



## Monnens v. Speeter

2004 | Cited 0 times | Court of Appeals of Minnesota | December 28, 2004

Affirmed

### UNPUBLISHED OPINION

Following a single-vehicle accident, appellant Kristy Rae Monnens, as Trustee for the Heirs of Kristal Monnens, brought this wrongful-death action against respondent City of Orono, alleging that the city was negligent in failing to place warning signs at the accident scene and in leaving a dangerous drop-off between the road's pavement and shoulder. In this appeal from a summary judgment for the city based on immunity, appellant argues that (1) vicarious official immunity does not apply to the decision to leave the drop-off because an affidavit on which the district court relied was not properly before the court, the city did not identify the official who made the decision, and the defect was patently hazardous; and (2) discretionary immunity is not available for failure to properly place signs at the curve where the accident occurred because signage was mandatory and its placement was not discretionary. We affirm.

### FACTS

Kristal Monnens (Monnens) was killed in a single-vehicle accident that occurred at night on North Arm Drive in the City of Orono in May 2001. Monnens had spent the evening with a group of friends, including Mark Speeter and Erica Ribe. Both Speeter and Ribe were driving cars, and Monnens was a passenger in Speeter's car.

Shortly before the accident, Ribe's car was ahead of Speeter's car on North Arm Drive. Then Speeter pulled into the oncoming traffic lane alongside Ribe's car, and Ribe accelerated for a second or two. Speeter also accelerated, passed Ribe, and pulled back into the right lane. A few seconds later, Speeter approached a curve in the road at the top of a small hill, veered off the roadway, and collided with a tree.

The road curved to the left over the top of the hill, but due to an opening in the shrubbery near the road and to pavement on a driveway, it appeared to Speeter that the road curved to the right. There was a five-inch drop between the pavement and the shoulder where the right side of the car left the pavement and a six-inch drop where the rest of the car left the road.

Orono Police Officer Bruce Anderson, who investigated the accident scene the night of the accident, determined that the accident was caused by a combination of Speeter's excessive speed and



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inexperience as a driver. Anderson calculated the speed of Speeter's car to be 64 m.p.h. when it left the pavement. Speeter was 16 years old and had obtained his license in March 2001.

Accident reconstructionist Jerry Kaproth opined that the five- to six-inch pavement height was "extremely dangerous" and that the height of the pavement lip was a "significant factor" in causing the accident. Kaproth stated in an affidavit that the high pavement edge caused Speeter to lose control of his vehicle and that, if Speeter had not lost control, he would have had sufficient time and distance to take appropriate corrective action and would have avoided hitting the tree. Kaproth also opined that "[t]he relatively tight radius of the curve, the grade, rural setting, and lack of appropriate road markings made the site of this accident a hazardous situation." Kaproth calculated the speed of Speeter's vehicle at impact to be 45 to 50 m.p.h.

North Arm Drive is a rural residential street that travels in a semi-circle around Lake Minnetonka's North Arm Bay and Lakeview Golf Course and connects with Hennepin County Road 19 at both ends. The posted speed limit is 30 m.p.h. According to the City of Orono's community management plan and the Minnesota Manual of Uniform Traffic Control Devices (MMUTCD),<sup>1</sup> North Arm Drive is considered a low traffic volume (less than 600 vehicles per day), rural collector street. One of the purposes of the community management plan is to "protect Lake Minnetonka and to preserve shoreline amenities, landowner's property rights, and the general public's ability to experience a slow-paced journey along Lake Minnetonka's most scenic and most accessible shoreline." Gregory A. Gappa, an Orono city engineer, testified that for aesthetic reasons on lower-speed residential roads, Orono has a minimal signage policy and performs minimal tree trimming and clearing. The community management plan also addresses the budget problems relating to road maintenance decisions.

There was no warning sign for the curve or the low shoulder where the accident happened. Howard Preston, a professional transportation engineer, stated in an affidavit:

Under the MMUTCD, there is no requirement for the placement of any warning signs on this rural street [North Arm Drive] such as a reverse curve sign or low shoulder sign. Additionally, under Sections 1A-5 and 2C-1 of the MMUTCD, there is not even a recommendation for any type of warning sign for North Arm Drive. Pursuant to the MMUTCD, any placement or location of any warning sign is left to the judgment and discretion of the city engineer, based upon factors such as previous accidents or potentially hazardous conditions on the roadway, citizen requests or complaints for warning signs and to maintain conformity with the overall city policy regarding warning signs within the jurisdiction.

There are no traffic engineering requirements for pavement shoulder heights on rural, residential streets such as North Arm Drive under the MMUTCD or any other traffic engineering standard. This is due to the fact that most residential streets have curb and gutter which obviates any requirements or standards for shoulder heights. Again, the determination of pavement shoulder heights is left to



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the professional engineering judgment of the city based upon factors such as the speed limit of the roadway and the history of accidents or request by citizens for repairs or maintenance on the roadway. Pursuant to the MMUTCD, the pavement shoulder height is left to the discretion of the engineer and in conformity with pavement shoulder heights in other similarly situated roadways within the jurisdiction. [Appellant's] traffic engineer cites to standards set forth by AASHTO, which deals solely with design guidelines of roadways. North Arm Drive was never designed and was constructed from existing cart paths in the 1930's. AASHTO is not a required engineering standard for existing streets and has never been adopted by the City of Orono. [Appellant's] traffic engineer also cites to the MMUTCD, Figure VI-15a, 6K-111 as support that the MMUTCD requires either warning signs or requires repair of the pavement/shoulder edge. However, Section 6 of the MMUTCD is limited solely to construction zone signing and the sections specifically cited by [appellant's] engineer are in a separate booklet entitled "Temporary Traffic Control Zone Layout." These provisions cited as standards by [appellant's] engineer are completely inapplicable to North Arm Drive, since it was not under construction at the time of the accident.

To have a traffic warning sign posted on an Orono street, a citizen must make a request to the city council. In deciding whether to approve or deny the request, the city council considers the need for the sign, budget, resources, priority of other capital improvements, citizen requests or complaints, compliance with the community management plan, and public safety factors (e.g. number of accidents). Gappa testified that if a sign was needed to mark an extremely hazardous curve, he could make a request to the city council, which the council would likely approve, but that he was unaware of a road with a 30 to 40 m.p.h. speed limit where a hazardous curve sign was needed. The record contains no evidence of any request for signage at the accident site before the accident happened.

Regarding the distance between the asphalt and the shoulder on North Arm Drive, Orono City Administrator Ronald Moorse stated in an affidavit:

11. In 1999, the City of Orono elected to perform an asphalt overlay on North Arm Drive. This overlay project was based upon budget allocation, public safety of motorists and resource considerations by the City Council and upon recommendation of City Engineer Gappa. North Arm Drive was selected as the candidate street for the overlay project due to the fact that the existing asphalt pavement was cracking and had pot holes. The overlay project was considered based upon the recommendation of engineer Gappa that the street was requiring more maintenance work simply to keep the pot holes and cracks filled and that the existing pavement was generally in poor shape. A determination was made that an overlay was the most cost effective method of restoring pavement quality while still maintaining the natural, wooded residential character of the street. Each year, the City of Orono City Council appropriates \$190,000 for street maintenance and other improvements, of which \$130,000 is specifically designated for street overlays. Gregory Gappa, the Director of Public Services, along with Jack Brinkhaus, the Superintendent of Public Works, personally inspect the City streets to determine appropriate maintenance and improvements. The City also takes into consideration any comments made by the City staff including police and public works, as well as citizen requests or complaints



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regarding the particular street or roadway. The determination as to whether a public improvement project, such as a road reconstruction project, is necessary to address identified roadway deficiencies is made by a vote by the City Council based upon these recommendations, combined with budgetary considerations.

12. The material for the project was consistent with the requirements set forth by the Minnesota Department of Transportation. The project was advertised for bids pursuant to the City's regular competitive bidding process and the bid was awarded by the City Council. Midwest Asphalt was selected as the contractor for the overlay project on North Arm Drive. Midwest Asphalt performed the overlay project in approximately September of 1999. Jim Gregory, an Orono public works employee, was present during the overlay project. Upon completion of the overlay project, Public Works staff inspected North Arm Drive to ensure that the pavement edge/gravel shoulder and driveway approaches were proper and safe for residents and motorists using the low speed, low traffic volume street. Upon inspection, it was determined that no additional remedial work was necessary to the pavement or shoulder, and that the street was in conformity with the City's Plan.

Gappa testified that the determination of whether a pavement edge is safe is based on experience, location, traffic speed, and height of the drop-off, with a drop-off being much less of a concern on lower-speed roads than on high-speed roads. If a drop-off is unsafe, either material can be added to raise the shoulder or bituminous material can be added to the edge of the road to make a gradual angle from the road surface to the shoulder.

The district court concluded that the city's decision not to place a warning sign at the accident site was protected from liability under the doctrine of statutory immunity. The district court concluded that the decision whether to fill the shoulder or taper the pavement after the overlay was placed on North Arm Drive was made by an employee using professional judgment and in conformity with the MMUTCD and, therefore, the city was protected from liability under the doctrine of vicarious official immunity.

### DECISION

On appeal from a summary judgment, this court examines the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). This court must view the evidence in the light most favorable to the party against whom judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). The question of whether either statutory or common law immunity applies is one of law, which this court reviews de novo. Davis v. Hennepin County, 559 N.W.2d 117, 120 (Minn. App. 1997), review denied (Minn. May 20, 1997).

I.



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Appellant argues that the district court erred in concluding that vicarious official immunity applied to the decision whether to fill the shoulder or taper the pavement.

Official immunity protects government employees who may be subject to liability in the course of performing their duties. *Id.* at 122. Official immunity "primarily is intended to insure that the threat of potential liability does not unduly inhibit the exercise of discretion required of public officers in the discharge of their duties." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (quoting *Holmquist v. State*, 425 N.W.2d 230, 233 n.1 (Minn. 1998)).

Under the doctrine of official immunity, "[a] public official charged by law with duties which call for the exercise of his [ ] judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Kalia v. St. Cloud State Univ.*, 539 N.W.2d 828, 832 (Minn. App. 1995) (quoting *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988)). While official immunity operates to protect the individual employee's decisions or omissions, it may also extend vicariously to shield the city from liability:

The court applies vicarious official immunity when failure to grant it would focus stifling attention on an official's performance to the serious detriment of that performance. This standard grants vicarious official immunity in situations where 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 v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 664 (Minn. 2004) (quotation omitted).

Official immunity only protects acts by government officials that require the exercise of discretion. *Gleason v. Metropolitan Council Transit Operations*, 582 N.W.2d 216, 220 (Minn. 1998); *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). Unlike statutory immunity, official immunity protects the kind of discretion that is exercised on an operational rather than a policymaking level. *Sletten v. Ramsey County*, 675 N.W.2d 291, 301 (Minn. 2004); *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). Ministerial duties are not protected by official immunity. *Wiederholt*, 581 N.W.2d at 316; *Terwilliger v. Hennepin County*, 561 N.W.2d 909, 913 (Minn. 1997). A ministerial duty is one that does not require discretion, but is "absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts," such as an administrative or legislative requirement. *Wiederholt*, 581 N.W.2d at 315 (quotation omitted).

Appellant first challenges the district court's finding that "public works staff inspected North Arm Drive to determine if gravel should be added to the shoulder or the asphalt needed to be tapered off after completion of the overlay project" and "[t]he crew determined that no additional remedial work was necessary." The finding is supported by Moore's uncontradicted affidavit. Appellant, however, argues that Moore's affidavit was not properly before the district court because the city did not



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produce Moore for a deposition pursuant to appellant's discovery request to depose "Any City of Orono employees or agents who performed 'shouldering' work on the North Arm Drive overlay project." Therefore, appellant contends that Moore's affidavit should not have been considered by the district court. Appellant also argues that Moore's affidavit contains inadmissible hearsay evidence.

Appellant has not provided a citation to, and we did not find in our review of the record, any objection to Moore's affidavit before the district court.<sup>2</sup> This court generally will decide only those issues that the record shows were presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); see also Minn. R. Civ. P. 56.06 ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."); *Schluter v. United Farmers Elevator*, 479 N.W.2d 82, 86 (Minn. App. 1991) (showing of diligence required of party seeking continuance for additional discovery), review denied (Minn. Feb. 27, 1992). Absent any objection to Moore's affidavit before the district court, the issue is not properly before this court.

Appellant next contends that official immunity does not apply because the individual(s) who made the decision not to perform shouldering work were not identified. Appellant argues that unless an individual is identified, it is not possible for the court to examine the decision-making process to determine whether immunity applies. But Moore's affidavit shows that a crew of city employees inspected North Arm Drive after the overlay project and determined that the road was safe and no additional shoulder work was needed, and Gappa testified as to the factors considered in deciding whether shoulder work is needed. Specifically, Gappa testified that whether a pavement edge is safe is determined based on experience, location, traffic speed, and height of the drop-off, with a drop-off being much less of a concern on lower-speed roads than on high-speed roads. The evidence was sufficient to permit the court to examine the decision-making process for the purpose of determining whether official immunity applied.

Appellant cites *Riedel v. Goodwin*, 574 N.W.2d 753 (Minn. App. 1998), review denied (Minn. Apr. 30, 1998), which involved county and township board action rather than an action by a city official in an individual capacity, to argue that official immunity does not apply to a city crew. But appellant acknowledges that official immunity can apply to a group of government employees. See *Bailey v. City of St. Paul*, 678 N.W.2d 697, 703 (Minn. App. 2004) (official immunity applied to ambulance crew), review denied (Minn. July 20, 2004). Again appellant's objection goes to the sufficiency of the evidence to permit the court to examine the decision-making process.

Appellant next argues that no discretion was involved in the decision not to perform shouldering work because the decision did not involve a balancing of policy considerations. But official immunity protects the kind of discretion that is exercised on an operational rather than a policymaking level.





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Pletan, 494 N.W.2d at 40. The factors identified by Gappa as being involved in deciding whether to perform shouldering work support the application of official immunity. See *Ireland v. Crow's Nest Yachts, Inc.*, 552 N.W.2d 269, 273 (Minn. App. 1996) (holding official immunity extends vicariously to the county because traffic engineer's decision to place "stop ahead" sign demonstrates exercise of judgment and failing to extend immunity would result in chilling effect on traffic engineer's decision to place "stop ahead" signs), review denied (Minn. Sept. 20, 1996). Appellant also argues that performing shoulder work is a ministerial task. But the actual performance of shouldering work is not at issue in this case.

Appellant argues that the shoulder drop-off was so hazardous that the decision to not repair it constituted a dereliction of duty, and, therefore, official immunity does not apply. See *Terwilliger*, 561 N.W.2d at 913 (stating that official immunity does not apply when official is guilty of a willful or malicious wrong); *Bailey*, 678 N.W.2d at 701 (same). Citing *Don L. Ivey et al., The Influence of Road Surface Discontinuities on Safety*, (Transportation Research Board, National Research Council 1984), appellant argues that a three- to four-inch shoulder drop-off causes a substantial increased risk of accident even at speeds as low as 30 to 40 m.p.h. Appellant also cites the American Association of State Highway and Transportation Officials (AASHTO), *A Policy on Geometric Design of Highways and Streets* (1994), which states, "[s]houlders should be flush with roadway surface and abut the edge of the travel lane." But the MMUTCD, the standard adopted by the city, contains no required standards for the ratio of pavement height to shoulder applicable to North Arm Drive. To the extent that appellant is challenging the adoption of the MMUTCD, the question becomes one of statutory immunity. See *Goreci v. Hennepin County*, 443 N.W.2d 236, 240 (Minn. App. 1989) (explaining that statutory immunity applies to the adoption of standards or regulations).

Appellant cites the MMUTCD section applicable to construction zones, which requires tapering of a four- to twelve-inch drop-off or closing the adjacent traffic lane. MMUTCD § 6 (2004). Appellant argues that if a five- to six-inch drop-off is not allowed as a temporary hazard in a construction zone, it cannot be allowed on a completed road. We disagree. Conditions that exist in a construction zone (e.g., narrower-than-normal traffic lanes) do not necessarily exist on a completed roadway.

The district court properly determined that official immunity applies to the decision whether to fill the shoulder or taper the pavement. Accordingly, vicarious official immunity applies to the city. See *Ireland*, 552 N.W.2d at 273 (holding official immunity extends vicariously to the county for traffic engineer's decision to place "stop ahead" sign).

## II.

Appellant argues that the district court erred in concluding that statutory immunity applied to the decision not to place a warning sign at the accident site.

Statutory immunity grants government entities immunity from tort liability for "a loss caused by the



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performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subd. 3(b) (2002). For statutory immunity purposes, discretionary acts are planning-level actions that require evaluating such factors as the financial, political, economic, and social effects of a given plan. *Holmquist*, 425 N.W.2d at 232. Operational-level decisions, in contrast, are those actions involving the ordinary, day-to-day operations of the government and do not receive statutory immunity. *Id.*

Where a government employee simply implements an established policy, the conduct may be protected because the challenge is, in effect, to the policy itself. *Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 413 (Minn. 1996); *Holmquist*, 425 N.W.2d at 234. Even if there is a duty to correct a hazard, the government agency has statutory immunity if its corrective action involves a planning-level decision. *Nguyen v. Nguyen*, 565 N.W.2d 721, 723-24 (Minn. App. 1997); see also *Holmquist*, 425 N.W.2d at 232 (stating, "[t]he question is not whether the State's conduct resulted in a condition posing an unreasonable risk of harm; it is whether the conduct consisted of planning or policymaking decisions (protected) or operational level decisions (unprotected)").

Appellant argues that the decision not to place low-shoulder and curve warning signs on North Arm Drive were not protected by statutory immunity. Citing the section of the MMUTCD applicable to construction zones and the opinion of its expert James Benshoof, appellant argues that the shoulder drop-off was so dangerous as to require a low-shoulder warning sign. Appellant cites Benshoof's opinion to support its position that the curve was so dangerous that it required a reverse-curve warning sign.

The city adopted a community management plan that sets forth a minimal signage policy for rural collector roads. Retaining the pastoral quality of those roads was a city policy objective. The city also adopted the MMUTCD. Under the MMUTCD, use of reverse-curve warning signs is permissive, and low-shoulder warning signs are only required in construction zones. MMUTCD §§ 2C.6 and 6F.41.1; see also Introduction to MMUTCD at iv (defining "option" as "a statement of practice that is a permissive condition" for which "the verb may is typically used"). In deciding whether to approve or deny a request for a sign, the city council considers the need for the sign, budget, resources, priority of other capital improvements, citizen requests or complaints, compliance with the community management plan, and public safety factors (e.g., the number of accidents). Adoption of the community management plan and MMUTCD and implementation by the city council involve a balancing of policy considerations, to which statutory immunity applies.

To the extent that appellant is challenging the engineering decision that no signs were needed, that conduct would be protected by official immunity. See *Ireland*, 552 N.W.2d at 273 (holding official immunity extends vicariously to the county because traffic engineer's decision to place "stop ahead" sign demonstrates exercise of judgment and failing to extend immunity would result in chilling effect on traffic engineer's decision to place "stop ahead" signs).





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Affirmed.

1. The MMUTCD is a manual adopted by the Commissioner of the Department of Transportation pursuant to Minn. Stat. § 169.06, subd. 1 (2002), for the purpose of establishing a uniform system of traffic devices.
2. Appellant did not provide a transcript of the summary-judgment hearing, so any objection made at the hearing is not part of the record before this court. See Minn. R. Civ. App. P. 110.02(a) (setting forth appellant's duty to order a transcript of those parts of the proceedings not already part of the record that are deemed necessary for inclusion in the record).

