STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0114

Mary Wendt, et al.,
Respondents,

vs.

County of Mille Lacs,
Appellant.

Filed September 3, 2013
Affirmed in part, reversed in part, and remanded
Willis, Judge[*]

Mille Lacs County District Court
File No. 48-CV-12-84

Richard W. Curott, Curott & Associates, LLC, Milaca, Minnesota (for respondent)

Jason M. Hiveley, Amanda L. Stubson, Iverson Reuvers Condon, Bloomington, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Cleary, Judge; and Willis, Judge.

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

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

WILLIS, Judge

Appellant county challenges the district court's conclusion that the common-law doctrine of official immunity does not bar claims that employees of the Mille Lacs County jail negligently caused respondent to suffer two separate falls while she was incarcerated. We reverse the district court's determination that official immunity does not protect the decision to transfer appellant to her cell in the general population but affirm the determination that the failure to provide respondent with suitable footwear for transfer to a court appearance was not protected by official immunity. We affirm in part, reverse in part, and remand.

FACTS

On November 27, 2009, respondent Mary Wendt consumed five or six mixed drinks at her residence and was later stopped for speeding while driving on Highway 169 near Onamia. After smelling alcohol and requiring Wendt to take a field sobriety test, a highway patrolman took her into custody and eventually transported her to the Mille Lacs County jail. Wendt was charged with two counts of second-degree driving while impaired. The medical-screening questionnaire completed when Wendt was booked lists medications for high blood pressure and anxiety, and a preliminary breath test administered at the jail showed an alcohol concentration of .148.

While the booking log indicates that Wendt requested to be sent to a detoxification unit in the early morning hours of November 28, the log also notes that she was feeling "much better" hours later. Wendt was transferred from the booking area to a cell in the

general population shortly before noon on November 28. Shortly thereafter, correction officers saw that Wendt was not able to stand on her own, and she had to be escorted to her cell from the jail's day room. Once in her cell, Wendt required the assistance of a corrections officer to use the toilet. A corrections officer took Wendt's vital signs and saw that she was shaky, incoherent, and possibly suffering from chemical dependency withdrawal. The form recording the oral instructions to jail staff from on-call medical personnel provides that Wendt should be placed in a holding cell and that jail staff should monitor her vital signs over the course of two hours and provide medication. The form does not indicate whether or when Wendt was to be transferred back to the general population.

Wendt was transferred from the holding cell into a cell in the general population at about 6:00 p.m. on November 28. Wendt recalled that after the transfer, she was in her cell when she "had an onset of claustrophobia, had medical issues, so [she] rang the buzzer on the wall" to alert someone in the booking area. She further testified that she was experiencing difficulty breathing, felt "as though the room was closing in on [her]," and "felt [she] was going to pass out" because she was "dizzy and off balance." After additional unsuccessful attempts to ring for assistance, she "had a fall" and "hit [her] head on the toilet in the cell and cut [her] head open." The responding corrections officer recalled that he heard a "bang" from his desk located about 50 or 60 feet away from Wendt's cell and that when he investigated, Wendt reported that she had fallen and hit her head on the toilet. Wendt received additional medical attention during the morning of November 29, and that afternoon she met with the on-call jail nurse and showed signs of

anxiety, agitation, and hallucination. She was eventually transferred to a medical facility in St. Cloud, where she was treated for alcohol withdrawal.

Wendt was transported back to the Mille Lacs County jail on December 4 and was brought before a judge on December 7. Before being transferred to the courthouse for her appearance, she was moved to the booking area, where she was one of a group of ten or eleven inmates. She stated that there "was a lot of commotion and confusion of finding enough shackles and chains for all inmates" and that she was given "extremely large" shoes, which she described as "clown shoes" in which she could not walk. Wendt also stated that the shoes appeared to be men's size 11 and that she normally wears women's size seven and a half.

The group was escorted to a van to drive the short distance to the courthouse, and Wendt complained to jail staff that she could not walk in the shoes provided to her. After their court appearances, the inmates were escorted down the front steps of the courthouse. She remained handcuffed and chained at her ankles. Wendt stepped "down the second or third step on the courthouse" but "fell the complete flight down to the sidewalk, landing face first." She explained that her "shoes got tangled in the leg shackles and chains, and [she] went completely down the whole staircase onto the sidewalk." Wendt alleges that she suffered cuts and bruises to her face and lips, a broken nose, injuries to her hands, and later underwent surgery on her left shoulder.

Wendt and her husband sued appellant County of Mille Lacs, alleging breach of a special duty of care and negligence with respect to the fall that occurred inside the jail on November 29, as well as the fall on the steps of the courthouse on December 7. The

county filed a motion to dismiss, or, in the alternative, a motion for summary judgment, arguing that it was entitled to summary judgment on the ground of vicarious official immunity. The district court concluded that both the decision to move Wendt to a cell in the general population after being instructed by medical personnel to observe her in a holding cell and the decision to provide Wendt with oversized shoes during the transfer to the courthouse were not protected by official immunity. This appeal follows.

D E C I S I O N

The county argues that jail staff engaged in discretionary acts when they transferred Wendt from the holding cell to the general population area of the jail and when they provided her with shoes from "a limited supply" of footwear. The denial of a motion for summary judgment is appealable when the motion is based on a claim of official immunity. *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 218 (Minn. 1998). "Official immunity provides immunity from suit, not just from liability." *Sletten v. Ramsey Cnty.*, 675 N.W.2d 291, 299 (Minn. 2004). On review of an order denying summary judgment, we determine whether there are genuine issues of material fact and whether the district court erred in applying the law. *Gleason*, 582 N.W.2d at 218–19. The application of immunity is a question of law subject to de novo review. *Id.* at 219.

An assessment of the applicability of vicarious official immunity first requires considering whether official immunity applies. *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). "Official immunity involves the kind of discretion which is exercised on an operational rather than a policymaking level, and it requires

something more than the performance of merely ministerial duties." *Johnson v. State*, 553 N.W.2d 40, 46 (Minn. 1996) (quotation omitted).

> The common law doctrine of official immunity protects government officials from suit for discretionary actions taken in the course of their official duties. Official immunity applies when the official's conduct involves the exercise of judgment or discretion, but malicious conduct is not immunized. In the absence of malice, the critical issue in a claim of official immunity is whether the public official's conduct is discretionary or ministerial. A discretionary act requires the exercise of individual judgment in carrying out the official's duties. In contrast, a ministerial act is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

Kari v. City of Maplewood, 582 N.W.2d 921, 923 (Minn. 1998) (citations and quotation omitted). A discretionary decision has also been described as "one involving more individual professional judgment that necessarily reflects the professional goal and factors of a situation," while a ministerial duty "is one in which nothing is left to discretion." *Wiederholt*, 581 N.W.2d at 315. Wendt does not claim that the conduct of jail staff was malicious.

I. The decision to transfer Wendt to her cell in the general population was not imperative from fixed or designated facts or mandated by controlling policy.

The county argues that the jail has no policy requiring staff "to comply precisely with recommendations of or instructions from medical personnel." Analysis of an immunity question begins with identifying the precise governmental conduct at issue. *Gleason*, 582 N.W.2d at 219. Wendt argues that the district court correctly concluded that jail staff breached a ministerial duty when they transferred her back to a cell in the

general population on the evening of November 28 after being instructed by medical personnel to observe her in a holding cell in the booking area.

In determining whether an official duty is properly classified as ministerial, the supreme court has "not required that a duty be imposed by law in order to be ministerial." *Anderson v. Anoka Hennepin Indep. School. Dist. 11*, 678 N.W.2d 651, 659 (Minn. 2004).

> [I]t is inherent in the concept of ministerial duty that the duty must dictate the scope of the employee's conduct. Because the common law official immunity analysis always involves evaluation of government employee conduct, that control will most often emanate from a statute, rule, ordinance or other official standard. But there is no logical reason that a sufficiently narrow standard that does not meet an "imposed by law" criterion should not similarly make the conduct ministerial if the employee is bound to follow the standard.

Id. "The existence of a government policy mandating certain conduct by public officials can influence whether a duty is classified as ministerial or discretionary." *Mumm v. Mornson*, 708 N.W.2d 475, 491 (Minn. 2006). But "the fact that a written protocol exists does not transform an otherwise discretionary act into a ministerial one. Field-level actions taken by public officials may be discretionary even when there are extensive regulations that dictate procedure." *Bailey v. City of St. Paul*, 678 N.W.2d 697, 702 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

We conclude that the district court erred by determining that the decision to return Wendt to a cell in the general population violated a specific duty arising from fixed and designated facts. In determining that the decision was not entitled to official immunity, the district court reasoned that Wendt was transferred to the general jail population

"without any apparent approval or consultation with jail medical staff." This is an insufficient basis upon which to conclude that this decision violated a ministerial duty because the record does not establish that medical personnel gave jail staff any fixed or certain instruction to observe Wendt in the holding cell for a particular period. Sergeant Jeremy Gothman, who was supervising the jail on November 28, testified that he filled out the medical-instruction form after consulting with the on-call nurse. The form indicates that staff was to give Wendt specified medication and "[t]ake vitals every hour for [two] hours and place in [holding cell]." The circumstances under which Wendt was to be transferred back to the general population were not addressed; the written instructions did not require a particular period of monitoring in a holding cell that was absolute, certain, or imperative.

Wendt argues that the medical directive required that she be monitored on "an essentially continuous basis." In support, she notes that Sergeant Gothman generally agreed that decisions regarding her care were made by medical personnel. But this affirmation does not establish that jail staff had no decision-making responsibility regarding Wendt's cell arrangements. Sergeant Gothman explained that the purpose of the medical-instruction form is to document instructions from medical personnel. Again, the instructions are silent with respect to the length of time, if any, beyond two hours, for which Wendt was to be observed in a holding cell.

Wendt also notes that Sergeant Gothman explained that new inmates are kept in a holding cell until they are sober and require medical clearance to be moved if they remain "incoherent or dazed." A reading of Sergeant Gothman's complete testimony shows that

this explanation occurred as part of a larger inquiry into the circumstances under which inmates are transferred out of a holding cell after they are initially booked, a situation that did not exist during the evening of November 28. While Sergeant Gothman explained that jail staff defers to medical personnel when deciding whether to transfer an inmate to "detox" or to a hospital after an inmate is initially booked, he made no similar representation with respect to transferring inmates between different areas of the jail for medical purposes.

No other witness provided any further information concerning the specific period that Wendt was to be monitored in a holding cell on November 28, and there is no indication that jail staff received additional medical directives addressing the circumstances under which Wendt could be transferred back to the jail's general population. For purposes of applying official immunity, this lack of a specific directive must be contrasted with ministerial duties "arising from fixed and designated facts." *Wiederholt*, 581 N.W.2d at 315 (quotation omitted). Finally, the jail's written policies do not provide clear guidance as to how jail staff should have interpreted or executed the instructions from medical personnel regarding observation of Wendt. *Cf. Thompson v. City of Minneapolis*, 707 N.W.2d 669, 674–75 (Minn. 2006) (concluding that vehicular-pursuit policy imposed on police a ministerial duty because it provided no discretion regarding conduct at issue).

Wendt argues that this matter is similar to *Terwilliger v. Hennepin Cnty.*, which held that official immunity did not protect employees of a county medical facility from liability for a decision not to hospitalize a mental-health patient who later committed

suicide. 561 N.W.2d 909, 913–14 (Minn. 1997). The supreme court, noting that the decision not to hospitalize the patient was unlike a "policeman's split-second decision whether to engage in a high speed chase," reasoned that the conduct at issue merely "implement[ed] Hennepin County's established public policy of providing treatment for its mentally ill citizens." *Id.* at 913. Wendt reasons that the current case, like *Terwilliger*, does not involve a situation in which jail staff was forced to make a decision about her care in the context of an emergency. But an emergency is not required for official immunity to apply. *Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 415 (Minn. 1996). Because the decision to transfer Wendt to a cell in the general population was a discretionary act not prohibited by any rule or policy, Wendt's reliance on *Terwilliger* is unavailing.

The decision to return Wendt to a cell in the general prison population on the evening of November 28 was not an act "in which nothing [was] left to discretion." *Wiederholt*, 581 N.W.2d at 315. Therefore, the decision was discretionary and is protected by official immunity.

II. The failure of jail staff to provide Wendt with suitable footwear during the transfer to the courthouse violated a ministerial duty established by statute.

The county next argues that the district court erred by concluding that official immunity does not apply to the decision to give Wendt oversized footwear on December 7. The county asserts that there are no policies, statutes, or rules requiring jail staff to provide inmates with, as described by the district court, "shoes that were not so extremely oversized," and that the decision to provide Wendt "with whatever shoes were available

was discretionary" in light of "the professional goal at issue," which "was to secure the inmates and escort them in a timely manner" to their court appearances.

Wendt argues that the county had a statutory duty to provide her with shoes that fit appropriately. A county board "shall provide suitable jail clothing" to prisoners. Minn. Stat. § 641.15, subd. 1 (2012). Wendt asserts that the county had discretion to provide a "range of suitable footwear" but that "[a]t some point, ill[-]fitting shoes become as dangerous or more dangerous than no shoes at all" and that "a jail can be held responsible for shoes that are extremely oversized and so ill[-]fitting that they become dangerous." The fact that the jail had a limited supply of shoes does not negate the statutory requirement that the county provide inmates with suitable clothing, and the record contains no evidence disputing Wendt's claim that she wears a women's size seven-and-a-half shoe but was provided with a men's size 11 shoe. The district court did not err by determining that jail staff violated a ministerial duty by providing Wendt with grossly oversized shoes.

III. The county has vicarious official immunity from liability for Wendt's fall in the jail cell.

Finally, Wendt argues that vicarious official immunity does not shield the county from liability arising from the conduct of jail staff because of policy considerations. "Generally, if a public official is found to be immune from suit on a particular issue, his or her government employer will be vicariously immune from a suit arising from the employee's conduct and claims against the employer are dismissed without explanation." *Anderson*, 678 N.W.2d at 663–64. "[A] grant of vicarious official immunity to a public

employer would be based on the nature of an employee's immune conduct, whether or not the employee was actually named as a defendant in a lawsuit." *Wiederholt*, 581 N.W.2d at 316–17. But "vicarious immunity is not an automatic grant." *Sletten*, 675 N.W.2d at 300. It applies when "officials' performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions." *Anderson*, 678 N.W.2d at 664. The supreme court has commented that the purpose of official immunity is defeated if vicarious official immunity does not apply and "the conduct of the [official] must still be reviewed in order to impose liability on the employer." *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992). Consideration of whether to extend official immunity to a governmental employer is a policy question. *Id.*

Wendt argues that the county is not vicariously immune from liability because county jails "stand in a role equivalent to being in loco parentis" and because inmates "have no control over their environment and no control of how they are cared for." Wendt cites no authority supporting her argument. While this court does not normally address arguments not supported with argument or citation, we conclude, nevertheless, that the county is protected under Minnesota law from liability based on the discretionary conduct of jail staff.

In *Pletan*, the supreme court justified the application of vicarious official immunity to a wrongful-death action arising out of an officer's decision to initiate and continue a vehicular pursuit of a fleeing suspect by recognizing that "[p]olice officers may justifiably think their own employment performance is being evaluated and

consequently may decline to engage in pursuit when pursuit is indicated." *Id.* Similarly, employees at county jails might reasonably anticipate possible liability imposed on their employers when engaging in discretionary and often-times dangerous acts in the day-to-day management of a jail. *See Ireland v. Crow's Nest Yachts, Inc.*, 552 N.W.2d 269, 274 (Minn. App. 1996) (granting vicarious official immunity to a county in a suit involving a deadly accident and a challenge to the installation of warning signs and rumble strips "to avoid chilling the traffic engineer's exercise of his independent judgment by allowing him to act without fearing that his conduct may eventually be subject to review by the judiciary and may expose his employer to civil liability"), *review denied* (Minn. Sept. 20, 1996).

Moreover, the current matter is distinguishable from the narrow circumstances in which this court has concluded that governmental employees had official immunity but their employer was denied vicarious official immunity. For example, in *S.W. v. Spring Lake Park Sch. Dist. No. 16*, this court concluded that, while official immunity protected the conduct of school employees who saw a stranger on school property who later raped a student in a locker room, the school district did not have vicarious official immunity because "no security policy exist[ed]," and the application of vicarious immunity "would . . . reward the school district for its failure to develop and implement a basic security policy that would have applied." 592 N.W.2d 870, 876–77 (Minn. App. 1999), *aff'd*, 606 N.W.2d 61 (Minn. 2000).

Here, Sergeant Gothman explained the jail's procedures regarding inmates who are brought into custody while under the influence of alcohol and described his

consultation with the on-call jail nurse when Wendt experienced medical problems. This shows that the jail had procedures to address the medical needs of inmates. The county has vicarious official immunity from liability arising from the decision of jail staff to transfer Wendt to the general population from the holding cell.

Affirmed in part, reversed in part, and remanded.