.**

In defining the term “malicious,” the Minnesota Supreme Court has stated there must be an element of bad faith involved. *Elwood*, 423 N.W.2d at 679. Relying on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court has required plaintiffs to present “specific facts evidencing bad faith” rather than “bare allegations of malice.” *Reuter v. City of New Hope*, 449 N.W.2d 745, 751 (Minn. App. 1990) *rev. denied*, (Minn. Feb. 28, 1990). The Minnesota Supreme Court has determined in the official immunity context, willful and malicious are synonymous. “Malice means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right.” *Rico v. State*, 472 N.W. 2d 100, 107 (Minn. 1991) (citations omitted). Furthermore, the Minnesota Supreme Court stated:

The defendant must have reason to know that the challenged conduct is prohibited. The exception does not impose liability merely because an official *intentionally* commits an act that a court or a jury subsequently determines is a wrong. Instead, the exception anticipates liability only when an official intentionally commits an act that he or she then has reason to believe is prohibited.

*Id.*

Judge Rosenbaum correctly determined there is no evidence the officers acted willfully or maliciously. As noted earlier, the officers responded to a domestic dispute call and found Brown intoxicated and irrational. She would not listen to police orders to exit the house and drop her weapon. It was only after Brown exited the trailer and refused to obey repeated commands to drop the weapon that Officer Duerksen fired. Brown concedes it was fair to fire the first round because she was a danger to herself. Furthermore, Officer Duerksen reasonably feared for his safety and the safety of his partners. His training established a kill zone within 21 feet of a person with a knife. Clearly, Officer Duerksen acted pursuant to training and not with willful and malicious intent. Nothing in Brown's version of the incident suggests other than an honest law enforcement effort by peace officers faced with uncertain circumstances.

Minnesota law applies official immunity to claims of assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and violations of the Minnesota Human Rights Act. *See Johnson v. County of Dakota*, 510 N.W. 2d 237 (Minn. App. 1994) (finding

officers are entitled to official immunity for negligence, false arrest, false imprisonment, intentional infliction of emotional distress and negligent infliction of emotional distress); *See State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567 (Minn. 1994) (finding official immunity applies to Minnesota Human Rights Acts claims so long as the officers did not act willfully or maliciously).

Therefore, Brown's remaining state tort claims of assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and violations of the Minnesota Human Rights Act against Bloomington Police Officers Duerksen and Taylor should be dismissed under the doctrine of official immunity.

**D. Vicarious Official Immunity.**

Because Officers Duerksen and Taylor are immune from liability, the City of Bloomington is entitled to vicarious official immunity. Vicarious official immunity protects a governmental entity from a suit based on the acts of an employee who is entitled to official immunity. *See Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998). The Minnesota Supreme Court concluded, "it would be anomalous" to impose liability on the government employer for the very same acts for which the employee receives immunity. *Id.*

The court in *Leonzal* commented, "[s]ubjecting the [county] to liability for actions of police officers in responding to a 911 call would unquestionably inhibit

the officers from exercising their independent judgment because liability would continue to stem from the officers' performance of their duties." *Leonzal*, 516 N.W.2d at 214. Because Officers Duerksen and Taylor are entitled to official immunity, the City of Bloomington is vicariously immune from liability.

## **II. THE CITY OF BLOOMINGTON IS ENTITLED TO STATUTORY IMMUNITY.**

Brown's claims against the City of Bloomington for negligent supervision are barred by the doctrine of statutory immunity. Under the Minnesota Tort Claims Act, a municipality is "subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function." Minn. Stat. § 466.02. However, a municipality enjoys "statutory immunity" 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.

The purpose of statutory immunity is "to preserve the separation of powers by insulating executive and legislative policy decisions from judicial review through tort actions." *Rico*, 472 N.W. 2d at 104. Pursuant to statutory immunity, a county's conduct is protected when the county produces evidence showing the conduct at issue was of a "policy-making nature involving social, political, or

economic considerations.” *Nusbaum v. Blue Earth County*, 422 N.W.2d 713, 722 (Minn. 1988).

Using this analytical framework, the Minnesota Supreme Court has distinguished between “planning level” conduct, which is protected by immunity, and “operational level” conduct, which is not protected. *Id.* at 719. “Planning level decisions involve questions of public policy – ‘the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy.’” *Fisher v. County of Rock*, 596 N.W.2d 646, 652 (Minn. 1999) (citations omitted). “Operational level decisions, on the other hand, concern the day-to-day operation of government.” *Id.*

Minnesota Courts have determined supervising employees is a policy-level activity that is protected by statutory immunity.

In *Johnson v. State*, 553 N.W. 2d 40 (Minn. 1996), a woman was raped and murdered by a parolee after the parolee failed to report to a halfway house. The Minnesota Supreme Court found numerous policymaking considerations such as the safety of the public, the parolee’s rehabilitation, treatment needs and reintegration into the community were considered in establishing the terms and conditions of the parolee’s supervised release. *Id.* at 47. The court held supervision of parolees is a discretionary act subject to statutory immunity. *Id.*

*In re Alexandria Accident of Feb. 8, 1994*, 561 N.W. 2d 543 (Minn. App. 1997) an individual involved in an accident with a snowplow claimed the state negligently supervised its snowplow operators. The snowplow operator involved in the accident used an older vehicle that did not have new lights which cut down on white-out conditions near a plow. The “decision to allow plows with the older lights to remain in service on interstate highways balanced financial resources against safety concerns.” *Id.* at 547. Therefore, the court held the supervision of snowplow operators involves policy considerations and requires immunity protection. *Id.* at 548.

*In Fear v. Independent School Dist. 911*, 634 N.W. 2d 204 (Minn. App. 2001), a student who was injured when he fell from a snow pile onto a piece of ice during recess brought an action for, among other claims, negligent supervision. The Minnesota Court of Appeals found the supervision of school employees is a policy-level activity entitled to statutory immunity. *Id.* at 212.

Because Minnesota Courts have clearly determined supervising employees is a policy-level activity that is protected by statutory immunity, Brown’s claims against the City of Bloomington for negligent supervision should be dismissed as a matter of law.

Furthermore to the extent Brown claims the City negligently trained its officers, those claims are also barred by statutory immunity. In *Maras v. City of*

*Brainerd*, 502 N.W.2d 69, 78 (Minn. App. 1993), the Minnesota Court of Appeals considered a claim that the city defendant had failed to adequately train its police officers in the use of deadly force to apprehend a misdemeanor. The court determined “the training a city provides to its police officers is a policy decision” which is “protected by discretionary immunity” under § 466.03. *Id.* Accordingly, the City of Bloomington is entitled to statutory immunity and summary judgment on Brown’s failure to train claim.

### **III. BROWN CANNOT ESTABLISH A PRIMA FACIE CASE OF EMOTIONAL DISTRESS.**

If this Court finds Brown’s claims for emotional distress are not barred by official immunity, she still cannot establish a prima facie case of emotional distress.

#### **A. Intentional Infliction of Emotional Distress.**

To establish a claim for intentional infliction of emotional distress, a plaintiff must show:

- (1) The complained-of conduct was extreme and outrageous;
- (2) The conduct was intentional and reckless;
- (3) It caused the plaintiff 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 constitute “extreme and outrageous” conduct, the conduct must be “so atrocious that it passes

the boundaries of decency and is utterly intolerable to the civilized community.”

*Id.* (citation omitted).

Here, the conduct of the Respondents does not even approach an arguable level of “extreme and outrageous.” In reference to “severe emotional distress,” the Supreme Court noted, “[t]he law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it.” *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983) (citation omitted). Brown concedes it was fair to fire the first round because she was a danger to herself. Brown has produced no evidence sufficient to satisfy the requirements of an intentional infliction of emotional distress claim. As a consequence, this claim should be dismissed as a matter of law.

**B. Negligent Infliction of Emotional Distress.**

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

An example of the degree of physical danger necessary to recover for negligent infliction of emotional distress is found in *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 441-42 (Minn. App. 1985), in which the plaintiff recovered

for damages sustained while a passenger in an airplane which lost power and nearly crashed before the pilot regained control.

The physical manifestation requirement is designed to ensure the genuineness of the emotional distress. *Leaon v. Washington County*, 397 N.W. 2d 867, 875 (Minn. 1986). “Absent an objective showing of physical manifestation of emotional distress, a damage award for negligent infliction of emotional distress is not usually appropriate.” *State by Woyke v. Tonka Corp.*, 420 N.W. 2d 624, 627 (Minn. App. 1988).

In *Leaon*, the Minnesota Supreme Court found symptoms of losing weight, becoming depressed and exhibiting feelings of anger, fear and bitterness did not satisfy the physical manifestations test. *Leaon*, 397 N.W. 2d at 875.

In *State by Woyke*, the court found no negligent infliction of emotional distress when plaintiff’s hair was falling out and her children experienced more colds than previously. *State by Woyke*, 420 N. W. 2d at 627.

Here, Brown has provided no evidence of a physical manifestation of emotional distress sufficient to state a claim under negligent infliction of emotional distress. Brown’s Complaint alleges she has “suffered emotional distress, physical harm, and loss or invasion of rights.” A-15. These vague statements are not enough to satisfy the requirements of a physical manifestation of emotional

distress. Therefore, her claim of negligent infliction of emotional distress should be dismissed as a matter of law.

**IV. THERE IS NO EVIDENCE TO SUPPORT BROWN'S MINNESOTA HUMAN RIGHTS ACT CLAIM AGAINST THE CITY.**

The Minnesota Human Rights Act (MHRA) 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. Minnesota Statute Section 363.03, subd. 4 (2000). The purpose of the statute is to eradicate discrimination in the provision of public service, including law enforcement services. *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 570 (Minn. 1994).

Here, there is absolutely no basis to assert a MHRA claim against the City. Brown has provided absolutely no evidence supporting her MHRA claim. *See Lang v. City of Maplewood*, 574 N.W.2d 451, 454 (Minn. App. 1998). Officers are not trained that a woman with a knife is less dangerous than a man. Such a proposition is ludicrous and frivolous. Therefore, Judge Rosenbaum's dismissal of these claims was proper.

**CONCLUSION**

For the foregoing reasons, Respondents request this Court affirm Judge Rosenbaum's Order dismissing Brown's claims in their entirety.

Respectfully submitted,  
IVERSON REUVERS

Dated: April 1, 2005.

By: 

Jon K. Iverson, #146389

Jason J. Kuboushek, #0304037

Attorneys for Respondents  
9321 Ensign Avenue South  
Bloomington, MN 55438  
(952) 548-7200

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).