

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0859**

Jolene Megan Vassallo,
by and through her Guardian ad Litem, Lisa A. Brown,
Appellant,

vs.

Jason Lee Majeski, et al.,
Respondents.

**Filed February 4, 2013
Affirmed in part, reversed in part, and remanded
Collins, Judge***

Hennepin County District Court
File No. 27-CV-10-23046

Douglas E. Schmidt, Schmidt Law Firm, Minnetonka, Minnesota (for appellant)

Michael O. Freeman, Hennepin County Attorney, Toni A. Beitz, Assistant County
Attorney, Minneapolis, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Stauber, Judge; and
Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

Appellant, through her guardian ad litem, challenges the district court's grant of summary judgment in favor of respondents based on official immunity and vicarious official immunity, arguing that the respondent deputy violated both statutory and departmental-policy provisions thereby negating immunity. Appellant also contends the district court erred in denying spoliation sanctions due to destruction of certain audio recordings. We affirm in part, reverse in part, and remand.

FACTS

In the afternoon on December 25, 2009, Deputy Jason Lee Majeski of the Hennepin County Sheriff's Office (HCSO) heard a dispatch call for canine assistance in response to a home-security-system alarm, indicating a possible home invasion in Brooklyn Park. At 1:22 p.m. Deputy Majeski activated his emergency lights and siren and headed toward the address of the alarm. Weather conditions were poor, and roadways were somewhat slippery due to snowfall.

At 1:33 p.m., HCSO's dispatcher broadcast the reported location of the home-invasion suspects. As Deputy Majeski approached the intersection of 93rd Avenue North and West Broadway, he observed six cars that had pulled over, and he believed the intersection was clear of all other traffic. Deputy Majeski then turned off his siren because he was nearing the suspects' reported location and did not want to alert them.

Deputy Majeski's traffic light was red,¹ and he may have been traveling 54 miles-per-hour in a 50 mile-per-hour zone as he entered the intersection.

On entering the intersection, Deputy Majeski observed appellant Jolene Vassallo's white vehicle, traveling on the intersecting street, for the first time.² He immediately applied his brakes and veered to the left, but could not avoid the collision. Deputy Majeski testified that Vassallo did not make any evasive maneuvers and that her elbow was resting on the driver's-side window, possibly obstructing her view of his vehicle entering the intersection. Vassallo sustained extensive injuries and has no memory of the collision. At 1:34 p.m., the dispatcher broadcast a "clear the main" instruction regarding the home invasion. At 1:35 p.m., 911 received a phone call reporting the collision. Vassallo informed Hennepin County of a potential lawsuit within ten days of the accident and requested proper preservation of all evidence for discovery. Subsequently, some dispatch audio recordings related to the dispatching of officers to the home-invasion incident were erased.

Vassallo commenced this personal-injury lawsuit. The parties made cross-motions for summary judgment. Vassallo also asserted a spoliation claim due to the destruction of the audio recordings. Respondents sought summary judgment based on official immunity and vicarious official immunity. Vassallo contended that Deputy Majeski's emergency response was unwarranted and that Deputy Majeski's violation of statutory and departmental-policy provisions negated official immunity even if he was performing

¹ Respondents conceded this fact for the purpose of summary judgment.

² An accident reconstructionist speculated that Deputy Majeski may not have previously seen Vassallo's white car due to high snow banks surrounding the intersection.

official duties. In the alternative, Vassallo argued that the proper sanction for the spoliation of evidence would be the stripping of any such official immunity.

The district court determined that respondents are eligible for official immunity and vicarious official immunity as a matter of law. The district court stated that (1) Deputy Majeski was responding to an emergency situation, giving rise to his official immunity; (2) his actions of speeding and extinguishing his siren upon entering the intersection were discretionary; (3) his actions were not willful or malicious; and (4) Hennepin County is entitled to vicarious official immunity as Deputy Majeski's employer. The district court also denied Vassallo's spoliation claim, characterizing it as a "red herring," in that no party received an evidentiary advantage from the destruction of the audio recordings because a written record was preserved, and witnesses were available to interpret it. This appeal followed.

D E C I S I O N

Vassallo, through her guardian ad litem, challenges the district court's grant of summary judgment in favor of respondents based on official immunity and vicarious official immunity, and the court's ruling that spoliation sanctions are unwarranted. Seeing genuine issues of material fact regarding Deputy Majeski's conduct, we reverse the grant of summary judgment to respondents, and remand for trial. Because the district court did not abuse its discretion in finding that the destruction of dispatch audio recordings provided neither party an evidentiary advantage, we affirm the district court's denial of spoliation sanctions.

I.

The district court granted respondents' motion for summary judgment on the basis that official immunity and official vicarious immunity apply to shield them from liability. We review a district court's grant of summary judgment de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In doing so, we determine whether the district court erred in its application of the law. *Fedke v. City of Chaska*, 685 N.W. 2d 725, 729 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004). Summary judgment is not available when a genuine issue of material fact exists. *Id.* We view the evidence in the light most favorable to the nonmoving party against whom summary judgment was granted. *Id.* A genuine issue of material fact exists when the record, taken as a whole, could lead a rational trier of fact to find for the nonmoving party. *Id.* However, when a grant of summary judgment is on appeal, the record must show substantial evidence to support a determination that a genuine issue of material fact exists. *Id.*

Official immunity acts as a liability shield protecting government officials engaged in discretionary official duties. *Id.* This immunity insulates public officials from fear of personal liability that may deter quick independent action. *Id.* Eligibility for immunity depends on whether the official's actions were discretionary or ministerial. *Id.* An official who fails to perform a ministerial duty is not entitled to the immunity. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006). Conduct is ministerial if "the existence of a policy . . . sets a sufficiently narrow standard of conduct" where the official is "bound to follow [the] policy." *Mumm v. Mornson*, 708 N.W.2d

475, 491 (Minn. 2006). Put differently, a ministerial act is one that is “absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.” *Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937) (quotation omitted). If the official’s action was discretionary, normally official immunity insulates liability, unless the official committed a willful wrong or acted with malice. *Fadke*, 685 N.W.2d at 729. The starting point of any official-immunity analysis is identifying the precise government conduct at issue. *Mumm*, 708 N.W.2d at 490.

It is undisputed that the precise government conduct at issue here is that of Deputy Majeski’s driving as he responded to a request for canine assistance and the updated information regarding the suspected perpetrators location. More specifically, the most relevant conduct is that of Deputy Majeski as he entered the intersection of the collision. As a threshold matter, Vassallo contends that Deputy Majeski’s decision to engage in an emergency response, with lights and siren, was unnecessary. Minnesota statutes do not define what constitutes an “emergency situation” for police purposes. However, HCSO policy 6-401 defines an emergency situation as one where “the immediate response of the office[r] is required” to facilitate the timely apprehension of a suspect.³ The Eighth Circuit has defined the term as “a situation needing the presence of law enforcement officers as rapidly as they could arrive, even if that entailed the risks inherent in high-speed driving.” *Terrell v. Larson*, 396 F.3d 975, 980, n.2 (8th Cir. 2005).

³ The policy enumerates other situations that qualify as an emergency. We note only this one as it is directly applicable.

The facts support Deputy Majeski’s decision to engage in an emergency response. The record establishes that HCSO treats home-security-alarm calls as high-priority, and that here the dispatcher subsequently recoded the incident as a burglary with fleeing suspects. Five HCSO employees familiar with the emergency-response policy stated that the decision to initiate an emergency response is one of officer discretion. Also, despite Vassallo’s argument that home-security-system alarms are often false, here it appears to have been real. Responding officers observed footprints in the snow and an indication of a forced-entry home invasion, and requested canine assistance to “do a possible track on the suspects.” While Deputy Majeski was enroute, the dispatcher broadcast the reported location of the home-invasion suspects. Deputy Majeski’s decision to engage in an emergency response to aid in the timely apprehension of suspects falls squarely within HCSO policy 6-401.⁴ Because Deputy Majeski’s actions were in the course of official police duties—responding to an emergency situation—he is eligible for official immunity, and we next consider whether his actions qualify for its protections. *See Fedke*, 685 N.W.2d at 729.

Vassallo argues that Deputy Majeski violated at least one Minnesota statute and several HCSO policies, thus nullifying his eligibility for official immunity in this

⁴ Vassallo also argues that, if an emergency situation existed, the emergency was over prior to the collision, which renders Deputy Majeski’s continued emergency response improper. The record shows otherwise. Vassallo apparently interprets the “clear the main” instruction broadcast at 1:34 p.m. to signify an end to law-enforcement response to the home-invasion incident. However, the record indicates that a “clear the main” instruction is a directive to uninvolved officers to switch to different radio frequencies, not a signal that an incident response is concluded. The record also shows that the dispatcher continued requesting officer assistance at 1:40 p.m. and 1:41 p.m., five minutes after the collision occurred.

instance. Minnesota Statutes section 169.03, subdivision 2, governs how officers should respond to emergency situations and provides:

The driver of any authorized emergency vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety, but may proceed cautiously past such red or stop sign or signal after sounding siren and displaying red lights, except that a law enforcement vehicle responding to an emergency call shall sound its siren or display at least one lighted red light to the front.

Minn. Stat. § 169.03, subd. 2 (2012). In addition to this statute, Vassallo asserts that Deputy Majeski violated various ministerial HCSO policies that invalidate his claim to official immunity. The district court determined, and we agree, that many of the policies cited by Vassallo are inapplicable here. Therefore, we discuss only the policy that creates a genuine issue of material fact, where we disagree with the district court's conclusion. HCSO policy 6-402 states that “[o]nly vehicles with red lights and siren are authorized for emergency response. The use of *both red lights and siren* is required when responding to an emergency. Deputies *are required* to drive with due regard for the safety of all persons.” (Emphasis added.)

The parties dispute whether these provisions create a discretionary or ministerial duty. Normally, our analysis of official immunity begins with such a determination. *Fadke*, 685 N.W.2d at 729. However, in this case we conclude that such a determination is premature. It is undisputed that Deputy Majeski turned off his siren but did not turn off his flashing emergency lights as he entered the intersection. Thus, Deputy Majeski conformed to the statute's mandate that “a law enforcement vehicle responding to an

emergency call shall sound its siren *or* display at least one lighted red light to the front.” Minn. Stat. § 169.03, subd. 2 (emphasis added). But the district court went on to conclude that, as a matter of law, Deputy Majeski’s actions were a “classic example of the use of discretion” and were therefore protected. The Minnesota Supreme Court has ruled that the application of Minn. Stat. § 169.03, subd. 2’s provisions regarding proceeding with caution is ultimately a question of fact. *Travis v. Collett*, 218 Minn. 592, 595-96, 17 N.W.2d 68, 71 (1944). Although *Travis* was a negligence action, not implicating official immunity, we find its dicta nonetheless instructive: “Whether the slowing down is necessary, the extent of slowing down that is required, and whether the driver proceeded with caution or due care depend upon all the facts and circumstances of each case and are questions the determination of which rests peculiarly with the trier of fact.”⁵ *Id.* Because HCSO policy 6-402 includes language substantially similar to Minn. Stat. § 169.03, subd. 2, in that both require responding officers to drive cautiously and with due regard for the safety of others, we analyze the provisions in tandem.

The record contains evidence that contradicts whether Deputy Majeski proceeded cautiously through the intersection. It is undisputed, at this stage, that Deputy Majeski proceeded through a red light, and there is evidence of him traveling 54 miles-per-hour in

⁵ Albeit an unpublished opinion, we previously considered Minn. Stat. § 169.03, subd. 2, as it relates to *Travis*. See *Terrell v. Larson*, 2008 WL 2168348, review denied (Minn. Aug. 19, 2008). In a parenthetical, we noted that *Travis* stood for the proposition that Minn. Stat. § 169.03 was an “elastic standard that plainly does not impose an absolute duty upon the driver of an emergency vehicle to slow down in every situation upon approaching stop signal.” *Id.* at *6 (quotations omitted). However, *Terrell* considered Minn. Stat. § 169.03, subd. 2, within an analysis of whether conduct was discretionary or ministerial. *Terrell* did not address *Travis*’ guidance that the factual determination of whether the driver proceeded cautiously rests with the trier of fact. *Id.*

a 50 mile-per-hour zone. An accident reconstructionist opined that, “[i]f [Deputy Majeski] were traveling through the intersection on a red [light,] it would be considered too fast for conditions as well as acting without due regard for the safety of the public.” These facts, combined with two separate witness accounts that Deputy Majeski’s speed appeared excessive for the conditions, create a genuine issue of material fact. *See Fedke*, 685 N.W.2d at 729 (stating that genuine issue of material fact exists if the record, taken as a whole and supported by substantial evidence, leads a rational trier of fact to find for the nonmoving party). On this appeal, we need not analyze whether these provisions are discretionary or ministerial. In either event, a jury must first determine whether Deputy Majeski proceeded cautiously through the intersection as required by public safety. *See Travis*, 218 Minn. at 595-96, 17 N.W.2d at 71. Also, because on this appeal we decline to reach whether the provisions are discretionary or ministerial, it is premature to address whether Deputy Majeski acted willfully or with malice. *Fedke*, 685 N.W.2d at 729. In light of the genuine issue of material fact, the grant of summary judgment in favor of Deputy Majeski was erroneous.⁶ Therefore, we reverse summary judgment and remand for trial.

⁶ The grant of summary judgment to Hennepin County based on vicarious official immunity is also reversed. When an employee is entitled to official immunity, it extends by operation of law to the employer government agency. *Watson by Hanson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 415 (Minn. 1996). Respondents suggest that, because Vassallo failed to brief the issue of Hennepin County’s vicarious official immunity, Vassallo waived the issue on appeal and we must leave the determination of summary judgment in favor of Hennepin County undisturbed. But, obviously, an employer cannot be shielded by vicarious official immunity through an employee that has yet to qualify for official immunity.

II.

Spoliation refers to the destruction of relevant evidence by a party. *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998). It is within the district court's discretion to examine the missing evidence in the context of the claims asserted and to weigh the proper remedy for any resulting prejudice. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). This broad discretion includes "[t]he task of determining what, if any, sanction is to be imposed." *Id.* A party challenging a district court's determination bears the heavy burden of showing that no reasonable person would agree with the district court's assessment of what sanctions are appropriate. *Id.*

Vassallo's spoliation claim stems from the destruction of dispatch audio recordings. Respondents concede that thirteen minutes of audio were inadvertently deleted. The missing audio included the recoding of the incident from a home-security-system alarm to a burglary, the broadcast of the reported location of the home-invasion suspects, and the "clear the main" directive.

Vassallo argues the district court erred by determining that (1) Deputy Majeski did not gain an evidentiary advantage from the destruction of the audio recordings, (2) the recordings were unavailable to everyone, and (3) depositions and testimony could supplement any missing information. The district court deemed the spoliation claim a "red herring" and ruled that no sanctions were appropriate because no party gained an evidentiary advantage. The district court's conclusion is well within its broad discretion.

In explaining its determination regarding the spoliation of evidence, the district court stated:

[A] written record or summary of the [dispatch] calls was preserved and was at all times available [to Vassallo]. Indeed, most of [Vassallo's] factual claims are based on [an exhibit] which is a record of all communications made in the critical time. That record can be readily interpreted It identifies the individuals, who can be called as witnesses, to refresh their recollection [T]he audio merely changes the medium by which the content of the evidence is conveyed.

Indeed, Vassallo relied on the referenced exhibit to conduct an entire deposition for the purpose of establishing and interpreting the timeline of events. The exhibit contains time-stamped information regarding the information relayed to Deputy Majeski, and shows when (1) the incident was recorded to a burglary, (2) the reported location of the home-invasion suspects was broadcast, and (3) the “clear the main” dispatch issued. Finally, the district court determined that Vassallo’s requested sanction of stripping Deputy Majeski and Hennepin County of official immunity and vicarious official immunity was too “drastic.”

Vassallo has failed to meet her burden to show that no reasonable person would agree [with] the [district] court’s assessment of what sanctions are appropriate. *Patton*, 538 N.W.2d at 119. We conclude that the district court did not abuse its discretion in ruling that no prejudice resulted from the destruction of the dispatch audio recordings and, accordingly, that no sanctions are warranted.

Affirmed in part, reversed in part, and remanded.