This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0722

Jerald Boitnott,
Appellant,

vs.

State of Minnesota, by and through its Department of Transportation,
Respondent.

Filed December 27, 2022
Affirmed
Reilly, Judge

Fillmore County District Court
File No. 23-CV-20-349

Aaron R. Thom, Samantha J. Ellingson, Thom Ellingson, PLLP, Minneapolis, Minnesota; and

Patrick W. Michenfelder, Throndset Michenfelder, LLC, St. Michael, Minnesota (for appellant)

Keith Ellison, Attorney General, Michael Goodwin, Benjamin Harringa, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and Halbrooks, Judge.*

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

NONPRECEDENTIAL OPINION

REILLY, Judge

In this appeal from the summary-judgment dismissal of his claim alleging that respondent failed to properly place warning signs on a state road, appellant argues that the district court erred by determining that: (1) respondent is entitled to statutory discretionary immunity as a matter of law, and (2) the evidence is insufficient to show a genuine fact issue on appellant's claim that the absence of warning signs was the proximate cause of his accident. We conclude that the district court did not err in granting summary judgment because of statutory discretionary immunity. Thus, we affirm.

FACTS

On a sunny day in July 2017, appellant Jerald Boitnott was traveling on his motorcycle eastbound on Highway 30 in southeastern Minnesota with a group of other motorcyclists. Highway 30 is a two-lane asphalt road maintained by respondent Minnesota Department of Transportation (MnDOT). Boitnott was traveling side-by-side with another motorcyclist in the single eastbound lane. The group of motorcyclists had been traveling on Highway 30 for about 30 to 40 miles. Around mile marker 248.600 the road curved and Boitnott noticed that the motorcyclist riding parallel to him was moving toward him, so he moved closer to the road's shoulder. The shoulder dropped from the road and Boitnott drove into the ditch, fell off his motorcycle, and sustained serious injuries. Boitnott sued

MnDOT alleging that it failed to warn roadway users of the unprotected shoulder drop-off[1] which constituted a dangerous condition.

Because MnDOT is an agency of the State of Minnesota, it is responsible for maintaining Minnesota's state highways, including Highway 30. Highway 30 falls within MnDOT's District 6.[2] Within District 6 alone, there are around 1,421 centerline[3] miles of road. MnDOT traffic engineers are tasked with reviewing and interpreting the Manual of Uniform Traffic Control Devices (the manual) to determine whether warning signs should be added to roadways to "alert road users to conditions that might call for a reduction of speed or an action in the interest of safety." According to the manual, the use of warning signs "shall be based on an engineering study or on engineering judgment." The manual also recommends that warning signs be used minimally to increase the effectiveness of the ones placed.

There are many types of MnDOT roadway warning signs, including one to warn motorists of an unprotected shoulder drop-off exceeding more than 3 inches in depth "for a significant continuous length along the roadway, based on engineering judgment" as depicted below.

[1] An unprotected shoulder drop-off refers to a sudden drop in elevation between the travel lane and the adjacent shoulder.

[2] MnDOT is divided into eight regional districts. Districts 1 through 7 make up the greater Minnesota districts, and the final district covers the Minneapolis and St. Paul metropolitan area.

[3] A "centerline" mile is one mile of a single roadway, no matter how many lanes.

W8-17

Just before the curve in the road on Highway 30 where Boitnott crashed is a MnDOT "Winding Road" warning sign with a speed limit listed at 30 miles per hour as depicted in the following photograph.

Boitnott had not traveled on that area of Highway 30 before his crash. In a deposition, Boitnott testified that he had ridden side-by-side with other motorcyclists "[m]any times" and admitted that riding parallel with another motorcyclist on a highway like Highway 30 was less safe. He testified that there have been "several times" while riding parallel to another motorcyclist that he has moved off the road and onto the shoulder but that he has

always been able to use the shoulder to get back onto the road. He testified that if there had been a warning sign conveying there was no shoulder or a low shoulder before the curve, he would have chosen not to ride parallel to the other motorcyclist when traveling around the curve.

A traffic engineer for MnDOT submitted an affidavit stating that the MnDOT sign office "can only respond to and evaluate sign requests that it is made aware of." The traffic engineer stated that "[t]he District 6 sign office was never made aware prior to the service of this lawsuit that someone believed the shoulder drop off at the site of the crash" exceeded 3 inches for a significant length of the roadway. He also stated that if the sign office had been notified of this belief, "the sign office would have had to weigh safety and financial concerns to determine whether to post a sign at the crash site." Additionally, the maintenance superintendent for District 6 submitted an affidavit stating that motorists or law enforcement officers may report concerns with roadways, and that once a report is received, MnDOT responds and evaluates whether maintenance is needed. The maintenance superintendent stated that he was unaware of any information reflecting that anyone informed MnDOT maintenance that they believed the shoulder in the area was dangerous.

MnDOT submitted a motion for summary judgment in response to Boitnott's claim of negligence, arguing that statutory discretionary immunity applied and that MnDOT did not cause Boitnott's injuries. Boitnott opposed the motion, arguing that statutory discretionary immunity does not apply because MnDOT failed to follow its own policies requiring it to place signage warning motorists of dangerous conditions. He also contended

that MnDOT created the dangerous condition by narrowing the shoulder of the road with an abrupt drop-off at the edge of an off-camber[4] turn. Following a motion hearing, the district court granted MnDOT's motion for summary judgment in full. In doing so, the district court adopted MnDOT's entire proposed order. This appeal follows.

DECISION

Boitnott challenges the district court's grant of summary judgment for MnDOT based on statutory discretionary immunity. On appeal from summary judgment, we review whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019). In doing so we view "the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving part[y]." *Id.* (quotation omitted). Whether certain governmental action is protected by statutory discretionary immunity is a legal question that we review de novo. *Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004).

Under the State Tort Claims Act, the state is subject to liability for torts "caused by an act or omission of an employee of the state while acting within the scope of office or employment." Minn. Stat. § 3.736, subd. 1 (2020). However, statutory discretionary immunity is an exception to this general rule. *Minder*, 677 N.W.2d at 483-84.[5] Under this

[4] An off-camber turn is a turn in which the road slopes toward the outside of the turn.

[5] Statutory discretionary immunity provisions applicable to the state and municipalities have been treated as coextensive such that caselaw addressed to one can be relied on in interpreting and applying the other. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 511 n.3 (Minn. 2006).

exception, the state is immune from tort liability "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) (2020). When defining "discretionary duty" we must distinguish planning decisions from operational decisions. *Minder*, 677 N.W.2d at 484. Planning decisions are protected as discretionary actions, while decisions relating to day-to-day operations are not protected. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994). Thus, we must first identify what governmental conduct is being challenged. And when a defendant asserts statutory discretionary immunity, the plaintiff bears the burden "to articulate specifically the claim that must be scrutinized to determine the immunity issue and to make some showing of fact to suggest the basis for the claim." *Gerber v. Neveaux*, 578 N.W.2d 399, 403 (Minn. App. 1998), *rev. denied* (Minn. July 16, 1998).

Boitnott only challenges MnDOT's failure to erect a warning sign of a dangerous condition where he crashed. Boitnott does not challenge MnDOT's signage policies but instead argues that MnDOT failed to follow its own signage policies. Boitnott contends that MnDOT knew or should have known that the narrow shoulder on Highway 30 near mile marker 248.600 suddenly dropped from the road and MnDOT failed to place appropriate signage to protect against the dangerous condition. Erecting road signs to warn of hazards "is not inherently either discretionary or operational; classification depends on the factors considered in making the decision." *Minder*, 677 N.W.2d at 485 (quotation omitted). But for statutory discretionary immunity to apply and protect a decision to place—or not place—a warning sign, an actual decision by the governmental entity must

have been made. *Id.* at 486. Thus, the governmental entity must have created or had actual notice of the dangerous condition.

In this case, MnDOT asserts it was unaware of a dangerous condition in the roadway on Highway 30 and therefore could not make a policy decision about whether to place a warning sign at that location. Both MnDOT's traffic engineer and maintenance superintendent for District 6 explained in separate affidavits that MnDOT's sign policy is to respond to maintenance and signage issues as MnDOT learns about them because MnDOT does not have the resources to continuously evaluate the conditions of all the roadways. They also explained that, when the sign office receives a sign request or concern about a dangerous condition, the office then weighs safety and financial concerns to determine whether to erect a sign at that location. They stated that before this litigation, the sign office was never made aware that someone believed the shoulder drop-off where Boitnott crashed was dangerous. Thus, MnDOT could not make a policy decision about whether to place a shoulder drop-off warning sign.

In support of his contention that MnDOT knew of the dangerous condition that led to his crash, Boitnott submitted an affidavit from a landowner near the crash site. The landowner stated that he lived on the property for 54 years and was aware of six accidents in that time in which a vehicle left the roadway and the state highway patrol or other members of law enforcement responded. Boitnott also submitted an expert report from a civil engineer who stated that portions of Highway 30, including the accident site, had a shoulder drop-off of more than three inches that "developed over a period of time." The expert report opined that MnDOT had a duty to inspect roadways for hazardous conditions

and to use warning signs to call attention to potential hazards that may not be readily apparent. The expert concluded that MnDOT knew or should have known about the drop-off and had a duty to place signage. Finally, Boitnott submitted an email sent from a MnDOT employee to two other MnDOT employees stating that there are considerable stretches of steep slopes over a 21-mile section of Highway 30. The email stated that "[t]hough there [are] no traffic/accident issues . . . there are severe potential run-off road risks." The email stated that guardrail installation for that section of Highway 30 should be reviewed.

Boitnott's argument that MnDOT knew about the dangerous condition is not persuasive. Boitnott does not provide any evidence that MnDOT had actual knowledge of the drop-off from the road to the shoulder. *See Minder*, 677 N.W.2d at 486 (concluding that one work order to fill a pothole was a bare assertion and insufficient to prove that the county knew about this pothole). Here, the affidavit from the neighbor does not provide evidence that MnDOT was aware there had been six crashes over the 54 years that the landowner lived on the property. While the neighbor stated that law enforcement responded to the crash, there is no evidence that law enforcement reported any concerns about the conditions of the road to MnDOT. And the expert report stated that the road conditions leading to a drop-off could have occurred naturally from the displacement or settling of the aggregate material. The expert report states that MnDOT's policy is to place a shoulder drop-off sign near where a road's shoulder drops more than three inches for a substantial and continuous length "based on engineering judgment." But the expert report notes that "[t]here is no evidence that MnDOT performed an engineering study or used

engineering judgment to determine that this sign should not be placed as indicated by the MnDOT [manual]." Finally, the email relied on by Boitnott shows that MnDOT was preparing to evaluate the use of guardrails on Highway 30. But the email does not show that MnDOT was aware of any accidents in the unspecified 21-mile section of Highway 30.

Even considering the facts in a light most favorable to Boitnott, we conclude that Boitnott failed to present evidence sufficient to establish that MnDOT had actual knowledge of the road's drop-off from the shoulder at the location of the crash. And absent actual knowledge, Boitnott can only challenge MnDOT's maintenance and inspection policies, which statutory discretionary immunity protects. Because we conclude that MnDOT is entitled to statutory discretionary immunity, we need not reach Boitnott's secondary issue of proximate causation in his negligence claim.

Finally, Boitnott argues that by accepting MnDOT's proposed order in its entirety, the district court failed to regard the evidence in the light most favorable to him. Appellate courts have cautioned against district courts' wholesale adoption of proposed findings of fact and conclusions of law "because it does not allow the parties or a reviewing court to determine the extent to which the court's decision was independently made." *Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376, 380 n.1 (Minn. 2006); *see also Sigurdson v. Isanti Cnty.*, 408 N.W.2d 654, 657 (Minn. App. 1987), *rev. denied* (Minn. Aug. 19, 1987). But no findings of fact are required on summary judgment. *See* Minn. R. Civ. P. 52.01. And the concerns of *Lundell* are not implicated here, where this court reviews de novo whether summary judgment was appropriately granted. After a thorough and careful review of the

record, we conclude that the district court did not err in finding that MnDOT is entitled to statutory discretionary immunity. Thus, the district court properly granted summary judgment for MnDOT.

Affirmed.