STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1292

Cody Lee Elven,
Respondent,

vs.

St. Louis County,
Appellant.

Filed May 3, 2021
Affirmed
Hooten, Judge

St. Louis County District Court
File No. 69DU-CV-20-545

Cody L. Elven, Duluth, Minnesota (pro se respondent)

Mark Rubin, St. Louis County Attorney, Nora C. Sandstad, Assistant County Attorney, Duluth, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Johnson, Judge; and Hooten, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this interlocutory appeal from a denial of a motion for summary judgment, appellant argues that the district court erred by concluding that it was not entitled to official immunity or statutory discretionary immunity. We conclude that the duty of appellant's employee was ministerial, and that policy concerns disfavor granting appellant official

immunity in this case. We also conclude that appellant failed to prove its entitlement to statutory discretionary immunity. We affirm.

FACTS

This cases arises out of a string of break-ins at appellant St. Louis County's temporary impound lot. In 2016, sheriff's deputies arrested respondent Cody Elven driving a Chevrolet Tahoe with drugs in the vehicle. The county impounded the Tahoe at a recently constructed, temporary impound lot surrounded by a chain-link fence and a locked gate. Elven was moving to a new home when arrested, so he had the entirety of his personal belongings in the Tahoe.

The lot suffered its first break-in in September 2017, when someone cut a hole in an unobserved section of fence. Lieutenant Nate Skelton, who managed lot security, discovered the hole in the fence later that month and found that the thief broke into some vehicles. He thereafter conducted daily checks of the impound lot, ordered patrols to check the lot twice per shift, and installed a game camera on the south side of the lot for monitoring. In October, a thief cut another hole in the same section of fence, shattered the Tahoe's window and stole all of Elven's possessions. Lt. Skelton discovered the second break-in at the end of October and installed a second camera. The lot suffered at least three more break-ins between November 2017 and April 2018, after which officers finally identified and arrested a thief using the camera images. This person was not the thief who stole Elven's property; as of July 2020, the county had not charged anyone for that theft.

The county never informed Elven of the theft. He only learned of it when, in March 2018, his brother went to the lot to get Elven's possessions, and discovered the shattered

window and empty Tahoe. Elven sued the county and won a judgment in the conciliation court for $15,000. The county removed the case to the district court, then moved for summary judgment. The district court denied the motion. The county appeals that denial.

DECISION

In its motion for summary judgment, the county argued that it was officially immune and statutorily immune from Elven's lawsuit. The county argues on appeal that the district court erred by concluding that the county was not immune. "Denial of a motion for summary judgment is not ordinarily appealable, [but] an exception to this rule exists when the denial of summary judgment is based on rejection of a statutory or official immunity defense." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). "In an appeal from summary judgment, [this court] must determine whether there are genuine issues of material fact and whether the district court erred in applying the law." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014). "When reviewing a denial of summary judgment based on a claim of immunity, we assume the facts alleged by the nonmoving party are true." *Shariss v. City of Bloomington*, 852 N.W.2d 278, 281 (Minn. App. 2014). We review de novo whether immunity applies to the government. *Id.* The party asserting immunity bears the burden of proving entitlement to that immunity. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997). The county asserts entitlements to official immunity and statutory discretionary immunity.

I. The district court did not err by concluding that the county was not entitled to official immunity.

"The doctrine of common law official immunity provides that 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." *Anderson*, 678 N.W.2d at 655 (quotation omitted).[1]

> Imposing liability for discretionary acts would deter public officials from exercising their judgment when making the difficult decisions often necessary to effectuate the public policies mandated by law. On the other hand, imposing liability for ministerial acts merely encourages public officials to exercise care while performing duties that require little or no independent judgment.

Shariss, 852 N.W.2d at 281.

The district court concluded that official immunity did not apply because Elven sued the county, rather than an employee. But the government employer may enjoy vicarious immunity even when the plaintiff sues only the employer, not the employee who caused the alleged harm. *Anderson*, 678 N.W.2d at 664. We could reverse and remand for the district court to reanalyze the issue, but we "may decide an issue not presented to or considered by the trial court when the issue . . . involves a question of law not dependent on new or controverted facts." *Miller v. Soo Line R.R. Co.*, 925 N.W.2d 642, 653 (Minn.

[1] As seen throughout the rest of this opinion, our caselaw refers to immunity for discretionary "duties" and "acts." This inconsistent terminology risks confusing the focus of our analysis. We focus on the nature of the duty, examining the level of professional discretion required to execute the duty, not individual actions. An individual action may require no decision-making to carry out, but be part of a larger discretionary duty, while a ministerial duty may involve some actions requiring the employee to make a decision.

App. 2019). The district court's premature conclusion means that it did not fully consider the official immunity issue. But whether on remand or before us, immunity is a question of law that can be resolved on the uncontroverted facts currently in the record. In the interest of judicial economy, we resolve that issue here.

A. The county is not entitled to vicarious official immunity because Lt. Skelton is not immune from suit for his actions in securing Elven's property after learning of the first break-in.

To determine whether the county is entitled to vicarious official immunity, we must first determine if the employee who allegedly harmed Elven is entitled to official immunity. *Sletten v. Ramsey Cty.*, 675 N.W.2d 291, 300-01 (Minn. 2004). "[I]f a public official is not entitled to official immunity, the public official's employer is not entitled to vicarious official immunity." *Raymond v. Pine Cty. Sheriff's Office*, 915 N.W.2d 518, 527 (Minn. App. 2018), *review denied* (Minn. July 17, 2018). We first identify the specific employee and conduct at issue. *Vassallo*, 842 N.W.2d at 462. We next determine whether the employee acted under a discretionary or ministerial duty. *Id.* The employee does not enjoy immunity for acts that were part of a ministerial duty. *Id.* Finally, if the duty was discretionary, we determine whether the employee acted willfully or maliciously in executing the duty. *Id.*

What is the specific conduct that Elven alleges harmed him?

The district court determined that Elven's claims against the county were based on "what the [c]ounty did to secure his property once it was known that break-ins were occurring." The county agrees. The employee responsible for responding to the initial

break-in in September 2017 was Lt. Skelton. Therefore, we consider Lt. Skelton's conduct securing Elven's property after learning of the first break-in in September.

Was Lt. Skelton acting under a ministerial or discretionary duty?

"The discretionary-ministerial distinction is a nebulous and difficult one." *Shariss*, 852 N.W.2d at 281 (quotation omitted). We "focus [our] inquiry on the nature of the act itself and acknowledge that in doing so almost any act involves some measure of freedom of choice." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006). "Some degree of judgment or discretion will not necessarily confer discretionary immunity on an official." *Elwood v. Rice Cty.*, 423 N.W.2d 671, 677 (Minn. 1988).

"A discretionary duty involves individual professional judgment that necessarily reflects the professional goal and factors of a situation." *Vassallo*, 842 N.W.2d at 462 (quotation omitted). We typically consider duties discretionary when they involve "responding to uncertain circumstances that require the weighing of competing values on the grounds that these circumstances offer little time for reflection and often involve incomplete and confusing information such that the situation requires the exercise of *significant*, independent judgment and discretion." *Shariss*, 852 N.W.2d at 282. Examples of a discretionary duty include:

- A police officer exercising professional judgment in choosing what speed was safe to drive through a red light while responding to an emergency situation, under a statute imposing a duty on the officer to "slow down as necessary for safety." *Vassallo*, 842 N.W.2d at 463.

- A bus driver exercising professional judgment in choosing to keep the bus moving on a highway while passengers attacked each other, under the driver's duty to ensure the safety of all passengers. *Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 415 (Minn. 1996).

These duties required the employees to use their professional judgment to choose between a variety of options under uncertain circumstances and without the benefit of time for reflection. But even with time for reflection, a duty may still be discretionary. *See Schroeder*, 708 N.W.2d at 506 (holding as discretionary the decision of a road-grader operator to grade against traffic on a highway, under a county's policy allowing him that discretion).

By comparison, "a ministerial duty is one that is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Vassallo*, 842 N.W.2d at 462 (citations and quotations omitted). Examples of ministerial duties include:

- State employees demolishing an abandoned house, when "their job was simple and definite—to remove a house. While they undoubtedly had to make certain decisions in doing that job, the nature, quality, and complexity of their decision-making process does not entitle them to immunity from suit." *Williamson v. Cain*, 245 N.W.2d 242, 244 (Minn. 1976).

- County employees managing the waste at a yard-waste site, when they had a duty to not exceed the site's maximum annual waste capacity, regardless of the decisions involved in managing the waste. *Sletten*, 675 N.W.2d at 306.

- A bus driver securing a wheelchair-bound passenger on the bus and allowing her to disembark when she demanded, when the driver had a duty to do both and the only decisions involved the best way to secure the wheelchair based on guidelines and diagrams distributed by employer. *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 220-21 (Minn. 1998).

These situations did not involve split-second decision-making or uncertain circumstances requiring the exercise of professional judgment, though the situations all required some exercise of discretion and judgment.

Though it is a close question, we disagree with the county's argument that Lt. Skelton's duty was discretionary. While Lt. Skelton certainly had to make judgment calls about the best ways to secure the lot, his duty was a straight-forward ministerial command to protect Elven's property from a known threat of theft. The district court correctly identified the county's (and Lt. Skelton's) duty as statutory. "When property is so seized [for forfeiture], the appropriate agency shall use reasonable diligence to secure the property and prevent waste." Minn. Stat. § 609.531, subd. 5 (2020). The county seized the Tahoe for forfeiture, so Lt. Skelton had a duty to use reasonable diligence to secure the Tahoe and its contents, especially once he knew of the first break-in.

The situation did not require split-second decision-making based on incomplete and confusing information. *See Shariss*, 852 N.W.2d at 282. Lt. Skelton knew that the thief walked through the woods surrounding the lot to access a section of fence hidden from plain view, cut a hole in that fence, and then broke into cars to steal valuable property like that in the Tahoe. He had plenty of time to make his decisions about lot security. With these facts, Lt. Skelton's duty was "simple and definite"—to secure property like Elven's by preventing or deterring the thief from cutting more holes in the fence, or by removing Elven's property to a more secure location. *See Williamson*, 245 N.W.2d at 244.

This duty did not require a significant exercise of Lt. Skelton's professional judgment in pursuit of the goals of his position as a law enforcement officer. *Cf. Vassallo*, 842 N.W.2d at 463 (holding discretionary a police officer's duty to drive through red lights safely when responding to emergency situation); *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992) (holding discretionary a police officer's duty to decide when and how to

engage in a high-speed car chase). Lt. Skelton needed to decide only how best to secure private property in a fenced lot against a thief's known method of cutting a hole in the fence and breaking into cars. While he had a variety of options (cameras, patrols, reinforcing the fence, moving the property, etc.), the choice of which options would best accomplish his duty did not require balancing competing professional concerns and conflicting goals. "[T]he nature, quality, and complexity of [Lt. Skelton's] decision-making process does not entitle [him] to immunity." *Williamson* 245 N.W.2d at 244.

We hold that Lt. Skelton's duty was ministerial, so official immunity does not apply in this case.

B. The county is not entitled to vicarious official immunity even if Lt. Skelton is immune.

Even if we concluded that the duty was discretionary and Lt. Skelton is entitled to immunity, we would hold that the county is not entitled to vicarious official immunity. "In general, when a public official is found to be immune from suit on a particular issue, his government employer will enjoy vicarious official immunity from a suit arising from the employee's conduct." *Schroeder*, 708 N.W.2d at 508. "While [we] have generally extended official immunity vicariously to governmental entities after a government employee has been allowed official immunity, vicarious immunity is not an automatic grant." *Sletten*, 675 N.W.2d at 300. "Ultimately, the extension of vicarious official immunity is a policy question for the court." *Schroeder*, 708 N.W.2d at 508; *see also Sletten*, 675 N.W.2d at 304 ("The application of vicarious official immunity . . . is a policy question based on the facts presented.").

The supreme court has indicated that an employer may be entitled to vicarious immunity when a lawsuit might cause the employer to focus so excessively on the employees' conduct that it would be detrimental to the employees' job performance by discouraging them from using their knowledge and experience to independently craft their conduct in the future. *Schroeder*, 708 N.W.2d at 508. In *Anderson*, the court granted vicarious official immunity to a school district against a lawsuit accusing the district and teachers of negligent safety procedures for students using a powered table saw. 678 N.W.2d at 664-65. A group of wood-shop teachers created the challenged safety procedures, and the court granted the school district vicarious immunity because "to rule otherwise would create a disincentive to use collective wisdom to create such protocols and policies." *Id*; *see also Schroeder*, 708 N.W.2d at 508 (granting vicarious official immunity to county because county staff used "collective knowledge and experience" to craft challenged road-grading conduct, and failing to grant vicarious immunity would disincentivize the county staff from doing so in the future). These cases instruct that when the employer's attention would hurt its employees' performance, vicarious immunity may be granted.

But a government employer may not be entitled to vicarious immunity when the government could improve the employees' performance by focusing on them and imposing clearer duties and direction. In *Sletten*, the court refused to extend vicarious official immunity to a county for its employees' alleged mismanagement of a yard-waste site. 675 N.W.2d at 306. It reasoned that the lack of immunity "would not deter the county's compost workers' performance by focusing stifling attention on performance, but would

rather encourage these employees to comply with governmental permits, operating requirements, and facility design limitations, which were sufficiently certain and imperative." *Id.* at 306 (quotation and citation omitted). In *S.W.*, the court refused to extend vicarious official immunity to a school district against a lawsuit alleging that the district negligently failed to prevent a student from being sexually assaulted. *S.W. v. Spring Lake Park Sch. Dist. No. 16*, 592 N.W.2d 870, 875-77 (Minn. App. 1999), *aff'd*, 606 N.W.2d 61 (Minn. 2000). The court concluded that the district employees' duties to respond to the assailant's unpermitted presence in the school were discretionary because they were not guided by any law or school policy. *Id.* at 875. But it reasoned that the district was not entitled to immunity because "[t]o hold otherwise would be to reward the school district for its failure to develop and implement a basic security policy that would have applied in these circumstances." *Id.* at 877.

The doctrine of vicarious official immunity risks a perverse incentive for the government employer to avoid all liability by granting its employees wide discretion for all of their duties regardless of how well they perform, ensuring they get official immunity that vicariously applies back to the government. These cases demonstrate that we should refuse to grant immunity when it risks that incentive. If the government could encourage better employee compliance with their duties or provide clearer direction for its employees, granting vicarious immunity is inappropriate.

We conclude that granting the county vicarious immunity would create that very incentive problem. The county offers no arguments about why it is entitled to vicarious official immunity, except to simply claim that it is entitled. The county has the burden to

prove its entitlement to vicarious immunity, but it did not produce any evidence that it or the sheriff's department employees had a policy regarding the security of impounded property. The county admits that "there are no statutes that govern the decision-making required to establish and monitor an impound lot." Without evidence of a policy, we infer that the county leaves security decisions entirely to the discretion of the individual officers in charge of impound lot security.

Without drawing comparisons between the harm of sexual assault and the harm of property theft, we are concerned that similar to the school district in *S.W.*, granting the county vicarious immunity would reward its "failure to develop and implement a basic security policy that would have applied in these circumstances." *Id.*, 592 N.W.2d at 877. The county does not argue that we if refused to grant it vicarious immunity, it would bring stifling attention to Lt. Skelton that would be detrimental to his job performance. We see nothing in the record to suggest that Lt. Skelton's job performance would suffer from the county's increased attention to impound lot security. In fact, more organized attention from the county could improve those security procedures by creating an actual policy. We hold that the county is not entitled to vicarious official immunity.

II. The district court did not err by concluding that the county was not entitled to statutory discretionary immunity.

In addition to the common-law official immunity, political subdivisions of the state government, like counties and municipalities, are immune from liability "for any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6 (2020).

This (along with vicarious official immunity) is an exception to the general rule that every subdivision is subject to liability for the official acts of its employees. Minn. Stat. § 466.02 (2020); *see also Conlin v. City of Saint Paul*, 605 N.W.2d 396, 400 (Minn. 2000). As such, "[t]he discretionary function exception is interpreted narrowly." *Conlin*, 605 N.W.2d at 400.

Though both official and statutory immunity discuss discretionary duties, they refer to distinct forms of discretion. "Official immunity protects the kind of discretion which is exercised on an operational rather than a policymaking level." *Sletten*, 675 N.W.2d at 301. In comparison, "[t]he purpose of statutory immunity is to protect the legislative and executive branches from judicial second-guessing of certain policy-making activities through the medium of tort actions." *Schroeder*, 708 N.W.2d at 503.

> Statutory immunity is extended when there has been a planning-level decision; that is, social, political, or economic considerations have been evaluated and weighed as part of the decision-making process. . . . Statutory immunity does not extend to operational-level decisions, those involving day-to-day operations of government, the application of scientific and technical skills, or the exercise of professional judgment.

Id. at 504. The government must "produce[] evidence that the conduct was of a policy-making nature." *Id.*

As with official immunity, we first identify the precise government conduct being challenged. *Id.* That conduct is Lt. Skelton's acts to secure Elven's property after learning of the first break-in to the impound lot.

We next determine if the county demonstrated that Lt. Skelton "engag[ed] in the balancing of social, economic, or political considerations" to guide his conduct. *Id.* at 505.

The court in *Schroeder* concluded that a county was entitled to statutory discretionary immunity against a lawsuit targeting its policy allowing road graders to grade against traffic. *Id.* The record included memoranda, letters, and transcripts of meetings of county staff and road superintendents addressing the practice of grading against traffic, examining alternatives to that practice, and discussing the economic and social impacts of the options. *Id.* The court reasoned that the county proved through this record that the decision to permit grading against traffic "was made on a planning level and was of a policy-making nature," so the county was entitled to statutory immunity. *Id.*

In comparison, the court in *Conlin* denied statutory immunity to a city in a lawsuit challenging the city's failure to place warnings around a dangerous road condition created by city road repair. 605 N.W.2d at 398-99. The city's only evidence supporting it claimed immunity were affidavits submitted by the street maintenance engineer consisting of conclusory affirmations that the engineer considered economic, social, and political concerns when deciding to not place any barriers or warning signs. *Id.* at 402-03. The court considered this evidence insufficient. *Id.* It expressed concern that "allowing minimal averments in an affidavit to be sufficient evidence of a planning decision" risked bootstrapping professional and scientific decisions made at the operational level into the immunity intended to protect policy decisions, and that doing so conflicted with the narrow construction and burden of proof required for statutory discretionary immunity. *Id.* at 403.

We conclude that similar to the city in *Conlin*, the county here failed to present sufficient evidence to demonstrate that its actions involved planning-level considerations. The county argues that "actions to secure the impound lot after the initial break-in – adding

patrols and a trail camera – required balancing the department's limited resources, in terms of both patrol redeployment and consideration of additional budgetary investments, to best monitor the property." But the record fails to bear this out. The only evidence regarding the county's actions to secure the property after the first break-in are two affidavits submitted by Supervising Deputy Jon Skelton (distinct from Lt. Nate Skelton) and reports from Lt. Nate Skelton and another deputy. Supervising Deputy Skelton's affidavits describe the operational considerations for lot security prior to the first break-in, but do not describe any planning or policy considerations in the county's response to the first break-in. The reports from Lt. Skelton and the other deputy describe the specific actions they took in response to the break-ins, but they do not describe any policy-level considerations that guided their response. These reports and affidavits do not even invoke the policy language used by the insufficient affidavits in *Conlin*. We hold that the county failed to prove its entitlement to statutory discretionary immunity.

Affirmed.