STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1738

Mary M. Plaster, et al.,
Appellants,

vs.

City of St. Paul, et al.,
Respondents.

Filed May 16, 2011
Affirmed
Schellhas, Judge
Dissenting, Stauber, Judge

Ramsey County District Court
File No. 62-CV-09-8982

Patrick H. O'Neill Jr., Stephen M. Warner, Eric M. Laine, O'Neill & Murphy LLP, St. Paul, Minnesota (for appellants)

Sara R. Grewing, St. Paul City Attorney, Portia Hampton-Flowers, Assistant City Attorney, St. Paul, Minnesota (for respondents)

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

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

After sustaining severe injuries in an automobile collision caused by a suspect fleeing police, appellants challenge the district court's summary judgment in favor of

respondents in their negligence action on the grounds of official immunity and vicarious official immunity. We affirm.

FACTS

On August 21, 2008, a confidential informant (CI) informed St. Paul police officers that he could buy crack cocaine from an individual known to him as "Nutta" or "Netta" (the suspect). The CI also stated that the suspect drove a black Dodge Charger. On August 27, St. Paul police officers set up a controlled delivery of two ounces of crack cocaine by the suspect. When the suspect pulled in front of 987 Churchill Street in his black Dodge Charger, the officers moved in to arrest him. But the Charger pulled away from the curb on Churchill headed southbound. At the same time, Sergeant Steve Anderson turned northbound onto Churchill in an unmarked SUV and activated his emergency lights. The suspect sped up, collided with another officer's unmarked car, and headed east on Front Avenue.

Officer Brad Hazelett activated his emergency lights and siren and initiated a pursuit of the suspect with Officer Robert Vetsch close behind. As Hazelett pursued the suspect from a distance of approximately 100 yards and at a speed of approximately 75 to 80 miles per hour, he focused his squad car's manual spotlight at the suspect's car and saw several objects thrown out of the passenger-side window. The suspect then accelerated heavily and, still travelling on Front, proceeded through the intersection of Front, Dale Street, and Como Avenue. The suspect collided with another eastbound vehicle, lost control, and collided with a car parked on Front that was occupied by appellants Thomas and Sandra Plaster. The collision caused the Plasters' car to collide

with the car parked in front of it. Standing behind the car with which the Plasters' car collided was their daughter, appellant Mary Plaster, and her friend, appellant Daniel Sanford. Mary Plaster and Sanford were loading Mary Plaster's gifts into the trunk of the car, Mary having just celebrated her 21st birthday at a nearby restaurant. The collision pinned Mary Plaster and Sanford between the cars, causing severe lower body injuries requiring multiple surgeries and amputation of Mary's left leg.

Officers arrested the suspect at the scene and found several large pieces of crack cocaine in the area where Officer Hazelett saw objects thrown out the passenger-side window of the suspect's car.

Alleging negligence; negligence per se; gross negligence; willful and wanton negligence; negligent training, instruction, and supervision; and negligent infliction of emotional distress, appellants commenced an action against the City of St. Paul and the officers involved in the police pursuit. Specifically, appellants alleged that the officers failed to follow the St. Paul Police Department's written pursuit policy. The district court granted summary judgment to respondents, concluding that official immunity and vicarious official immunity bar appellants' claims because the officers' initiation of the pursuit was lawful and the City's pursuit policy did not require termination of the pursuit.

This appeal follows.

D E C I S I O N

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a

judgment as a matter of law." Minn. R. Civ. P. 56.03. "On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). "The application of official immunity presents a question of law reviewed de novo." *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006).

Appellants argue that respondents are not entitled to official immunity and vicarious official immunity because the officers violated ministerial duties by initiating and failing to terminate the high-speed pursuit. Alternatively, appellants argue that, even if the officers' decisions were discretionary, material disputed questions of fact exist about whether the officers' acts were willful and malicious, thereby precluding immunity. Appellants also argue that a lesser standard than willful and malicious should apply to discretionary acts.

Official Immunity

"Official immunity prevents a public official charged by law with duties which call for the exercise of his judgment or discretion from being held personally liable for damages, unless the official has committed a willful or malicious act." *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006) (quotations omitted). "A public official is

not protected by immunity in the performance of his duties when he fails to perform a ministerial act, or when his performance of a discretionary act is willful or malicious." *Thompson*, 707 N.W.2d at 673. "The purpose of official immunity is to protect public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004) (quotation omitted).

To analyze the application of official immunity, appellate courts must "first identify the precise governmental conduct at issue." *Mumm*, 708 N.W.2d at 490. Here, the governmental conduct at issue is (1) the police officers' decision to initiate a pursuit of the suspect and (2) their decision to continue the pursuit.

Initiating Pursuit

Having identified the conduct at issue, we must "determine whether the conduct at issue involves ministerial or discretionary duties." *Id.* "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." *Id.* (quotation omitted). A discretionary act is one that requires "the exercise of individual judgment in carrying out the official's duties." *Thompson*, 707 N.W.2d at 673.

"[A] government policy mandating certain conduct by public officials can influence whether a duty is classified as ministerial or discretionary." *Mumm*, 708 N.W.2d at 491; *see also Anderson*, 678 N.W.2d at 659 (concluding that existence of policy that sets sufficiently narrow standard of conduct will make public employee's conduct ministerial if he is bound to follow policy); *Wiederholt v. City of Minneapolis*,

581 N.W.2d 312, 314 (Minn. 1998) (concluding that sidewalk inspector's failure to comply with policy requiring immediate repair of sidewalk protrusions greater than one inch was ministerial act).

In this case, the St. Paul Police Department Manual section 443 contains the city's policy regarding hot pursuits (the pursuit policy). Section 443.01 provides:

> All emergency vehicle operation during pursuits will be conducted in strict accordance with existing Minnesota statutes.
>
> Prior to a decision to pursue an officer must consider if the pursuit itself would create a more hazardous condition than if no pursuit occurred. In applying this line of thought, the individual officer must exercise sound judgment, with careful consideration of the following [17 factors.[1]]
>
> Any decision to initiate, continue, or become involved in a pursuit will be based upon facts known to the officer at the time the decision is made; facts unknown to the officer cannot be considered later in justifying the pursuit.
>
> An officer *will not* become involved in a pursuit when the identity of the driver of the pursued vehicle (or wanted passenger) is known to officers and that person can be found later, *unless a serious felony or hazardous driving behavior is involved.*

[1] The 17 factors that an officer must carefully consider are: "nature and seriousness of the offense observed or reported"; "degree of reckless driving behavior exhibited by the pursued driver prior to initiation of the pursuit"; "ability of the officer to identify and apprehend the driver . . . at a later time without initiating a pursuit"; "[r]oad and weather conditions"; "density of vehicular and pedestrian traffic"; "apparent age of the driver"; "[t]ype and condition of the subject vehicle"; "apparent driving ability of the pursued driver"; "[t]ype and condition of the police vehicle"; "driving ability of the police driver"; "officer's familiarity with the area"; "time of day"; "[s]pecial hazards such as parades, road construction, school zones, etc."; "length of the pursuit"; "amount of assistance available"; "availability of aircraft surveillance"; and "presence of non-police passengers in the police vehicles."

(emphasis added). Section 060.00 provides that "[t]he words shall and will . . . indicate that the action required is mandatory."

In *Mumm*, the Minnesota Supreme Court concluded that the following language in the Minneapolis Police Department's pursuit policy imposed a ministerial duty upon police officers: "Officers shall not initiate a pursuit" if "the officer can establish the identification of the offender so that an apprehension can be made at another time *unless the crime is for homicide, 1st and 2nd degree assault, aggravated robbery, sexual assault involving the use or threatened use of a dangerous weapon, or kidnapping*." 708 N.W.2d at 491 (emphasis added). Similarly, in this case, section 443.01 of the pursuit-policy language also prohibits the initiation of a pursuit in certain circumstances thereby imposing a ministerial duty in those circumstances. But, in all other circumstances, section 443.01 imposes a discretionary duty because officers are required to exercise their judgment, using 17 factors to guide their decision. The issue before us is whether the circumstances in this case imposed a ministerial or discretionary duty on the officers.

Respondents do not argue that when the officers decided to initiate their pursuit, hazardous driving behavior by the suspect was involved, and they do not dispute that the officers knew the suspect and could have found him later. But the parties strongly disagree about whether a "serious felony" was involved. Appellants argue that first-degree controlled-substance crime is not a serious felony justifying a pursuit under the policy and that the pursuit policy therefore prohibited the officers' initiation of a pursuit. Respondents argue that a serious felony was involved and that the pursuit policy

therefore allowed the officers to exercise their discretion in deciding to initiate the pursuit. We therefore must decide whether a serious felony was involved.

"Serious felony" is not defined in the pursuit policy. "The general rule is that the construction of a writing which is unambiguous is for the court, particularly when the intention of the parties is to be gained wholly from the writing." *Hunt v. IBM Mid Am. Emps. Fed. Credit Union*, 384 N.W.2d 853, 856 (Minn. 1986) (quotation omitted). We conclude that the term "serious felony" is unambiguous.

A felony is "a crime for which a sentence of imprisonment for more than one year may be imposed." Minn. Stat. § 609.02, subd. 2 (2010). First-degree controlled-substance crime is a felony because it is punishable by a maximum of 30 years imprisonment. Minn. Stat. § 152.021, subd. 3(a) (2010). "Serious" means "grave in quality or manner." *The American Heritage Dictionary of the English Language* 1648 (3d ed. 1992). Under the sentencing guidelines, first-degree controlled-substance crime is a severity-level-nine offense out of a possible 11 and the presumptive sentence for someone convicted of a first-degree controlled-substance crime with a criminal history score of zero is 86 months. *Id.* We conclude that first-degree controlled-substance crime is unambiguously a "serious felony."

Citing the portion of the pursuit policy that states that a decision to pursue must be based on facts known at the time of the decision, appellants argue that even if a first-degree controlled-substance crime is a serious felony, the officers did not know that the suspect was in possession of any drugs because "[a]ll the police knew . . . was that [the suspect] had appeared in front of the house with an apparent intent to sell." The officers

had information about the suspect's identity and criminal background prior to the incident. Based on information from the CI, the officers knew that the suspect drove a black Dodge Charger, that the suspect was willing to sell two ounces of crack cocaine, and that after several phone calls between the suspect and the CI, the suspect informed the CI that he was right around the corner from the arranged location for the transaction. A black Charger then turned onto Churchill Street and parked in front of the predetermined address. Although the officers did not know with absolute certainty that the suspect had crack cocaine, the officers' reasonable belief that the suspect possessed two ounces of crack cocaine constituted sufficient knowledge that a serious felony was involved for purposes of the pursuit policy.

Because the officers reasonably believed that the suspect was involved in a serious felony, the pursuit policy did not prohibit the officers from initiating the pursuit. Their decision was discretionary under section 443.01 of the pursuit policy. We therefore conclude that the officers are protected by official immunity unless they committed a willful or malicious act. *See Mumm*, 708 N.W.2d at 490.

Malice is the "intentional doing of a wrongful act without legal justification." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). "In the official immunity context, wilful and malicious are synonymous." *Id.* The issue of malice has been characterized as an "objective inquiry into the legal reasonableness of an official's actions." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). "Mere allegations of malice are not sufficient to support a finding of malice, as such a finding must be based on specific facts evidencing bad faith." *Semler v. Klang*, 743 N.W.2d 273, 279

(Minn. App. 2007) (quotation omitted), *review denied* (Minn. Feb. 19, 2008). "Whether or not an officer acted maliciously or willfully is usually a question of fact to be resolved by a jury." *Johnson v. Morris*, 453 N.W.2d 31, 42 (Minn. 1990).

But, in this case, no material question of fact exists regarding whether the officers acted willfully or maliciously. Viewed in the light most favorable to appellants, the evidence shows that the officers attempted to move in on the suspect to arrest him. The suspect pulled away from the curb, sped away and collided with an unmarked squad car, and accelerated heading east on Front Avenue. The officers initiated pursuit with their emergency lights and siren activated. As the officers pursued the suspect eastbound on Front Avenue, they did not encounter any other cars or pedestrians. The weather conditions consisted of a light drizzle. The Charger entered the intersection of Front, Como, and Dale at approximately 100 miles per hour before crashing and injuring appellants. These facts do not provide a basis for a finding of malice or bad faith. The officers are therefore entitled to immunity for their performance of discretionary duties.

Terminating Pursuit

Section 443.02.1 of the pursuit policy provides that a pursuit will be terminated when "[t]he suspect's identity becomes known to the officer and the offense is a *non-violent* felony." (Emphasis added.) The district court concluded that section 443.02.1 imposed a ministerial duty upon the officers, but that termination of the pursuit was not required because the suspect was engaged in a violent felony. The district court did not err by concluding that section 443.02.1 imposes a ministerial duty because the policy

uses the mandatory word "will," meaning the officers did not have discretion in those circumstances.

Appellants argue that the officers violated the policy because first-degree controlled-substance crime is not a violent felony. "Violent felony" is not defined in the pursuit policy. We conclude that the term is unambiguous. As discussed above, first-degree controlled-substance crime is a felony. Black's Law Dictionary defines "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon." *Black's Law Dictionary* 1188 (9th ed. 2009). But multiple Minnesota statutes include first-degree controlled-substance crime within the definition of a violent crime. *See* Minn. Stat. § 609.1095, subd. 1(d) (2010) (including "any provision of chapter 152 that is punishable by a maximum sentence of 15 years or more" in the definition of "violent crime" in the context of increased sentences); Minn. Stat. § 624.712, subd. 5 (2010) (including felony convictions under chapter 152 in the definition of "crime of violence" in the context of firearms); Minn. Stat. § 299A.296, subd. 2(5) (2010) (including "any provision of chapter 152 that is punishable by a maximum sentence greater than ten years" in the definition of "violent crime" in the context of community crime-prevention programs). And weapons and violence are frequently associated with drug transactions. *United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005).

Canons of construction dictate that words are construed according to their common usage, but technical words and words that have acquired a special meaning or are defined by statute are construed accordingly. Minn. Stat. § 645.08(1) (2010); *see also*

Mumm, 708 N.W.2d at 492 (applying canons of construction when interpreting pursuit policy). Therefore, even though section 443.02.1 of the pursuit policy imposes a ministerial duty, because first-degree controlled-substance crime is a violent felony, the pursuit policy did not require the officers to terminate their pursuit.[2]

Appellants also argue that section 443.02.4 of the pursuit policy mandated that the officers terminate their pursuit. Section 423.02.4 provides:

> A pursuit will be terminated . . . [w]hen conditions then exist that have created a clear and unreasonable hazard to the officers, the fleeing driver, and others and the danger created by continuing the pursuit outweigh the necessity for immediate apprehension[.] (A clear hazard exists when speeds dangerously exceed the normal flow of traffic or when vehicular or pedestrian traffic necessitates erratic maneuvering which exceeds the performance capabilities of the vehicle or driver.)

Appellants argue that the district court erred by concluding that section 443.02.1 imposes a discretionary duty and that the evidence is insufficient to establish willful or malicious conduct.

Under section 423.02.4, an officer must decide whether the conditions "have created a clear and unreasonable hazard to the officers, the fleeing driver, and others," and then must weigh the danger created by continuing the pursuit against the necessity for immediate apprehension. An officer must make these decisions "under emergency conditions with little time for reflection." *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992). Section 423.02.4 encompasses discretionary duties because it allows the officer to

[2] We note our concern that the St. Paul Police Department pursuit policy does not require officers to terminate pursuit of a drug suspect when he or she is known to the officers and can be found later.

exercise individual judgment in deciding whether to terminate the pursuit. The officers therefore are protected by official immunity unless they committed a willful or malicious act. *See Mumm*, 708 N.W.2d at 490.

As previously set forth, no material facts exist about whether the officers acted willfully or maliciously. We conclude that the officers are entitled to immunity for their performance of discretionary duties under section 423.02.4.

Standard for Discretionary Duties

The well-settled law in Minnesota provides immunity for a public official performing a discretionary act, unless the official commits a willful or malicious act. *See, e.g.*, *Mumm*, 708 N.W.2d at 490; *Thompson*, 707 N.W.2d at 673. Appellants ask this court to discard the willful-or-malicious standard and adopt a gross-negligence or willful-and-wanton negligence standard. "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). "This court, as an error correcting court, is without authority to change the law." *Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1988), *review denied* (Minn. June 17, 1998).

Appellants argue that they are not asking this court to make new law but, instead, are asking "this court to resolve the issue of applying . . . Minn. Stat. § 169.17 . . . to the official immunity doctrine." The statute to which appellants refer provides that authorized emergency vehicles may exceed speed limits when responding to an emergency call. Minn. Stat. § 169.17 (2010). But "[t]his provision does not relieve the

driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of persons using the street, nor does it protect the driver of an authorized emergency vehicle from the consequence of a reckless disregard of the safety of others." *Id.*

In *Pletan*, a child pedestrian was struck by a car driven by a criminal suspect whom a police officer was pursuing at high speeds, and the plaintiffs cited section 169.17, arguing that police chases should not be immunized. 494 N.W.2d at 39, 41 n.2. The supreme court held that section 169.17 was not at issue because "[t]he issue . . . is not about how a police car should be driven during a pursuit, but whether a pursuit should have been undertaken in the first place or discontinued at some point after being undertaken." *Id.* Similarly, in this case, the issue is not about how the officers drove during the pursuit of the suspect, but whether the officers should have initiated a pursuit or terminated it at some point. And even if section 169.17 were at issue, it would not preclude the defense of official immunity. *See Nisbet v. Hennepin Cnty.*, 548 N.W.2d 314, 318 (Minn. App. 1996) (concluding that section 169.17 does not preclude defense of official immunity).

Vicarious Official Immunity

"[V]icarious official immunity protects the government entity from suit based on the official immunity of its employee." *Wiederholt*, 581 N.W.2d at 316. A police officer's official immunity with respect to high-speed police pursuits extends to the officer's public employer. *Pletan*, 494 N.W.2d at 43. Because the officers in this case

are entitled to official immunity, the City of St. Paul is entitled to vicarious official immunity.[3]

Affirmed.

[3] The district court also concluded that the City is entitled to statutory immunity under Minn. Stat. § 466.03 (2010). Appellants make no argument regarding statutory immunity.

STAUBER, Judge (dissenting)

I respectfully dissent.

Following a botched drug bust resulting in a damaged squad car, St. Paul police decided to initiate a high-speed chase of the suspect through residential St. Paul. Failing to terminate the chase, the suspect crashed into several cars and seriously injured at least four bystanders. One lost her leg. The well-written majority opinion affirms a veil of immunity from civil liability upon the St. Paul police as their conduct was discretionary under St. Paul's pursuit code because the drug crime was deemed a "violent felony."

After careful review of the record, including St. Paul's outdated, ambiguous, and contradictory pursuit code, the pleadings, discovery (including the deposition of the lead chase officer), and excellent briefing; and giving the benefit of the doubt to the police, I am convinced that significant evidence exists by which a jury could find that the police, particularly the lead officer who initiated and refused to terminate the high-speed chase, were reckless and willfully and wantonly negligent. In such a case, the city and the officers are not entitled to immunity.

Every statute and policy relevant to police-chase activity highlights the overriding requirement of protecting the public, even if a suspect escapes. We expect police to use common sense. Continuing a 100-mile-per-hour chase through a residential neighborhood in dark and rainy conditions toward a dangerous six-way intersection with 13 semaphores belies any common sense.