

NO. 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 La Crescent,
John Doe, and Jim Doe,

Respondents.

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. DEPUTY SASS AND OFFICER HARGROVE ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND OF OFFICIAL IMMUNITY.

- A. The actions of Deputy Sass and Officer Hargrove were not discretionary and were not required by a protocol established through the exercise of discretionary judgment that would be protected by immunity.**

On p. 16 of its brief, Houston County makes the conclusory argument that Deputy Sass “is entitled to official immunity because he was charged with a discretionary duty in serving the Writ of Recovery on Pahnke....”

The application of official immunity is limited to discretionary actions. “Discretionary actions,” in the context of a police officer’s action, involve actions which are “often split-second and on meager information....” Elwood v. Rice County, 423 N.W.2d 671, 678 (Minn. 1988).

The execution of this Writ did not require the use of discretion. There was no discretion in the circumstances involved in the execution of this Writ requiring the need to make a split-second decision, take emergency action, or any need to proceed with limited information. To the contrary, the execution of this Writ of Recovery in all respects conformed to the definition of a ministerial duty: “[a] ministerial duty is simple and definite, leaving nothing to the discretion of the official.” Elwood v. Rice County, *supra* at 664.

The actions of Deputy Sass and Officer Hargrove in executing the Writ of Recovery were not discretionary because they required only the execution of a

Writ in a manner which was proper and consistent with Minn. Stat. Sec. 504B.365 Subd. 1(a), the statute which controls how and when the Writ is to be executed. In its brief at p. 13, Houston County argues that “Sass exercised judgment and discretion in enforcing the Writ of Recovery” but the only “discretion” which is suggested is that of Sass’s refusal to comply with the controlling statute.

In the District Court’s Memorandum analyzing the summary judgment decision on official immunity, the District Court notes:

However, even if the conduct in question was ministerial, as the Plaintiff maintains, the Defendants do not forfeit official immunity if their conduct was required by a protocol established through the exercise of discretionary judgment that would itself be protected by immunity. Anderson, 678 N.W.2d 660. (Minn. 2004)

The District Court went on to find such a protocol on the basis that the “legislature could have allowed the Writ and Order to be served and executed by any number of people, including the landlord, his agent or some other civilian, but chose otherwise in order to discourage landlords from taking the law into their own hands.” [Court Memorandum at p. 12] Houston County, on p. 18 of its brief, and the City of LaCrescent on p. 12 of its brief, adopt the Court’s analysis pertaining to official immunity on the basis of a protocol.

The District Court erred in determining that there was a protocol establishing the exercise of discretionary judgment because it incorrectly relied on a presumed discretionary judgment by the legislature instead of the body seeking to be protected by immunity. Here, there is no evidence that either Houston County or

the City of LaCrescent established any protocol through the exercise of discretionary judgment which required Deputy Sass and Officer Hargrove to serve the Writ in violation of the statute.

B. Alternatively, Deputy Sass and Officer Hargrove are not entitled to official immunity because there are issues of material fact as to whether they acted willfully or maliciously.

The District Court recognized on p. 13 of its Memorandum:

Even though adoption of the protocol was a discretionary decision and even if the Defendants' alleged liability arose from compliance with the protocol, they are not entitled to immunity if their actions were willful or malicious wrongs. [Citation omitted]¹

The District Court went on to improperly make a factual finding that:

...there is no indication that either officer had any reason to believe that what they were doing was prohibited (and it is not at all clear that the way they carried out the eviction actually was prohibited). Nor is there any evidence that the Defendants acted with malice in removing her from the apartment; they were doing what they thought was required under the circumstances.

[Court Memorandum at p. 13]

¹ Houston County argues on p. 13 of its brief that, despite the numerous factual issues concerning whether Deputy Sass and Officer Hargrove acted maliciously or willfully summarized on pp. 7-8 of Appellant's Brief, Appellants should be precluded from arguing this disputed fact on appeal. In light of the facts presented on the record, and on Judge Benson's disposition of such factual matters by way of summary judgment, Appellants argument is entirely proper.

Houston County on pp. 16-17 of its brief, and the City of LaCrescent on pp. 12-13 of its brief, make the conclusory argument that there is no evidence that Deputy Sass and Officer Hargrove committed a willful and malicious wrong.

The District Court's summary judgment decision was in error because it failed to take into account the facts submitted by Appellant that:

1. Appellant Pahnke told Sass and Hargrove about the 24 hour provision in the eviction statute.
2. Appellant Pahnke actually showed them the page from her Tenant's Rights Handbook that clearly and unambiguously stated multiple times, that under Minnesota law she had 24 hours to move out from the time of the service of the Writ of Recovery.

Viewing the facts, and inferences from facts, in the light most favorable to the Appellants², the District Court was in error in granting summary judgment on the issue of whether Deputy Sass and Officer Hargrove acted maliciously or willfully.

C. Deputy Sass and Officer Hargrove are not entitled to immunity for executing a Court Order which was regular on its face.

Houston County on p. 19 of its brief, and the City of LaCrescent on p. 15 of its brief, make the argument that the District Court properly found immunity because the Officers were executing an Order which was "regular on its face," citing Robinette v. Price, 8 N.W.2d 804 (Minn. 1943). Other than the conclusory

² In summary judgment proceedings, all evidence, and all inferences from circumstantial evidence, must be viewed in favor of the non-moving party. Forsblad v. Jepson, 195 N.W.2d 429 (Minn. 1972).

argument that the Writ was “regular on its face,” Houston County and the City of LaCrescent provide no analysis in support of their position.

Appellants’ analysis establishes that the form Writ signed by Judge Benson set forth a time frame for eviction which was controlled by statute, Minn. Stat. Sec. 504B.365 Subd. 1(a).³ The language in the Writ pertaining to the time of eviction, stating that Appellant Pahnke was to be “immediately removed from the premises” cannot be understood or enforced without reference to the controlling statute. Thus, the format of this Writ was not “regular on its face” in that its terminology required reference to the controlling statute.

D. Houston County and the City of LaCrescent are not entitled to vicarious immunity.

Because Deputy Sass and Officer Hargrove are not entitled to official immunity, neither Houston County nor the City of LaCrescent are entitled to vicarious official immunity.

Further, as the District Court notes on p. 14 of its memorandum, vicarious official immunity is always a policy question, citing Anderson v. Anoka Hennepin Independent School Dist., 678 N.W.2d 651, 664 (Minn. 2004). Policy considerations in any event do not favor the extension of vicarious official

³ Houston County argues on pp. 11-12 of its brief that Appellants should be precluded from discussing the interplay between Minn. Stat. Sec. 504B.365 Subd. 1(a) and 504B.361 Subd. (1) because the issue is not before the District Court. Contrary to Houston County’s statements, Appellants argued this issue extensively on pp. 5-6 of the Brief submitted in opposition to summary judgment.

immunity to Houston County and the City of LaCrescent because they produced no evidence that they developed any protocol, or otherwise properly instructed their peace officers, with respect to proper service of the Writ of Recovery. There was significant evidence submitted in the record by Appellant that other counties have established and published a clear protocol for providing the tenant 24 hours after the Writ of Restitution is served, including Hennepin County. See Affidavit of William French, exs. A,B and C.

II. APPELLANTS' CLAIM THAT DEPUTY SASS AND OFFICER HARGROVE COMMITTED STATUTORY VIOLATIONS PRECLUDE SUMMARY JUDGMENT.

An alternative basis for overruling the District Court's grant of summary judgment to Houston County and the City of LaCrescent, and/or remanding the case to the lower court for further decision, is Appellant's claim of statutory violation which was not addressed by the District Court. On pp. 10-12 of its Brief in Opposition to the Defendants Motions for Summary Judgment, Appellants submitted that Deputy Sass and Officer Hargrove violated Minn. Stat. Sec. 504B.365 Subd.1(a) in connection with their service of the Writ of Recovery. Houston County argues on pp. 24-25 of its brief that violation of the above referenced statute does not give rise to a cause of action against Respondents.

It is Appellants' position that the violation of the above-referenced statute is negligence per se under well-established case law which is addressed under CIV JIG 25.45. Absent a valid excuse or justification, a violation of a statute that

imposes a standard of conduct designed to protect a particular class of person (or the general public) is negligence per se, unless such statute expressly designates the breach is only prima facie evidence of negligence.

Butler v. Engle, 243 Minn. 317, 322, 68 N.W.2d 226, 230 (Minn. 1954); Lavalle v. Kaupp, 240 Minn. 360, 363-364, 61 N.W.2d 228, 230 (Minn. 1953). For the statute to apply, the Appellants must be a member of the class protected by the statute, and the Appellants must sustain an injury resulting from a hazard the statute was designed to avoid. Alderman's Inc. v. Shanks, 536 N.W.2d 4, 8 (Minn. 1995); and, Hage v. Stade, 304 N.W.2d 283, 286 (Minn. 1981).

In this case, the Appellants belong to the class of persons designed to be protected by Minn. Stat. Sec. 504B.365. Appellant Pahnke and her children are the tenants. Clearly, said statute was intended to protect the Appellants from being evicted from their apartment premises under a Writ of Recovery prior to 24 hours. As such, the statute imposes a standard of conduct to be compiled with by peace officers who serve Writs of Recovery. To the extent that the employees of Houston and LaCrescent have violated such statute, such violation constitutes negligence per se.⁴ The fact that Minn. Stat. Sec. 504B.365 imposes a "penalty"

⁴ Houston County cites the case of Larsen v. Wright County Human Service Agency – Daycare Division, 526 N.W.2d 59 (Minn. App. 1995), on p. 24 of its Brief. The distinction between the present case and the case of Larsen is that, in the latter case, the statute did not provide a standard of conduct designed to protect a particular class of persons, as does Minn. Stat. Sec. 504B.365.

against specific persons does not in any way negate the standard of conduct it creates for other persons, specifically peace officers.

Alternatively, there is an issue of fact as to whether Deputy Sass and Officer Hargrove were acting under the direction or control of Home when they executed the Writ. As seen in the factual evaluation in Plaintiff's Brief in Opposition to Motions for Summary Judgment, Home initiated the Eviction Action and requested the service of the Writ. On the date of the service of the Writ, December 4, 2002, Hulberg directed Deputy Sass and Officer Hargrove to Appellant Pahnke's apartment and collaborated with the plan for eviction. Hulberg monitored the service of process from her position in the parking lot at the apartment premises.

III. THERE ARE MATERIAL ISSUES OF FACT AS TO WHETHER DEFENDANT HOUSTON COUNTY BREACHED ITS CONTRACT WITH APPELLANT PAHNKE AND SUMMARY JUDGMENT IS NOT APPROPRIATE.

On pp. 25-28 of its brief, Houston County makes a factual argument on the issue of Appellant Pahnke's contract claims which, to adopt, would require that all facts and factual inferences be decided in favor of the party for summary judgment. The District Court properly concluded that, due to the dispute in the testimony between Pahnke and Houston County's arguments that factual questions exist which cannot be decided on Motion for Summary Judgment.

Likewise, with the claim of promissory estoppel, Houston County simply makes the conclusory argument on p. 28 of its brief that "Pahnke [did not] detrimentally rely on the fictional promise to her detriment." The court properly

determined that the factual questions with respect to promissory estoppel could not appropriately be decided on Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, the District Court decision must be reversed with respect to granting partial summary judgment to Houston County and the City of LaCrescent based on immunity. To the extent this Court of Appeals entertains review of the District Court's denial of summary judgment on the issue of contract claims with Houston County, the District Court should be affirmed.



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