STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2093

Computer Forensic Services, Inc.,
Respondent,

vs.

Benjamin Green, et al., defendants, counterclaimants and third party plaintiffs,
Respondents,

vs.

Mark Tracey Lanterman, third party defendant,
Respondent,

City of Minnetonka Police Department, third party defendant,
Appellant.

Filed June 10, 2013
Reversed and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CV-11-17976

Dean A. LeDoux, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, Minnesota (for respondents Computer Forensic and Mark Lanterman)

Thomas A. Harder, Shawn M. Dobbins, Foley & Mansfield, PLLP, Minneapolis, Minnesota; and

Kevin O'Connor Green, Law Offices of Kevin O'Connor Green, P.A., Mankato, Minnesota (for respondents Benjamin Green, et al)

Patricia Y. Beety, Ryan M. Zipf, League of Minnesota Cities, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Connolly, Judge; and Larkin, Judge.

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

CONNOLLY, Judge

Appellant, a city police department, moved for summary judgment dismissing respondents' claims against it, arguing that it is protected by vicarious official immunity because its detective and police officers were protected by official immunity when committing the acts on which respondents' claims were based. The district court denied appellant's motion on the ground that genuine issues of material fact precluded summary judgment. Because we conclude that no issues of fact are material and that the city is entitled to judgment as a matter of law, we reverse the denial of appellant's motion and remand for entry of summary judgment dismissing the claims against it.

FACTS

Respondent Mark Lanterman is the founder of respondent Computer Forensic Services Inc. (CFS), an electronic discovery and forensic analysis firm. On August 25, 2011, a detective employed by appellant City of Minnetonka Police Department received a report from Lanterman that respondent Benjamin Green, a former CFS employee, had stolen trade secrets from CFS. After leaving CFS, Green had joined another former CFS employee, respondent Matthew Heinsch, who had founded respondent Mast Consulting LLC (Mast), which also engaged in electronic discovery and forensic analysis.[1]

[1] Although Lanterman and CFS are designated as respondents, neither takes part in this appeal. The term "respondents" is used herein to refer to Green, Heinsch, and Mast.

After hearing Lanterman's report, the detective obtained a search warrant for Green's home. When he and other members of appellant executed the warrant, Green told him that he had no CFS property except some hardware items that CFS was discarding. After talking to Green, the detective called Lanterman from Green's house. Lanterman said he had not given Green permission to take any hardware items, including items that were being discarded, and that Green should not have any CFS property. Because Lanterman could not identify any missing CFS hardware items, no hardware items were seized from Green's home.

The detective and another officer then went to Heinsch's residence, an apartment. They found Heinsch outside, carrying a box of computer hard drives away from the building. Heinsch told the detectives that Green's wife had informed him of the search of Green's house, that he was carrying the box to the trunk of his car, and that the hard drives contained no CFS files but did contain some confidential material. Heinsch voluntarily surrendered his forensic work station and imaging drive for analysis. The detective took the work station (a laptop computer) and the imaging drive when Heinsch brought them out from his apartment, but did not take the box of hard drives Heinsch had been carrying because Heinsch was not a suspect and the detective, having no warrant, thought he lacked authority to do so.

On September 2, 2011, CFS brought an action against Green, Heinsch, and Mast, alleging breach of duty of loyalty against Green; conversion and breach of contract against Green and Heinsch; tortious interference with contract against Mast; and misappropriation of trade secrets and unfair competition against all three defendants. It is

undisputed that CFS's lawsuit was based in part on the information about the criminal investigation provided to Lanterman by the detective.

Appellant later obtained a search warrant for the electronic evidence obtained from Green and Heinsch and concluded that the evidence did not support criminal charges against them.

In November 2011, respondents brought this action against appellant, claiming that its officers, including the detective, violated the Minnesota Government Data Practices Act (MGDPA) by providing confidential information to Lanterman. Appellant moved for summary judgment dismissing the claim on the ground of vicarious official immunity based on the officers' official immunity.

Without addressing the merits of respondents' claim, the district court denied summary judgment on the ground that genuine issues of material fact precluded summary judgment. Appellant challenges the denial.

D E C I S I O N

Review of a denial of summary judgment sought on the basis of official immunity is de novo. *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 218-19 (Minn. 1998); *see also Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (holding that, when no genuine issue of material fact precludes summary judgment, it may be granted if either party is entitled to it as a matter of law). Because immunity protects against the lawsuit itself, a grant of summary judgment denying immunity is immediately appealable. *Gleason*, 582 N.W.2d at 218. Summary judgment may not be granted if there is a genuine issue of material fact, but "a moving party is entitled to summary

judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (quotation omitted). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue . . . ." *Id.* "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.*

> [A] public official is entitled to official immunity from state law claims when that official is charged by law with duties that require the exercise of judgment or discretion. Generally, police officers are classified as discretionary officers entitled to that immunity.
>
> Whether official immunity applies requires the court to focus on the nature of the particular act in question. . . .
>
> However, an exception to the immunity doctrine exists if the officer acted maliciously or willfully.

Johnson v. Morris, 453 N.W.2d 31, 41-42 (Minn. 1990) (citations omitted). "In conducting an official immunity analysis, we first determine whether the conduct at issue involves ministerial or discretionary duties. If the duties are discretionary, we then decide whether the officials acted willfully or maliciously." *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). "Whether or not an officer acted maliciously or willfully is usually a question of fact to be resolved by a jury." *Johnson*, 453 N.W.2d at 42. For purposes of this motion, appellant accepted as true respondents' allegations concerning appellant's employees' communications of confidential information to Lanterman.

The MGDPA provides:

> Any law enforcement agency may make any data classified as confidential or protected nonpublic pursuant to subdivision 7 accessible to any person, agency, or the public if the agency

> determines that the access will aid the law enforcement process, promote public safety, or dispel widespread rumor or unrest.

Minn. Stat. § 13.82, subd. 15 (2012). The phrase "if the agency determines" indicates that making data available under this subdivision is a discretionary act. *Id.*; *see also Johnson*, 453 N.W.2d at 42 ("Generally, police officers are classified as discretionary officers entitled to that immunity.").[2]

Thus, because official immunity applies to the officers' discretionary acts and confers vicarious official immunity on appellant unless those acts were done willfully or maliciously, whether the officers acted willfully or maliciously becomes "an essential element of [appellant's] case" and respondents must "do more than rest on mere averments" or "present[] evidence which merely creates a metaphysical doubt" as to the existence of the officers' willfulness or malice. *See DLH*, 566 N.W.2d at 71. Respondents did not meet this burden.

In their response to appellant's summary judgment motion, respondents asserted that "[the detective] knew that Lanterman was in the process of building up a civil suit against [respondents]" and cite the detective's continuation report as the source for this assertion. The report states that "Currently Lanterman is in the processes of initiating a civil action against Green," but the report is dated October 25, 2011, and therefore cannot

[2] Respondents argue that appellant may have a policy dictating officers' acts in such situations, which would make the officers' acts ministerial rather than discretionary, but respondents offer no evidence of such a policy and no explanation of why any police department would enact a policy that deprives its officers of discretion explicitly conferred on them by statute.

provide evidence of what the detective knew when he spoke to Lanterman on August 30, 2011.

In their complaint, respondents stated that, in a phone call Heinsch made to the detective on or after August 31, 2011,

> [the detective] admitted to Heinsch that he [i.e., the detective] had provided information regarding Mast's clients to Lanterman and that he had also told Lanterman that Heinsch had been putting hard drives in the trunk of his car when he had arrived at Heinsch's residence on August 30, 2011. [The detective] then agreed with Heinsch that sharing such information was inappropriate.

It could be argued that the detective's use of "inappropriate" to describe his acts raises a genuine issue of material fact as to whether he acted willfully or maliciously. But the fact that a discretionary act was "inappropriate" does not mean it was willful or malicious. "Malice means nothing more than the intentional doing of a wrongful act without legal justification . . . . In the official immunity context, wilful and malicious are synonymous." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (citation omitted). Neither is synonymous with "inappropriate," and the comment that an act was inappropriate does not raise a genuine issue of material fact as to whether it was willful or malicious.

Respondents have made no showing of a genuine issue of material fact as to whether any of appellant's officers "intentional[ly did] a wrongful act without legal justification." *See id.* Absent any such showing, appellant is entitled to summary judgment. *See DLH*, 566 N.W.2d at 71.

We reverse the denial of summary judgment and remand for entry of judgment dismissing the claims against appellant on the basis of vicarious official immunity.

Reversed and remanded.