



## 05/28/96 HELEN MARSH v. COUNTY ST. LOUIS

1996 | Cited 0 times | Court of Appeals of Minnesota | May 28, 1996

KLAPHAKE, Judge

Appellant Helen Marsh challenges the district court's grant of summary judgment to respondent St. Louis County, arguing that discretionary immunity does not protect the county's decision not to conduct further road repairs after a washout. We affirm.

### DECISION

On appeal from summary judgment, this court must determine whether material fact disputes exist for trial and whether the district court correctly applied the law. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). "Summary judgment is appropriate when a governmental entity establishes its actions are immune from liability." *Gutbrod v. County of Hennepin*, 529 N.W.2d 720, 723 (Minn. App. 1995).

In June 1994, Susan Andresen died when her car struck a gully created by a recent washout on County State Aid Highway (CSAH) 22. Marsh, as trustee for the heirs of Andresen, brought this wrongful death action against the county. The district court granted the county's motion for summary judgment, concluding that the county's decision to restore the road to its previous condition after a 1993 washout was protected by discretionary immunity. Both the 1993 and 1994 washouts occurred after storms involving unusually large rainfalls of five to six inches in a 24-hour period. According to the Soil Conservation Service, that amount of rainfall occurs in this area only once every 100 years.

Under Minn. Stat. § 466.03, subd. 6 (1994), municipalities are immune from claims arising from discretionary acts. Planning level decisions that "involve questions of public policy and the balancing of competing policy objectives" are protected. *Gutbrod*, 529 N.W.2d at 723. Operational level decisions that relate "to the ordinary day-to-day operations of the government" are not protected. *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988). In determining whether an act is protected by discretionary immunity, the critical inquiry is "whether the challenged governmental conduct involved a balancing of policy objectives." *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 722 (Minn. 1988).

Marsh, relying on *Abbett v. County of St. Louis*, 424 N.W.2d 82 (Minn. App. 1988), review denied (Minn. July 28, 1988), argues that the county's decisions to restore CSAH 22 and not to conduct further repairs after the 1993 washout were operational level decisions because they involved the



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professional judgment of the county's engineer. Abbett involved a county engineer's decision on where to install guardrails. This court held that the decision was not protected by discretionary immunity because the decision was "most correctly characterized as professional judgment, not policy-making." *Id.* Not every decision involving a professional judgment, however, is an operational level decision. In *Gutbrod*, the county decided not to immediately repair a crack in a county road. 529 N.W.2d at 723. This court held that the county's decision to adhere to the established repair schedule after the county engineer considered the risks and costs of changing that schedule was a protected decision. *Id.*

We conclude that the government decision in this case is closer to the decision in *Gutbrod* than to *Abbett*. In *Abbett*, 424 N.W.2d at 85, the engineer had to decide whether to erect guardrails by considering "safety factors and factual variables," whereas the decision in *Gutbrod* involved weighing the risks and costs of changing a road repair schedule. Here, similar to *Gutbrod*, the St. Louis County Highway Engineer and Public Works Director stated in an affidavit:

In selecting roads for construction or maintenance projects, input is obtained from Public Works Department staff regarding specific needs and problem areas. Annual project lists are determined on a priority basis, taking into consideration such variables as traffic counts, existing service and age of roads, accident history, complaints, private and political pressure, funding availability, cost savings of construction versus expense of continued types of maintenance.

While the decision not to make further repairs to CSAH 22 may have involved a professional opinion that further repairs were unnecessary, the decision was ultimately a policy decision that the county's finances were best spent on other road construction projects rather than repairing a road so that it could withstand a 100-year storm. See *Gutbrod*, 529 N.W.2d at 723 (decisions involved in developing county's annual repair schedule were "clearly policy level decisions" and entitled to immunity).

Because we conclude that the county was entitled to summary judgment based on discretionary immunity, we do not address the county's arguments that it was also entitled to summary judgment on grounds of official immunity and no negligence as a matter of law.

Affirmed.

Roger M. Klaphake

5-17-96

\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

