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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1861**

Dorene Larson, as Trustee for the heirs of Megan Marie Lehner,
Appellant,

vs.

Joseph Robert Schramel,
Respondent,

Ashley Marie Gieseke,
Defendant,

State of Minnesota,
Respondent.

**Filed June 10, 2019
Affirmed
Bjorkman, Judge**

Wright County District Court
File No. 86-CV-17-3762

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Considered and decided by Florey, Presiding Judge; Connolly, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant, next-of-kin of a passenger killed in a head-on motor-vehicle collision, challenges summary judgment dismissing negligence claims against the driver of the other vehicle and the State of Minnesota. Because appellant did not produce competent evidence of the other driver's negligence and because the state is statutorily immune from liability, we affirm.

FACTS

Ashley Marie Gieseke turned the wrong way onto divided Minnesota State Highway 23 (MN 23) after exiting from west-bound Interstate 94 (Highway 94) on the morning of November 29, 2014. While proceeding in a southwesterly direction on MN 23 in what she perceived to be the right-hand lane, she encountered respondent Joseph Robert Schramel, who was approaching from the opposite direction in the same lane. Neither driver saw the other until it was too late. While they both attempted to steer out of the way, the vehicles collided. Gieseke's passenger, Megan Marie Lehner, died at the scene.

MN 23 is a four-lane highway divided by a wide median. As Gieseke approached MN 23 from the Highway 94 off-ramp, she encountered several signs on both sides of the intersection. A post to her right displayed a one-way sign, a stop sign, and a divided highway sign; a post to her left displayed a one-way sign and a stop sign. A divided-highway sign had been installed on the left side, but it disappeared in 2009 or 2010. In the median to Gieseke's left, there was a posted do-not-enter sign and a posted one-way sign.

Despite these numerous warnings, Gieseke turned left before the median, directly into the path of eastbound traffic.

Members of the Minnesota State Patrol spoke with both drivers at the scene and investigated the circumstances of the collision. The lead investigator prepared an accident-reconstruction report (report) in which he ruled out weather, speed, or the mechanical condition of the vehicles as factors that contributed to the accident. The report concludes that the collision was caused by Gieseke traveling the wrong way on MN 23 in violation of Minn. Stat. § 169.18, subd. 6 (2018), and her operation of a vehicle in violation of her instruction permit.

Lehner's next of kin, appellant Dorene Larson, commenced this action alleging both drivers were negligent and that respondent State of Minnesota was negligent because it did not detect and replace the missing divided-highway sign at the entrance to MN 23. Schramel and the state moved for summary judgment.¹ The district court granted the motions. Larson appeals.

D E C I S I O N

Summary judgment is proper if “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. In opposing summary judgment, a party may not rely on “mere averments in the pleadings or unsupported allegations but must come forward with specific facts to satisfy its burden of production.” *Id.* We review de novo whether there are genuine fact issues and whether

¹ Larson settled her claim against Gieseke and recovered underinsured-motorist benefits.

the court erred in applying the law. *Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018).

I. Larson did not present competent evidence to establish that Schramel was negligent.

To prevail on a negligence claim, a plaintiff must prove “(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury.” *Id.* Summary judgment is appropriate when the nonmoving party fails to establish an essential element of a claim for which that party has the burden of proof. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

Minnesota drivers have a duty to exercise reasonable care, including keeping a proper lookout and keeping their vehicles under control. *Fisher v. Edberg*, 176 N.W.2d 897, 902 (Minn. 1970); *see Sundeen v. Barthel*, 63 N.W.2d 267, 272 (Minn. 1954) (“It is . . . the duty of every operator of a motor vehicle upon the highways of this state to keep his vehicle under control, to keep a proper lookout, and to exercise due care to avoid danger or dangerous circumstances of which he has become aware”); *Thompson v. Hill*, 366 N.W.2d 628, 631 (Minn. App. 1985) (stating a driver owes a “duty to operate [a] car with reasonable care”). Drivers also have a duty to comply with traffic laws, including obeying traffic-control signs. Minn. Stat. § 169.06, subd. 4(a) (2018). Violation of a traffic law is *prima facie* evidence of negligence. Minn. Stat. § 169.96(b) (2018); *Marshall v. Galvez*, 480 N.W.2d 358, 361 (Minn. App. 1992).

At issue here is whether Larson produced evidence sufficient to defeat summary judgment on the second element of her negligence claim—breach of duty. Normally, the question of whether a driver exercised reasonable care is for the jury to decide. But summary judgment is warranted when “the evidence as a whole discloses no reasonable basis upon which the jury could have found [the driver] negligent.” *Coble v. Lacey*, 90 N.W.2d 314, 321 (Minn. 1958).

Larson’s sole claim is that Schramel breached his duty to keep a proper lookout at the time of the collision.² Larson argues that “where each of the vehicles came from before the crash” and their locations after the accident demonstrate that Schramel should have seen Gieseke’s vehicle approaching “from at least several hundred yards away.” But Larson did not offer evidence establishing Schramel’s location when he saw Gieseke’s vehicle, the precise speeds of the two vehicles in the moments before the accident, or the distance Schramel traveled after he observed Gieseke’s vehicle. Schramel testified that he first saw Gieseke’s vehicle when it was on a bridge ahead of him. But he saw only the roof and assumed the vehicle was driving in the same direction as he was. Nothing in his deposition testimony, statements to investigators at the scene, nor the limited accident-reconstruction evidence even hint at something Schramel could have done to avoid the collision. Both drivers described the collision as occurring within seconds of seeing each

² At oral argument, Larson suggested Schramel’s speed may have contributed to the accident. But Larson did not make this argument to the district court nor did she offer any other facts in her appellate briefs suggesting that Schramel failed to maintain proper control of his vehicle. The posted speed limit on MN 23 is 65 miles per hour (mph), with a posted 55-mph advisory near the intersection with Highway 94. Schramel testified that he was driving about 60 mph when he saw Gieseke’s vehicle.

other. Gieseke described the time between when she first saw Schramel and when she steered away to avoid the collision as “instantaneous.” And she testified that “from the time I turned my wheel, I blinked, and when I opened my eyes, I was already in the ditch.” On these facts, a jury could only speculate as to whether Schramel failed to keep a proper lookout or otherwise engaged in unreasonable driving conduct that contributed to the collision. See *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (stating that “[m]ere speculation, without some concrete evidence, is not enough to avoid summary judgment”).

In *Hastings v. United Pac. Ins. Co.*, we addressed a similar issue in a case involving a head-on collision that occurred after a driver veered out of his lane and into the lane of an oncoming intoxicated driver. 396 N.W.2d 682, 683 (Minn. App. 1986). We affirmed summary judgment in favor of the intoxicated driver because the nonmoving party did not demonstrate “material facts showing actual negligence” or “that the intoxication contributed to cause the injury.” *Id.* at 684 (quotations omitted). Likewise, this record contains no evidence that Schramel breached his duty to keep a proper lookout, violated traffic laws, or unreasonably responded to the danger represented by Gieseke’s oncoming vehicle. Lehner’s tragic death does not change the fact that no competent evidence points to Schramel’s negligence. Accordingly, he is entitled to summary judgment.³

³ Larson asserts that “the trial court . . . completely overlooked the possibility that more than one party can be at fault in a collision.” Larson is mistaken. The district court considered various other possible causes of the collision but concluded that Larson offered no material facts to support them.

II. The state is immune from liability for claims arising from its failure to detect and replace the missing divided-highway sign.

Under the Minnesota Tort Claims Act, the state may be liable for the “death caused by an act or omission of an employee of the state while acting within the scope of office or employment” under certain circumstances. Minn. Stat. § 3.736, subd. 1 (2018). But the state is immune from liability for claims of “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) (2018). Statutory immunity is grounded on the principle of separation of powers. *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 718 (Minn. 1988). The party asserting this statutory defense has the burden to demonstrate entitlement to immunity. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

In assessing a claim of immunity, we first identify the challenged governmental conduct. *Zaske v. Lee*, 651 N.W.2d 527, 531 (Minn. App. 2002), *review denied* (Minn. Dec. 17, 2002). We distinguish planning-level decisions involving questions of public policy, which are immune from suit, from operational-level decisions involving questions of government day-to-day operations, which are not. *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988). Placement of traffic signs “is not inherently either discretionary or operational; classification depends on the factors considered in making the decision.” *Christensen v. Mower County*, 587 N.W.2d 305, 307 (Minn. App. 1998). Statutory immunity applies when signage decisions “involv[e] a balancing of social, political, or economic considerations.” *Zaske*, 651 N.W.2d at 531.

Larson argues that the state was negligent in failing to detect and replace the divided-highway sign that went missing on the left side of the MN 23 intersection.⁴ She contends that “in exercising reasonable care[,] [the state] should have had a special plan for looking for missing signs like this, signs that were critical but would not be noticed by most people if they went missing.” We consider whether the state’s claimed failure to do so implicates the exercise of discretion.

Minnesota Department of Transportation (MnDOT) policy permits regional MnDOT districts to develop procedures for detecting and replacing damaged or missing traffic-control signs. Maintenance Supervisor Chad Stang averred in his affidavit that District 3, the relevant district here, maintains 54,000 traffic-control signs and requires inspection and replacement of signs every 15-20 years. During the period between scheduled inspections, District 3 “relies on the observations of law enforcement and the public to notify it about missing or damaged signs.” Traffic Engineer Thomas Dumont explained in his affidavit that District 3 prioritizes sign maintenance and replacement based “on a number of factors, including the severity of the problem, cost effectiveness, safety concerns, and available resources.” Dumont and Stang each stated that MnDOT has insufficient funds to constantly inspect signs and that MnDOT necessarily relies on reports of the public and law enforcement to identify signs that need to be replaced outside of the normal replacement cycle. According to Dumont, District 3 adopted “[t]he response-to-

⁴ We note that the state was required to place a divided-highway sign at the right side of the MN 23 intersection. 2011 *Minnesota Manual on Uniform Traffic Control Devices*, section 2B.42. But the state has the “option” to install an additional divided-highway sign on the left-hand side of the intersection.

complaint policy [as] a cost effective means of ensuring the prompt replacement or repair of traffic control signs that appropriately balances safety concerns.”

In *Zaske*, this court affirmed summary judgment in favor of a county against allegations that the county was negligent in failing to detect and replace a missing stop sign. 651 N.W.2d at 529, 533. As in this case, the county adopted a sign detection-and-replacement policy that “involved a balancing of budgetary, safety, and personnel considerations.” *Id.* at 533. We rejected the argument that the county received constructive notice of the missing sign as a direct attack on “the county’s conduct in formulating its policy to detect problems with traffic-control devices.” *Id.* at 532. And we concluded the county’s policy is protected by statutory immunity. *Id.* at 533; *see also McEwen v. Burlington N. R.R.*, 494 N.W.2d 313, 317 (Minn. App. 1993) (holding that statutory immunity applies to claim of inadequate warning signs at a railroad crossing because the state’s decision involved a “priority rating system that balances financial constraints, limited funding, and safety considerations”), *review denied* (Minn. Feb. 25, 1993); *Wornson v. Chrysler Corp.*, 436 N.W.2d 472, 474-75 (Minn. App. 1989) (upholding a grant of immunity on the state’s prioritization of placement of highway traffic signals as a discretionary decision based on “balancing economic policy (available resources) with safety conditions”), *review denied* (Minn. Apr. 26, 1989).

As in *Zaske*, the undisputed evidence here demonstrates that the state’s failure to immediately replace the missing divided-highway sign was the result of a policy-making decision. This balancing of budgetary and safety concerns is precisely the sort of policy decision that is entitled to statutory immunity under Minn. Stat. § 3.736, subd. 3(b).

Because the state has established that its failure to detect and replace the missing divided-highway sign prior to the accident was the result of a policy decision, the state is entitled to statutory immunity against Larson's negligence claim.

Affirmed.