STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1686

Svetlana Schmitz, et al.,
Appellants,
Liberty Mutual Insurance Company, intervenor,
Respondent,

vs.

William Joseph Rowekamp,
Respondent,
State of Minnesota,
Respondent.

Filed May 19, 2014
Affirmed
Stauber, Judge

Winona County District Court
File No. 85CV12582

Elliot L. Olsen, PritzkerOlsen, P.A., Minneapolis, Minnesota (for appellants)

Michelle D. Hurley, Yost & Baill, L.L.P., Minneapolis, Minnesota (for Liberty Mutual Insurance Company)

Thomas D. Jensen, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent Rowenkamp)

Lori A. Swanson, Attorney General, Eric V. Brown, Assistant Attorney General, St. Paul, Minnesota (for respondent State)

Considered and decided by Stauber, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

STAUBER, Judge

Appellant challenges the dismissal of her negligence claims against respondent state arising out of personal injuries that she sustained when the vehicle she was driving struck a cow that wandered onto the interstate. Appellant asserts that the district court erred by concluding that the state is entitled to statutory immunity. We affirm.

FACTS

On April 16, 2011, appellant Svetlana Schmitz was driving westbound on Interstate Highway 90 (I-90) near Lewiston when her vehicle struck a cow that had wandered onto the highway. Appellant suffered a severe spinal cord injury that left her lower extremities completely paralyzed and her upper extremities partially paralyzed.

Appellant and her husband sued the cow's owner and the state alleging negligence. The state moved for summary judgment, asserting that its decision not to maintain the right-of-way fence along I-90 was a discretionary decision entitled to statutory or official immunity and that, in the alternative, no duty was owed to appellant to prevent harm caused by the negligence of a third party.

The state's motion was accompanied by numerous affidavits and exhibits. Jeffrey Vlaminck, the Assistant District Engineer for the Minnesota Department of Transportation (MnDOT) District 6 East, the area of appellant's accident, stated in an affidavit that he was responsible for the district's budget and for setting maintenance priorities. He stated that his district has a policy to prioritize highway maintenance "from the center-line out." For this reason, fencing is only replaced where "a vehicle goes off

the road and damages a fence" and MnDOT "obtain[s] funds from the driver's insurer to repair the fence," or in urban areas where significant numbers of pedestrians or children are a concern. In urban areas, a "5-foot chain link fence" is used, but in rural areas, such as the location of appellant's accident, only a "2.5-foot woven wire fence" is used. Vlaminck admitted that the fences "serve[] primarily to define the right-of-way" and are not effective barriers to animals because "the fencing is not sturdy or tall enough" and, in any event, "animals can enter the I-90 right-of-way at interchanges, which are not fenced." Vlaminck added that it would cost $70,000 per mile to repair the right-of-way fence.

David Redig, the Maintenance Superintendent for District 6 East stated in his affidavit that he is in charge of the budget for maintenance projects in the district and that he reports to Vlaminck. He determined that repairing fences along I-90 is a low priority based upon consultation with Vlaminck and other employees. Redig stated that he examined the accident site and observed that the cow must have wandered about 3,025 feet from the farm to the roadway. He also observed that the farm was located about 3,265 feet from the nearest interchange where there was an intentional opening in the right-of-way fence. Redig surmised that had the cow walked to the east instead of to the west, it would have ambled onto the I-90 right-of-way at the unfenced highway interchange.

Assistant Attorney General Sarah McGee also filed an affidavit with the court, attaching as exhibits the deposition testimony of Vlaminck, Redig, the cow's owner, and the Minnesota Motor Vehicle Crash Facts 2011 report. That report indicates that the

percentage of drivers involved in crashes caused by animals other than deer on Minnesota roadways was 0.2% in 2011.

Following a hearing on the state's summary judgment motion, the district court issued an order granting summary judgment in favor of the state.[1] The district court found that "the evidence before the court indicat[es] MnDOT's longstanding policy to prioritize highway maintenance from the centerline out, therefore deferring maintenance on its right-of-way fences." The district court concluded that appellants' claims against the state were barred by statutory immunity because MnDOT's policy "is precisely the type of protected planning-level decision the legislature intended to insulate from judicial second-guessing since it involves the management of limited resources and the balancing of safety and economic considerations." The district court declined to address the state's other arguments in support of summary judgment. This appeal followed.

D E C I S I O N

This court "review[s] a district court's summary judgment decision de novo." *Riverview Muir Doran, LLC v. JADT Dev. Grp.*, 790 N.W.2d 167, 170 (Minn. 2010). On review, this court "determine[s] whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* The evidence is viewed "in the light most favorable to the party against whom summary judgment was granted." *STAR Centers, Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76-77 (Minn. 2002). Upon a motion for summary judgment, "[j]udgment shall be

[1] The district court denied the cow's owner's motion for summary judgment. Appellant's claims against the cow's owner are not the subject of this appeal.

rendered forthwith if 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. This court "may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

Appellants argue that the district court erred by concluding that statutory immunity barred their suit against the state. "Whether government entities and public officials are protected by statutory immunity and official immunity is a legal question which this court reviews de novo." *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996).

Minnesota law provides that:

> The state will pay compensation for . . . 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 . . . under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function.

Minn. Stat. § 3.736, subd. 1 (2012). But there is an exception: the state is not liable for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subd. 3(b) (2012). This exception is designed to address separation-of-powers issues by "assur[ing] that the courts do not pass judgment on policy decisions entrusted to coordinate branches of government." *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988). The exception is narrowly

applied and "is limited to decisions which involve the balancing of competing public policy considerations." *Id.* at 232.

In determining whether to apply the statutory-immunity exception, courts must distinguish "planning level decisions from those at the operational level." *Id.* "Planning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. Operational level decisions, on the other hand, involve decisions relating to the ordinary day-to-day operations of the government." *Id.* Planning-level decisions always involve "the evaluation and weighing of social, political, and economic considerations underlying public policy decisions, not the application of scientific and technical skills in carrying out established policy." *Id.* at 233. "[T]he ultimate question is whether the challenged conduct involves policymaking decisions entrusted to government agencies which the legislature intended, through the discretionary function exception, to protect from judicial second-guessing." *Id.*

In this case, the district court concluded that statutory immunity barred appellant's claim because the state was able to present "sufficient evidence showing that MnDOT officials determined [that] repairing fences was not a high priority." Prioritization of maintenance activities is protected by statutory immunity. *See Riedel v. Goodwin*, 574 N.W.2d 753, 757 (Minn. App. 1998) (concluding that decision not to cut a sight-triangle at an intersection because it was a low-volume, low-priority roadway is protected by statutory immunity), *review denied* (Minn. Apr. 30, 1998). But appellants assert that the state's decision not to repair the fence along I-90 was not a discretionary decision

because the state was required to show evidence of a "deliberative process" and that the state "offered the [district] court no such evidence." We disagree.

"Where the government has not provided any evidence as to how it made the decision for which it claims immunity, this court has held that the government was not entitled to statutory immunity." *Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000). In *Conlin*, the Minnesota Supreme Court affirmed this court's conclusion that statutory immunity did not shield the city from liability for its decision not to place warning signs on a roadway following road maintenance that caused the surface of the road to be slippery, resulting in injury to a motorcyclist. *Id.* at 398-99. The supreme court concluded that the city failed to present sufficient evidence to show that a policy existed that compelled city employees not to put up warning signs because the evidence only showed that the city had a policy of responding to complaints and because the city's affidavits were conclusory. *Id.* at 402-03. The supreme court stated that "[b]y allowing minimal averments in an affidavit to be sufficient evidence of a planning decision, there is a risk that professional or scientific decisions, as well as nondecisions, will be bootstrapped into planning decisions and thus protected by statutory immunity." *Id.* at 403.

But in this case, the affidavits presented by the state both define the policy placing fence repair at a low priority and explain the purpose of the policy. Vlaminck stated in his affidavit that "maintenance priorities are ranked from the center-line out. MnDOT has made a policy decision that maintenance of the driving surface, shoulders, drainage, and signage has a far greater positive impact on safety and efficiency than maintenance of

highway fences in rural areas." The reason for the low priority of fence maintenance is that fencing is not a "reliable barrier" to animals but serves primarily to "define the right-of-way," and because "[v]ehicle collisions with stray farm animals are not common." By contrast, the most common types of crashes on rural roads involve "run-off-the-road; head-on, cross median and sideswipe crashes; and intersection-related crashes" requiring "edge-line and centerline rumble strips, cable median barrier, intersection lighting, improved signing and striping, passing lanes, and intersection turn lanes." Moreover, repairing the fence along I-90 would be prohibitively expensive.

Appellants concede that the state had a policy to "work from the centerline out" but argue that the evidence fails to show that there was a "specific State document that embodied this philosophy" or that there was "any meeting in District 6 East where the leaders discussed whether to budget funds for fence repair." But "[n]othing in the statute or the cases interpreting statutory immunity indicates that a governmental unit's statutory immunity is contingent on whether a policy has been reduced to writing." *Bloss v. Univ. Bd. Of Regents*, 590 N.W.2d 661, 667 (Minn. App. 1999). "The absence of a written policy may make it more difficult for a governmental entity to sustain its burden of proof, but a written policy is not essential." *Id.* Because appellants concede that there was a policy prioritizing maintenance of the road surface over fencing, it is unnecessary to require the state to present further evidence of this policy in the form of written materials or meeting minutes.

Appellants argue that this case is analogous to the facts in *Holmquist*, where the plaintiff asserted that the state was negligent in failing to post a sign to warn of a narrow

shoulder and where the supreme court concluded that statutory immunity did not apply. 425 N.W.2d at 234-35. We disagree. In *Holmquist*, the supreme court concluded that the state failed to uphold its burden to prove that statutory immunity applied because the state merely argued that a decision about whether to post a roadway sign facially involved the balancing of policy-based factors. *Id.* at 234. But here, the state has presented evidence that the decision to forego repair of the right-of-way fence was contemplated by the "centerline out" policy, a fact that appellants concede. Therefore, unlike in *Holmquist*, the state has presented sufficient evidence to meet its burden.

Appellants also rely on *Nusbaum v. Blue Earth Cty.*, 422 N.W.2d 713, 723 (Minn. 1988), in which the supreme court affirmed statutory immunity for one of the plaintiff's claims, but denied immunity for a separate but related claim. The plaintiff argued that the state was negligent in choosing the location of an "END 45 MILE SPEED" sign. *Nusbaum*, 422 N.W.2d at 723. Because the state could not identify any policy requiring the location of the sign or that any policy concerns were considered, the state was not entitled to immunity on this issue since "[t]o challenge the placement of this sign does not challenge any policy itself or infringe on a regulatory agency's policy-based criteria for signing roadways." *Id.* But the state was entitled to statutory immunity on their decision not to put up a new speed limit sign because the state's policy only required an "END" speed sign. *Id.* The plaintiff's claim on this issue was barred because "[w]here the state engineers followed that policy, a challenge to their conduct is merely a challenge to the policy." *Id.* This case is more analogous to the latter *Nussbaum* claim than the former because the state has demonstrated a policy of setting fence repair at a low

priority, and their decision to forego repair of the I-90 right-of-way fence was consistent with that policy; therefore, a challenge to the lack of fence repair represents a direct challenge to the state's policy, which is not permissible under Minnesota law.

Appellants further argue that statutory immunity is not a shield because the state had actual knowledge that sections of the I-90 right-of-way fence was down. Appellants rely on *Zaske v. Lee*, 651 N.W.2d 527, 532-33 (Minn. App. 2002), *review denied* (Minn. Dec. 17, 2002), which held that a county could not be charged with constructive knowledge of a downed stop sign. In *Zaske*, the plaintiff argued that because the stop sign was down for four days the county should have identified the problem and replaced the sign, and that its failure to do so was negligent. *Id.* at 531-32. The county conceded that if it had had actual knowledge of the downed sign and failed to replace it, it would have contravened an express policy and the decision would not have been protected by statutory immunity. *Id.* But imputing notice based on the length of time the sign was down would amount to a challenge to the county's policy regarding patrolling for downed signs, and therefore would be a challenge to a planning-level decision that is protected by statutory immunity. *Id.* at 532-33. *Zaske* does not hold, as appellants claim, that anytime the state has actual notice of a condition, it is not shielded by statutory immunity. If the state had a policy that it always repaired downed right-of-way fences and it knew about the existence of downed fences but failed to repair them, then this case would be analogous to *Zaske* and the state would not be shielded by statutory immunity for allowing the fences to languish. But the state's policy is exactly the opposite—the policy sets fence repairs as a low priority, and accordingly the downed fence was not

repaired. Therefore, the district court did not err by concluding that appellants' challenge to the state's decision not to repair the fence was a policy decision protected by statutory immunity.

Because we affirm the district court's application of statutory immunity to bar appellants' claims, we do not address the state's alternative arguments in support of summary judgment.

Affirmed.