

A05-2401

STATE OF MINNESOTA
IN COURT OF APPEALS

Paulette Pahnke, Individually
and as a Parent and Natural
Guardian of Brittany Newman,
Alyssa Newman, and Michael Newman,
Minors,

Appellants,

vs.

Anderson Moving and Storage,
Home Apartment Development, LLC,
County of Houston, City of LaCrescent,
John Doe, and Jim Doe,

Respondents.

APPELLANTS' BRIEF AND APPENDIX

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LEGAL ISSUE

- I. Were Appellants County of Houston, City of LaCrescent, John Doe, and Jim Doe entitled to Partial Summary Judgment?

TRIAL COURT HELD: In the AFFIRMATIVE.

STATEMENT OF THE CASE

Appellants commenced this civil action in Olmsted County District Court in February, 2004. App. 5. They alleged nine federal and state theories of recovery arising from the forced eviction from their home by two peace officers (whose names were not conclusively known to Appellants when the case was commenced) in LaCrescent, Minnesota on 4 December 2002. App. 7 - 16. In their Answers, Respondents County of Houston ("Houston"), John Doe, City of LaCrescent ("LaCrescent"), and Jim Doe asserted, inter alia, that Appellants' claim were barred by various immunity doctrines. App. 17 - 26.

LaCrescent removed the case to U.S. District Court on 15 March 2004. All defendants subsequently moved for summary judgment on all claims. By order dated 21 April 2005 Judge Paul A. Magnuson dismissed the federal ones and remanded the state ones, ultimately to Houston County District Court. Shortly after remand, the parties brought cross-motions for summary judgment and, in addition, Appellants moved to substitute Luke Sass ("Sass") and William Hargrove ("Hargrove") for John Doe and Jim Doe. In its decision dated 7 October 2005, the court allowed the substitution before deciding that Sass and Hargrove, and their respective employers Houston and LaCrescent, were entitled to official immunity. App. 40 - 56. The Appellants' contract claim

against Houston survived. The court denied all other motions.

Partial summary judgment was entered on 7 October 2005, "there being no just reason for further delay." App. 6 - 7. Appellants served and filed a Notice of Appeal on 6 December 2005. App. 57.

STATEMENT OF THE FACTS

Appellant Paulette Pahnke ("Pahnke") was born on 19 February 1968. She attended Logan High School in LaCrosse, Wisconsin, graduating in 1986. The first two years after high school, Pahnke attended Bradley University in Peoria, Illinois, where she took pre-med classes, majoring in biology. Returning to Wisconsin, she continued her studies for one year at the University of Wisconsin-LaCrosse, then married Joseph Newman. They had three children together--Brittany (7-27-90), Alyssa (12-4-92), and Michael (2-16-94)--before divorcing in June, 1998. Close to a degree, Pahnke returned to college part-time but dropped out in early 2002 after Mr. Newman sexually assaulted her in her home. (Affidavit of James S. McAlpine in Support of the County of Houston and John Doe's Motions for Summary Judgment ("McAlpine Aff."), Exhibit A, Deposition of Paulette Pahnke ("Pahnke Depo."), p. 10.) He pled guilty and served approximately six months in the Houston County jail.

In early September, 2002, Pahnke and her children moved into an apartment in a building owned and managed by Home Apartment Development, LLC ("Home"). It was located at 1309 Willow Street in LaCrescent. Pahnke fell behind with the rent after Mr. Newman, blaming her for the time he had spent in jail, quit his job and stopped paying child support. Home promptly commenced an

eviction action. App. 1 - 2. At the initial hearing on 26 November 2002, after denying her the right to redeem, Judge Robert R. Benson signed Findings of Fact, Conclusions of Law, Order and Judgment, but stayed the Writ of Recovery until 3 December 2002. (McAlpine Aff., Exhibit B, transcript of proceedings in eviction action; and, App. 3.) Judge Benson signed the Writ of Recovery on 4 December 2002. App. 7.

Sass and Hargrove served the Writ of Recovery at 6:00 p.m. on 4 December 2002. App. 8. Pahnke was at home with her three children, the youngest of whom was celebrating her 10th birthday with two friends. (Pahnke Depo., pp. 24 - 25.) In no uncertain terms, Sass told Pahnke that she and her children had to leave immediately. (Pahnke Depo., p. 27; and, Affidavit of Paulette Pahnke ("Pahnke Aff."), App. 35.) Familiar with Minnesota law from a close reading of her tenants' rights handbook and a discussion with a legal aid attorney, Pahnke knew that she had 24 hours to move out from the service of the Writ of Recovery and had, accordingly, made arrangements with a local moving company to remove all of Appellants' personal property the morning of 5 December 2002. (Pahnke Depo., pp. 27, 68; and, Pahnke Aff.) Thinking that, as enforcers of the law, Sass and Hargrove would not want intentionally to violate it, Pahnke told Sass and Hargrove about the 24-hour provision in the eviction action statute, and then actually showed them the page from her tenants' rights handbook that clearly and unambiguously stated, multiple times, that under Minnesota law she had 24 hours to move out from

the service of the Writ of Recovery. (Pahnke Depo., p. 27; and, App. 33.) In front of her children who had recently been traumatized by the arrest and imprisonment of their father, Sass told Pahnke that, if she did not leave immediately, she would be arrested. (Pahnke Depo., p. 27, l. 21 - 23.) He made her give her keys to Deborah Hulberg ("Hulberg"), Home's rental agent who was sitting in her car in a nearby parking lot.

Appellants were only allowed to take the personal property they could carry. The officers forced them to leave behind nearly everything that was near and dear to them--clothes, books, plants, photos, goldfish, the big and little things that make life comfortable and enjoyable and without which we feel vulnerable and alone. Anderson Moving and Storage ("Anderson") removed all of it to LaCrosse on 9 December 2002 after Home deliberately made it impossible for Appellants to retrieve a single item before all of it was moved, holding it hostage then as now for the payment of unpaid rent. The total "charges" now exceed \$10,000.00.

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING PARTIAL SUMMARY JUDGMENT TO APPELLANTS COUNTY OF HOUSTON, CITY OF LACRESCENT, JOHN DOE, AND JIM DOE.

On a motion for summary judgment, the court views the evidence in favor of the nonmoving party and gives that party the benefit of all justifiable inferences that can be drawn in its behalf. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. Anderson, 477 U.S. at 250 - 251. On appeal from summary judgment, a reviewing court determines whether any genuine issue of material fact exists and whether the district court erred in its application of the law. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 112 (Minn.1992); and, Buer v. Atwater State Bank, 477 N.W.2d 782 (Minn.App.1991). No deference need be given to the trial court's application of the law. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

The application of immunity is a question of law. Gleason v. Metropolitan Council Transit Operations, 582 N.W.2d 216, 219 (Minn.1998). The burden to prove immunity is on the party claiming it. Hyatt v. Anoka Police Dept., 700 N.W.2d 502, 505 (Minn.App.2005). Under the doctrine of official immunity, a

peace officer is subject to civil liability with respect to ministerial duties, which are defined as duties which are "absolute, certain and imperative, and involve merely the execution of a specific duty arising from fixed and designated fact."

Johnson v. County of Dakota, 510 N.W.2d 237, 240 (Minn.App.1994).

The government is not entitled to official immunity if the actions of its officials are willful or malicious, if an official intentionally commits an act that he has reason to believe is prohibited. Anderson v. Anoka Hennepin Independent School Dist.11, 678 N.W.2d 651, 661 (Minn.2004); and, Johnson v. County of Dakota, infra at 240 - 241. As the court pointed out, this standard contemplates an objective inquiry into the legal reasonableness of an official's actions. State by Bialy v. City of Mounds View, 518 N.W.2d 567, 571 (Minn.1994).

The real issue in this case is the apparent conflict between two statutes, Minn. Stat. Sec. 504B.365, Subd. 1(a) and 504B.361, Subd. 1. The former provides that "the officer who holds the order to vacate (viz., Writ of Recovery) shall execute it by demanding that the defendant, . . .relinquish possession and leave, taking family and all personal property from the premises within 24 hours (emphasis added)." The latter provides that "the summons and writ of recovery of premises and order to vacate may be substantially in the form of paragraphs (b) and (c), which provide, inter alia, that the tenant be "immediately removed from the premises (emphasis added)." There is, however, a profound and legally controlling difference between the two. The former

enunciates the law and is mandatory, the latter pertains to a suggested form and is permissive. This is the first reason the trial court must be reversed--a mandatory law trumps a permissive form.

The second reason the trial court must be reversed is that there are genuine issues of material fact relating to the officers' conduct and, thus, vicariously to Houston and LaCrescent. In short, there is compelling evidence in the record that the actions of Sass and Hargrove were, in fact, willful or malicious because they committed acts they reasonably should have believed were prohibited. Invoking an objective standard that the cases require, no reasonable officer would force a young mother and three minor children into the street on a winter's night with a moment's notice after having been shown the law. Ignorance of the law has never been defense for a non-officer, why should it become one for governmental officials, people who are charged with and paid for knowing it? Sass and Hargrove, both relatively inexperienced officers, could have taken any number of actions while preserving Home's rights and acting consistently with the court's order. One or the other could have called a superior and/or more experienced officer, they could have waited for the next morning to consult with the county and/or city attorney, and/or they could have spoken to Hulberg about whether it was imperative the Appellants' apartment be vacated that night. A simple call would have resulted in a simple answer. And, if Sass or Hargrove had spoken to Hulberg, they would have discovered

that the Appellants' apartment had not been rented to anybody. (In fact, it was not re-rented for several months.) Instead of doing any of these things, of showing any kindness or humanity or knowledge of the law, Sass told Pahnke, in front of her children, that she would be arrested if she did not get moving. This evidence, from which a Houston County jury could easily find willfulness or malice, creates a genuine issue of material fact as to both officers and, hence, to both municipalities.

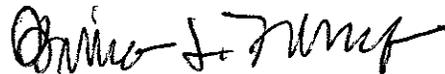
The third reason the trial court must be reversed is that the apparent conflict between these two statutory provisions can facilely be resolved by the Canons of Construction (Minn. Stat. Sec. 645.08) and/or a determination of legislative intent under Minn. Stat. Sec. 645.17 (Presumptions in Ascertainning Legislative Intent). Under the former, "general words are construed to be restricted in their meaning by preceding particular words." Minn. Stat. Sec. 645.08, Subd. 3. The word "immediately" must be construed, therefore, to be restricted by the words "24 hours." Under the latter, however, the apparent conflict is even more easily resolved. Minn. Stat. Sec. 645.17, Subd. 1 provides that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." All three nouns would pertain if the word "immediately" were not restricted by the words "24 hours." In other words, the legislature would not giveth a right and then on the next page taketh it away. This is a matter of common sense and serves as an additional basis, in and of itself, for reversal of the court's decision.

CONCLUSION

Irrespective of the law, or standing behind the veil of ignorance as Rawls would put it, any person intuitively knows there are certain levels below which any government must not go. Throwing a young mother and her three minor children (then 12, just 10, and 8) out into the cold, winter night is anathema in a civilized society. Such conduct would not be permitted in any other civilized place in the world, places where basic human rights and dignity are protected and honored, why should it be allowed to happen here?

For the foregoing reasons, the trial court must be reversed and the case remanded for trial on the merits.

DATE: 5 January 2006



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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).