STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0829

Nicholas W. Sterry,
Appellant,

vs.

Minnesota Department of Corrections (DOC),
Respondent,

and

Correctional Officer Ashley Youngberg, in her individual and official capacities,
Defendant.

Filed March 13, 2023
Reversed and remanded
Bratvold, Judge

Ramsey County District Court
File No. 62-CV-21-1313

Zorislav R. Leyderman, The Law Office of Zorislav R. Leyderman, Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, Anna Veit-Carter, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Jesson, Judge; and Klaphake, Judge.[*]

SYLLABUS

I. To determine whether the state is vicariously liable for its employee's acts or omissions under the Minnesota State Tort Claims Act (MSTCA), Minn. Stat.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

§ 3.736 (2022), we presume the definition of "scope of office or employment" in Minn. Stat. § 3.732, subd. 1(3) (2022), is consistent with the common-law understanding of scope of employment.

II. The state is not entitled to the dismissal of tort claims under Minn. R. Civ. P. 12.02(e) when those claims are based on allegations that a corrections officer sexually assaulted an inmate while the corrections officer was on duty performing assigned tasks including supervision of the inmate because evidence may be produced consistent with these allegations showing that the officer was acting within the scope of employment as provided in the MSTCA.

OPINION

BRATVOLD, Judge

Appellant Nicholas Sterry challenges the district court's dismissal of the tort claims in his complaint against respondent Minnesota Department of Corrections (the department) for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e). In 2021, Sterry sued the department and others alleging that while Sterry was an inmate in a correctional facility controlled and operated by the department, a department employee sexually harassed and assaulted him. The department moved to dismiss the complaint, arguing it was immune from liability under the MSTCA. The district court dismissed Sterry's tort claims with prejudice after determining that statutory immunity precludes his claims because the complaint fails to allege facts showing the department employee was acting within the scope of employment. We reverse and remand.

FACTS

For this appeal, the facts alleged in Sterry's complaint are taken as true. In 2018, Sterry was incarcerated at the department's correctional facility in Moose Lake. Sometime beginning in February 2018, defendant Ashley Youngberg, a department employee assigned to supervise inmates, including Sterry, engaged in a pattern of sexual harassment and sexual stalking against Sterry. Youngberg's behavior included making sexually suggestive comments.[1] Youngberg also harassed Sterry, according to the complaint, by "making various sexually suggestive facial expressions and poses using her body, including sucking on a hard candy with a stick in a way that imitated oral sex." The department was aware of Youngberg's "history of sexually harassing and intimidating DOC inmates" but failed to respond.

In April 2018, Sterry was working in the prison kitchen under Youngberg's supervision. Youngberg ordered Sterry into a supply room "to conduct inventory." Sterry claims that

> [w]hile [Sterry] was conducting inventory, Defendant Youngberg approached [Sterry], stuck her hand inside his pants, and fondled his penis without his consent. [Sterry] was in shock and immediately stepped away to terminate physical contact. [Sterry] did not know whether Defendant Youngberg was sexually assaulting [him] or conducting a search of his body as allowed under DOC policy. [Sterry] was not interested in any physical contact with Defendant Youngberg and felt violated, abused, and disgusted.

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[1] For example, Youngberg told Sterry, "You're cute," "You're sexy," and "I bet you look good." Youngberg also would tell Sterry how much fun it would be for him to be with her and that she would be checking on him in the future.

Sterry told Youngberg that he was not interested in engaging in sexual contact with her. In response, Youngberg threatened Sterry and told him that "if he told anyone about her attack, she would claim that he sexually assaulted her and that no one would believe him. Defendant Youngberg threatened [Sterry] with administrative discipline as well as additional criminal charges for sexually assaulting a correctional officer." Youngberg's harassment of Sterry continued through May 2018.

In April 2021, Sterry sued the department and others, asserting the department was vicariously liable for Youngberg's tortious conduct, including battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and negligence per se.[2]

The department moved to dismiss the complaint under Minn. R. Civ. P. 12.02(e), arguing that it was immune under the MSTCA from liability for Youngberg's tortious conduct. In November 2021, the district court dismissed Sterry's tort claims against the department with prejudice, concluding that the department was immune from suit because the MSTCA's "definition of . . . scope [of employment] effectively severs the State's liability from Officer Youngberg's sexual contact with Sterry." After deciding other

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[2] Sterry's complaint also asserts claims against the State of Minnesota, the commissioner of corrections in his official capacity, and Youngberg in her individual and official capacities. The record suggests that Sterry never served Youngberg with the complaint. Sterry's complaint alleges seven causes of action, including five torts Youngberg committed, violations of the Minnesota Human Rights Act, and a negligent-supervision-and-retention claim against the department. Through a series of motions and orders, the district court dismissed with prejudice all causes of action asserted in Sterry's complaint against the state defendants. Sterry voluntarily dismissed the claims against Youngberg without prejudice.

motions not relevant to the issues in this appeal, the district court entered judgment against Sterry, and this appeal follows.

ISSUE

Was the department entitled to dismissal of Sterry's tort claims under Minn. R. Civ. P. 12.02(e)?

ANALYSIS

Sterry contends that the district court erred by dismissing his tort claims against the department after determining the department was immune from suit for Youngberg's sexual assault. Sterry argues the district court failed to correctly analyze the complaint's allegations under the statutory language and applicable caselaw. The department disagrees, arguing that the MSTCA is a limited waiver of sovereign immunity and that the complaint alleges facts showing Youngberg's assault of Sterry was outside the scope of her employment, and thus, the department is "absolutely immune" from vicarious liability for Sterry's sexual assault.

Based on the parties' arguments, our review of the district court's order dismissing Sterry's complaint requires a two-part analysis. Because the district court dismissed Sterry's claims based on the MSTCA's language and emphasized the statutory definition of "scope of office or employment," we must first interpret the statutory definition. We then determine whether the department was entitled to dismissal of Sterry's complaint under rule 12.02 based on Sterry's allegations related to Youngberg's scope of employment.

I. Under the MSTCA, the state may be liable for torts state employees commit while acting within the scope of employment, a statutorily defined term that we presume is consistent with the common-law understanding of scope of employment.

The MSTCA provides that "the state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment." Minn. Stat. § 3.736, subd. 1. The MSTCA defines "scope of office or employment" as meaning "that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority." Minn. Stat. § 3.732, subd. 1(3) (defining the term "[a]s used in . . . section 3.736"). The department is an agency of the state.

Sterry contends that the district court incorrectly interpreted this statutory definition when it concluded that the definition precluded his tort claims. The district court reasoned: "Although Officer Youngberg may have abused her authority as a correctional officer, her doing so was not part of her duty as a DOC employee and it certainly was not a lawful task performed at the behest of the DOC."

Relying on statutory language and caselaw, Sterry argues on appeal that the department may be held liable in tort for sexual harassment and assault under the statutory definition "if the employee's duties gave the employee an opportunity to commit sexual assault or if the employee used the authority of her employment to sexually exploit the plaintiff." The department disagrees, arguing that the MSTCA's statutory definition of scope of employment shields the department from Sterry's tort claims because "[t]here is no allegation that [the department] lawfully assigned Youngberg to harass or sexually

abuse" Sterry. The department also argues that Sterry's complaint fails to allege that Youngberg's purpose "was anything other than personal" or that Youngberg "undertook sexual harassment or assault to benefit her employer."

Statutory interpretation presents a question of law subject to de novo review. *Kremer v. Kremer*, 912 N.W.2d 617, 623 (Minn. 2018). The primary objective of statutory interpretation is to give effect to the legislature's intent. Minn. Stat. § 645.16 (2022); *Jepsen ex rel. Dean v. County of Pope*, 966 N.W.2d 472, 483-84 (Minn. 2021). To do so, we first determine whether the relevant statutory language is ambiguous. *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013). Statutory language is unambiguous if its language is subject to only one reasonable interpretation. *Id.* If statutory language is unambiguous, our role is to "enforce the language of the statute." *Id.* (quotation omitted).

Neither party contends, nor did the district court determine, that the relevant statutory definition is ambiguous. We determine that the statutory definition is not ambiguous. But the parties disagree about the relevance of the common law on an employer's vicarious liability for an employee's tortious acts to the statutory definition. Based on the parties' arguments, the district court concluded that "the precise language of the [MSCTA's definition of scope of employment] narrows the scope of employment for government employees more than the general scope that would apply under the common law to private-sector employees."

Thus, we begin our interpretation of the unambiguous language in the statutory definition of scope of employment by noting some basic rules about the common law and statutory interpretation. We presume that "statutes are consistent with the common law."

Jepsen, 966 N.W.2d at 484. "Because [the Minnesota Supreme Court has] been reluctant to take away Minnesotans' common law rights and remedies, [it has] required" that when the legislature intends to abrogate the common law, its intent to do so must be "expressly declared or clearly indicated in the statute." *Id*. (quoting *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012)).

With this guidance in mind, we consider whether Minnesota's common law on the state's immunity from suit is relevant to our understanding of the MSTCA. For nearly 100 years, the common-law rule was that the state as sovereign was immune from suit absent its consent. *See Nieting v. Blondell*, 235 N.W.2d 597, 600 (Minn. 1975) (discussing *St. Paul & Chicago Ry. Co. v. Brown*, 24 Minn. 517 (1877)). But in 1975, the Minnesota Supreme Court prospectively abolished state tort immunity, expressly noting that the legislature had the opportunity to "take affirmative action prior to the elimination of the sovereign immunity defense." *Id.* at 603.

One year later, the legislature passed the MSTCA. 1976 Minn. Laws ch. 331, § 33, at 1293-97. In doing so, the legislature "waived its governmental tort immunity by creating a general rule of liability." *Rico v. State*, 472 N.W.2d 100, 104 (Minn. 1991). The legislature simultaneously excluded certain claims from the general rule of liability, declaring that "the state and its employees are not liable" for any of 18 enumerated types of losses. Minn. Stat. § 3.736, subd. 3(a)-(r).[3] "Because statutory immunity is an exception

[3] We note that the department did not raise any of the 18 statutory exclusions provided in the MSTCA in its motion to dismiss Sterry's tort claims based on vicarious liability. We also observe that although the statutory exclusions in subdivision 3 eliminate liability for losses caused by a state employee's act or omission while "exercising due care in the

to the general rule of governmental liability, courts must narrowly construe it." *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 902 (Minn. App. 2009) (interpreting a section of the municipal tort claims act, Minn. Stat. § 466.02, subd. 6 (2008)); *cf. Conlin v. City of Saint Paul*, 605 N.W.2d 396, 403 (Minn. 2000) (interpreting Minn. Stat. § 466.02, subd. 6 (1998), and recognizing supreme court precedent that statutory immunity should be narrowly construed). The MSTCA does not expressly abrogate the common law of vicarious liability of an employer for an employee's tortious conduct. Instead, it affirmatively provides the state is liable for the tortious acts of its employees while acting within the scope of employment. Minn. Stat. § 3.736, subd. 1.

With this in mind, we turn to how Minnesota common law on vicarious liability determines the scope of employment. First, whether an employee's acts fall within the scope of employment is generally a question of fact. *See, e.g.*, *Reetz v. City of Saint Paul*, 956 N.W.2d 238, 247 (Minn. 2021) ("[W]hen determining the vicarious liability of an employer, the issue of whether an employee was acting within the scope of their employment is also a question of fact.").

Second, the common law on the scope of employment has developed over time. Before 1973, an employee acted within the scope of their employment "where it [was] shown that the employee's acts were motivated by a desire to further the employer's business." *Lange v. Nat'l Biscuit Co.*, 211 N.W.2d 783, 784 (Minn. 1973). But in *Lange*,

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execution of a valid or invalid statute or rule," the statutory exclusions do not refer to a loss caused by a state employee's intentionally tortious conduct. Minn. Stat. § 3.736, subd. 3(a)-(r).

the supreme court rejected the employee-motivation rule in the context of a store employee's assault of the store owner because it "believe[d] that the focus should be on the basis of the assault rather than the motivation of the employee." *Id*. at 785. It rejected as impractical the imposition of liability based on "the arbitrary determination of when, and at what point, the argument and assault leave the sphere of the employer's business and become motivated by personal animosity." *Id.* The supreme court held that "an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and the assault occurs within work-related limits of time and place." *Id.* at 786. Based on this holding, the supreme court reversed the district court's decision to enter judgment notwithstanding the verdict for the employer and remanded for entry of judgment on the jury verdict for the injured store owner. *Id*.

Just three years after the common law developed in *Lange,* the legislature passed the MSTCA in 1976 and included its own definition of "scope of office or employment" as meaning "that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority." Minn. Stat. § 3.732, subd. 1(3).

We have little caselaw discussing or applying this statutory definition, and we conclude that the case on which the district court and the department rely—*Doe 175 v. Columbia Heights Sch. Dist.*, 873 N.W.2d 352 (Minn. App. 2016)—provides little guidance. In *Doe 175*, we considered the interplay between the MSTCA and the municipal tort claims act, Minn. Stat. §§ 466.02-.03 (2022).[4] 873 N.W.2d at 357. We considered a

[4] We cite the most recent version of the municipal tort claims act, Minnesota Statutes sections 466.02-.03, because it has not been amended since the *Doe 175* decision.

provision of the municipal act that grants municipalities immunity from liability for claims that "would be excluded under [the MSTCA], if brought against the state." Minn. Stat. § 466.03, subd. 15. The dispute in *Doe 175* centered on whether section 466.03, subdivision 15, incorporated the vicarious-liability language in subdivision 1 of the MSTCA or whether it incorporated only the enumerated exceptions to liability in subdivision 3.

The department argues that *Doe 175* applied the MSTCA's definition of scope of employment. We disagree. We only decided that "section 3.736 plainly excludes from various liability torts committed by a state employee who was *not* 'acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority.'" *Id*. at 358 (quoting Minn. Stat. § 3.732, subd. 1(3)). In other words, *Doe 175* repeated the statutory definition without interpretation. We held that the school district was immune after we observed that there was "no dispute that [the employee] engaged in sexual misconduct for his own personal reasons, not 'on behalf of' the school district 'in the performance of duties or tasks lawfully assigned by competent authority.'" *Id.* The parties in *Doe 175* agreed that the employee had acted outside the scope of his employment; thus, there was no need for this court to analyze or interpret the scope-of-employment definition. Because *Doe 175* did not interpret the scope-of-employment definition or address the definition's relationship to the common law, we do so for the first time now.

We read the MSTCA's definition of "scope of employment" as having three operative parts: "that [1] the employee was acting on behalf of the state [2] in the performance of duties or tasks [3] lawfully assigned by competent authority." Minn. Stat.

§ 3.732, subd. 1(3). For each part of this statutory definition, we apply the presumption that statutes are consistent with the common law, *Jepsen*, 966 N.W.2d at 484, and our obligation to construe the state's statutory immunity narrowly, *J.W. ex rel. B.R.W.*, 761 N.W.2d at 902.

We begin with the phrase "on behalf of." Dictionaries provide definitions falling into two categories: (1) "in the interest of" and (2) "as a representative of." *Merriam Webster's Collegiate Dictionary* 110 (11th ed. 2014); *accord The American Heritage Dictionary of the English Language* 162 (5th ed. 2011) (defining "on behalf of" as "1. As the agent of; on the part of. 2. For the benefit of; in the interest of."). Based on the presumption that the MSTCA's definition is consistent with the common law, we reject definitions in the "interest" or "benefit" category. Our caselaw addressing the common-law definition has expressly repudiated the notion that for an employee to be acting within their scope of employment, the employee's act must be committed "in furtherance of his employer's business." *Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999); *Lange*, 211 N.W.2d at 786. Thus, we conclude that the phrase "on behalf of" as used in subdivision 1(3) means that the employee was acting as a representative or agent of their employer.

Turning to the second part of the MSTCA's definition—"in the performance of duties or tasks"—we observe that this phrase mirrors language in the common law. The supreme court has held that an employee acts within the scope of their employment for the purposes of vicarious liability when the "act is related to the duties of the employee" and "occurs within work-related limits of time and place." *Fahrendorff*, 597 N.W.2d at 910

(quoting *Lange*, 211 N.W.2d at 786). Thus, the common law guides our understanding of whether an employee was acting in the performance of duties or tasks.

We finally examine the third part of the MSTCA's definition—"lawfully assigned by competent authority." The department argues, and the district court concluded, that the language "lawfully assigned" precludes the state's liability for an employee's acts that are criminal in nature. And at oral argument, the department theorized that the "lawfully assigned" language precluded liability because sexually abusing inmates is against the department's policy. We are unpersuaded for two reasons. First, these arguments must be juxtaposed with the supreme court's directive that we narrowly construe statutory immunity because it is an exception to the general rule of government liability. *J.W. ex rel. B.R.W.*, 761 N.W.2d at 902. Second, the department's position mistakenly emphasizes whether the alleged tortious conduct is lawful and fails to note that "lawfully assigned by competent authority" modifies the second part of the scope-of-employment definition. Simply put, to determine whether an employee was acting in the performance of employment duties or tasks, the statutory definition provides that we consider whether those duties and tasks were "lawfully assigned by competent authority," not whether the tortious act itself was an assigned duty or task.

In short, we conclude that the only reasonable interpretation of the MSTCA's scope-of-employment definition is consistent with the common law. We see no material reason to differentiate the MSTCA's definition of scope of employment from the common law. Thus, we interpret the MSTCA's definition of scope of employment to be consistent with the common law on scope of employment for vicarious liability.

We note, for the sake of completeness, that we are not persuaded by the department's contention that we should affirm the district court's interpretation because a contrary ruling would render the MSTCA's indemnification provision superfluous. Minnesota Statutes section 3.736, subdivision 9, provides for the defense and indemnification of state employees acting within the "scope of employment" and uses the definition from section 3.732, subdivision 1(3). Subdivision 9 expressly limits the state's indemnification to employees who did not engage in "malfeasance," "willful or wanton actions," or "neglect of duty." The department contends that applying the common-law view of "scope of employment" would "render the limitations on indemnification superfluous and meaningless because a plaintiff could sidestep this limitation merely by alleging a theory of vicarious liability." We fail to see how one would render the other superfluous. The liability and indemnification provisions serve two distinct purposes for two separate groups: potential plaintiffs under the MSTCA and state employees. And the legislature determined that the scope of indemnity provided turns, in part, on whether the employee was acting within the scope of employment. Minn. Stat. § 3.736, subd. 9. For these reasons, we reject this argument.

II. Sterry's complaint states legally sufficient tort claims against the department because it alleges facts that, if proved, show that Youngberg was acting within the scope of her employment when she sexually assaulted Sterry.

Having concluded that the common law is relevant to our analysis of whether a state employee committed a tort while acting within the scope of employment, we turn to whether Sterry's complaint states a legally sufficient claim for relief against the department.

This court reviews de novo both a district court's order dismissing a case under Minnesota Rule of Civil Procedure 12.02(e), *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008), and its application of statutory immunity, *Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006). "When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before [the] court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert*, 744 N.W.2d at 229. "A claim is legally sufficient if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58, 68 (Minn. 2020) (quotation omitted). We "accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

Sterry relies on the supreme court's analysis in *Fahrendorff* of an employer's common-law vicarious liability in support of his contention that the district court erred in dismissing his case for failure to state a legally sufficient claim. In that case, a minor was placed in the care of a nonprofit temporary crisis shelter, where she was sexually abused by a program counselor. *Fahrendorff*, 597 N.W.2d at 906. Fahrendorff's mother sued the shelter on her daughter's behalf, raising claims for assault and battery, sexual abuse, and infliction of emotional distress. *Id.* at 909. The district court granted summary judgment for the shelter, and we affirmed. *Id.*

The supreme court reversed, concluding that a reasonable jury could find that the counselor acted within the scope of his employment. *Id.* at 911. The court reasoned that

both parties agreed the sexual assault occurred within "work-related limits of time and place." *Id*. at 910. Thus, the court focused "on whether the source of [the sexual] assault was related to the duties of his employment" and concluded that it was, even as the court acknowledged the assault was "criminal and personally motivated." *Id*. at 910. The court determined the assault "would not have occurred but for [the program counselor's] employment."[5] *Id.* It relied on the fact that the counselor's position for the shelter gave him "significant power and authority over" Fahrendorff because the "job enabled [the program counselor] to be alone with Fahrendorff, to have unfettered access to her bedroom, and to conceal, at least for a short time, his criminal conduct." *Id.* at 911.

The department contends that the statutory definition of scope of employment controls, not *Fahrendorff*, which was decided under the common law. This is true. Still, we conclude that the facts alleged in Sterry's complaint are like those considered in *Fahrendorff,* which offers guidance on the relevant common law.[6]

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[5] The parties acknowledge that *Fahrendorff* also addresses whether the employee's conduct was foreseeable. But the foreseeability analysis in *Fahrendorff* focused on the employer's liability under a theory of respondeat superior, not whether the employee acted within the scope of his employment. 597 N.W.2d at 990-91. Nor did the department contend that Sterry's complaint failed because Youngberg's conduct was not foreseeable. And so, we do not address foreseeability here. We only address the interpretation of the scope-of-employment definition for liability under the MSCTA.

[6] Although *Doe 175* did not reach the scope-of-employment issue, we note that the circumstances there are materially different from those alleged in Sterry's complaint. In *Doe 175*, the employee did not coach Doe on any team or supervise Doe in the weight room. 873 N.W.2d at 354-55. In contrast, Youngberg was supervising Sterry at the time of the assault and had the authority to search his person.

Sterry's complaint alleges facts relevant to all three parts of the statutory definition of scope of employment. First, Youngberg was supervising Sterry as a representative of the department at the time of the sexual assault. Second, Youngberg was performing department duties and tasks related to the prison-kitchen inventory in the supply room as assigned by the department. More specifically, going to the third part of the statutory definition, the department authorized Youngberg by virtue of her position to order Sterry into the supply room to perform inventory, and she exercised this authority when she isolated Sterry on the day of the sexual assault. While Sterry was conducting the inventory as Youngberg directed, Youngberg "stuck her hand inside his pants, and fondled his penis without his consent." Sterry "did not know" whether Youngberg was "conducting a search of his body as allowed under DOC policy." Sterry immediately told Youngberg that "he did not wish to engage in sexual contact with her." Youngberg then used her authority to threaten Sterry with administrative discipline and criminal charges if he reported her conduct. These allegations sufficiently allege that Youngberg acted within her scope of employment as provided in the MSTCA, and so, Sterry's complaint survives the state's immunity-based motion to dismiss.

We recognize that the facts could develop in a way that warrants judgment for the department. For example, discovery could reveal that Youngberg was never assigned to supervise Sterry, that she was off the clock when the alleged assault occurred, or that she lacked the authority to order Sterry into the supply room and search him—all facts that would be relevant to the scope-of-employment determination. But at the motion-to-dismiss stage, we accept the facts alleged as true. And based on the alleged facts, a reasonable

fact-finder could conclude that Youngberg was acting on behalf of the state—specifically, as a representative of the department in the performance of Youngberg's duties to supervise, direct, and search inmates, as lawfully assigned by the department.

DECISION

We conclude with an observation much like the one made by the supreme court in *Fahrendorff*. The allegations in Sterry's complaint are "not conclusive" that Youngberg's acts were within the scope of her employment. *See Fahrendorff*, 597 N.W.2d at 913. But Sterry's complaint alleges facts sufficient to show that Youngberg acted within the scope of her employment, as required for liability under the MSTCA. Because at this stage of the pleadings we must assume that the allegations are true, we conclude that the department was not entitled to dismissal of Sterry's complaint for failure to allege a legally sufficient claim upon which relief can be granted. Thus, we reverse the dismissal of Sterry's tort claims against the department and remand for further proceedings.

Reversed and remanded.