**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-1714**

Donald Steele,
Appellant,

vs.

Brent LaFavor, et al.,
Respondents.

**Filed June 20, 2023**
**Affirmed**
**Frisch, Judge**

Hennepin County District Court
File No. 27-CV-21-11754

Jeremy Brantingham, Brantingham Law Office, Minneapolis, Minnesota (for appellant)

Kristyn Anderson, Minneapolis City Attorney, Gregory P. Sautter, Assistant City Attorney, Minneapolis, Minnesota (for respondents)

Considered and decided by Frisch, Presiding Judge; Wheelock, Judge; and Halbrooks, Judge.*

**NONPRECEDENTIAL OPINION**

**FRISCH**, Judge

This appeal follows the district court's conclusion that a snowplow driver is entitled to official immunity precluding appellant's negligence action. Because the undisputed

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

material facts establish that any claimed negligence originated from the snowplow driver's discretionary decision-making, we affirm.

## FACTS

On the morning of March 10, 2019, a collision occurred between a vehicle driven by appellant Donald Steele and a snowplow operated by respondent Brent LaFavor on behalf of respondent City of Minneapolis. The facts, taken in the light most favorable to Steele as the nonmoving party, are as follows.

The collision occurred at the intersection of 35th Street East and Longfellow Avenue South. A stop sign controlled traffic traveling on Longfellow, and traffic traveling on 35th Street had the right-of-way. LaFavor was traveling northbound on Longfellow in a snowplow with a plowing mechanism positioned underneath the snowplow. The cab lights and lights outside the plow cab were illuminated. Steele was traveling eastbound on 35th Street at about 20-25 miles per hour. There was snow and ice on the road.

As LaFavor was operating the snowplow and approached the intersection, he removed his foot from the gas pedal. LaFavor believed the underbody of the plow hit something, which caused "quite a loud thud." LaFavor looked to see if he had hit a car—he had not. LaFavor then looked down to see if the plow was damaged—it was not. When LaFavor looked forward, the front of his truck was partially past the stop sign, but he "hadn't gone past the whole sign." LaFavor believed the intersection was uncontrolled and was not aware of a stop sign until that moment. LaFavor "realized [he] wasn't going to make the stop sign," but applied the brakes to slow down. He did not want to jam on the brakes and "get into an accident." LaFavor looked to his left and initially could not see

"anything," but he kept his eyes on a snow berm that was restricting his line of sight. His view was also limited by a white house on the corner. LaFavor then caught sight of a car, later revealed to be driven by Steele, and tried to clear the intersection.

Before entering the intersection, Steele noticed the snowplow, later revealed to be driven by LaFavor. Steele did not immediately realize that the plow was not going to stop before entering the intersection. Moments later, Steele realized that the plow was not going to stop and, when Steele's vehicle was about 20 feet away from the plow, Steele braked and attempted to veer out of the way. Steele collided into the rear wheels of the plow.

Steele filed a negligence action against respondents. Respondents denied negligence and asserted affirmative defenses including official immunity, vicarious official immunity, discretionary immunity, and statutory immunity. Respondents later moved for summary judgment on the basis that they were "protected from liability by the doctrines of official and statutory immunity."

The district court granted respondents' motion for summary judgment and dismissed the matter with prejudice. It determined that an official-immunity defense was available to LaFavor because his failure to stop at the stop sign was a discretionary action, and Steele did not argue that LaFavor acted willfully or maliciously. The district court also concluded that the city was entitled to vicarious official immunity and declined to determine whether statutory immunity applied.

Steele appeals.

## DECISION

Steele challenges the district court's grant of summary judgment on three grounds: (1) there is a factual dispute about whether LaFavor hit something in the road before the collision, (2) official immunity does not apply as a matter of law because LaFavor was unaware of the stop sign until it was too late to stop, and (3) official immunity does not apply as a matter of law because the cause of LaFavor's distraction is unknown.[1] We address each argument in turn.

Summary judgment is appropriate 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. When reviewing a summary-judgment ruling, "we review [de novo] whether there are any genuine issues of material fact and whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). "[W]e consider the evidence in the light most favorable to the nonmoving party." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006). "The application of immunity presents a question of law that we review de novo." *Id.*

### I. Steele forfeited the argument that there is a material fact dispute about whether LaFavor "hit something in the road."

Steele argues that the district court erred by granting summary judgment because whether LaFavor actually "hit something in the road" is a genuine issue of material fact. Steele asserts that the district court relied on deposition testimony from LaFavor that "he

[1] Steele does not challenge the district court's determination that, if LaFavor is entitled to official immunity, vicarious official immunity applies to respondent City of Minneapolis.

heard a loud noise underneath his plow moments before running the stop sign" but that camera footage shows that LaFavor did not say anything about this to responding officers and that if LaFavor had truly heard such a noise, he would have slowed down to stop and investigate. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). "Nor may a party obtain review by raising the same general issue litigated below but under a different theory." *Id.* Before the district court, Steele did not assert that there was such a material fact dispute precluding summary judgment. Thus, Steele has forfeited any argument related to this alleged fact dispute, and we decline to consider it.

## II. Summary judgment was appropriate as a matter of law because LaFavor's failure to stop was discretionary.

Steele argues that the district court erred by determining that official immunity applies because LaFavor's failure to stop at the stop sign was not a discretionary act. Specifically, Steele argues that because LaFavor was unaware of the stop sign until it was too late, LaFavor therefore exercised no discretionary decision-making with regard to his operation of the plow, policy implementation, or safety associated with his failure to stop at the stop sign.[2] We disagree.

[2] At oral argument, Steele asserted for the first time that there is a fact dispute as to whether the city has a policy permitting snowplow drivers to roll through a stop sign. Although the record does not contain a specific written policy, the record also does not reflect that this issue was raised before the district court, and it too is therefore forfeited. *Thiele*, 425 N.W.2d at 582.

"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." *In re Alexandria Accident*, 561 N.W.2d 543, 548 (Minn. App. 1997) (quotation omitted), *rev. denied* (Minn. June 26, 1997). "[W]hether official immunity applies turns on: (1) the conduct at issue; (2) whether the conduct is discretionary or ministerial and, if ministerial, whether any ministerial duties were violated; and (3) if discretionary, whether the conduct was willful or malicious." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014). We first "identify the specific conduct at issue." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 656 (Minn. 2004.)

"A duty is discretionary if it involves individual professional judgment that necessarily reflects the professional goal and factors of a situation." *Shariss v. City of Bloomington*, 852 N.W.2d 278, 281 (Minn. App. 2014) (quotation omitted). The discretion must be more than what is required for the performance of a ministerial duty. *Alexandria Accident*, 561 N.W.2d at 549. A ministerial duty is an "absolute, certain, and imperative duty, involving merely execution of a specific duty arising from fixed and designated facts." *Id.* (quotation omitted). "[T]he mere existence of some degree of judgment or discretion will not necessarily confer common law official immunity; rather, the focus is on the nature of the act at issue." *Shariss*, 852 N.W.2d at 282 (quotation omitted). "[A]lmost any act involves some measure of freedom of choice." *Schroeder*, 708 N.W.2d at 507.

To determine whether an act is discretionary or ministerial, we consider whether the action occurred pursuant to a policy that permitted discretionary decision-making and the "nature, quality, and complexity" of the decision. *See id*. at 506-08 (reasoning that the decision to grade a road in the opposite direction of the flow of traffic was a discretionary action done pursuant to a policy allowing that decision, but the decision to operate the grader after sunset without lights was ministerial based on the nature of the act); *Shariss*, 852 N.W.2d at 283 (reasoning that official immunity was not available "when a snowplow driver is not actively engaged in snow-removal operations and performs a discrete act that requires little or no independent judgment" because "the job was simple and definite"); *Alexandria Accident*, 561 N.W.2d at 548-49 (reasoning that official immunity was available when a policy authorized the snowplow driver's actions and the driver "had to assess the existing conditions and rely on his judgment to determine the best time and manner for plowing").

We also consider whether the act should be considered in the context of a broader action. *See Shariss*, 852 N.W.2d at 283 (acknowledging concerns that snowplow drivers may need to make difficult decisions that arise in the "often-hazardous activity of snow removal" and reasoning that when a snowplow operator is not actively engaged in snow removal and "performs a discrete act that requires little or no independent judgment, he or she is obligated to exercise due care"); *Mielke v. Miller*, No. A10-1278, 2011 WL 1236811, at *3 (Minn. App. Apr. 5, 2011) ("To isolate the obligation to keep a proper lookout from the other aspects of protected discretionary snowplow activities would frustrate the very purpose of immunity . . . ."), *rev. denied* (Minn. June 14, 2011); *Gustafson v. Semmer*, No.

A09-1201, 2010 WL 608017, at *2 (Minn. App. Feb. 23, 2010) (reasoning that analyzing a decision to turn around and plow northbound separately from the decision to lift the blade and pull out into the northbound lanes was "too narrow a treatment of the act of plowing . . . an activity that includes multiple discretionary decisions"); *Kelley v. Jerde*, No. A06-898, 2007 WL 1531878, at *4 (Minn. App. May 29, 2007) (rejecting an argument that "construes official immunity too narrowly"), *rev. denied* (Minn. Aug. 21, 2007).[3]

Finally, we are mindful that official immunity is designed to "protect public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties," but that "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 (quotations omitted).

Steele identifies the specific conduct at issue here as LaFavor's failure to stop at the stop sign. We agree with the district court that, as a matter of law, LaFavor's failure to stop at the stop sign was a discretionary act. There is no policy requiring LaFavor to stop at every stop sign. At his deposition, LaFavor testified that he was trained to drive the plow in the safest manner that he could under the circumstances. He also testified that he was taught it is advisable to stop at a stop sign but that it was permissible to roll through with caution "in conditions." In this situation, LaFavor assessed the conditions and decided to continue through the stop sign. LaFavor testified that after he saw the stop sign, he did not think he could stop, but applied the brakes to slow the vehicle down. LaFavor testified

[3] Nonprecedential opinions are not binding authority and are being cited only for their persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).

that he did not want to jam on the breaks and "get into an accident." LaFavor also testified that he could not "see anything" until he was in the intersection. These are discretionary, not ministerial, acts. This undisputed evidence demonstrates that LaFavor exercised his discretion to fulfill the objective of snow removal in what he perceived to be the safest manner possible given the conditions.

Steele argues that in determining the application of official immunity, the conduct at issue must be isolated to the discrete act of running the stop sign and that the district court erred in considering broader context beyond that discrete act. This is not a case where action is discrete and subject to isolation from the broader context. LaFavor's failure to stop at the stop sign was a product of the discretionary decisions he made immediately prior to the collision giving rise to the underlying action. LaFavor was not looking forward as he approached the stop sign because he heard a loud noise he characterized as a "thud" and decided to look into possible causes of that thud while continuing to drive. LaFavor testified that if the plow loses momentum, the driver needs to lift the underbelly to avoid rolling or rocking the plow and getting stuck. LaFavor also testified that the snowplow driver has to "curl the blade back and then back up again, get speed again, and then hit the furrow, which would be the snow underneath the plow and get it moving again." LaFavor's decision to continue driving while looking into the cause of the thud is the reason that LaFavor was not aware of the stop sign until he was far enough into the intersection that he was faced with the additional decision as to whether to slow down or attempt to jam the breaks. We cannot ignore this entire context surrounding LaFavor's failure to stop at the stop sign. A ruling that LaFavor's failure to stop was ministerial would undercut the

purpose of official immunity, because his actions resulted from other decisions that were also discretionary as a matter of law. *See Mielke*, 2011 WL 1236811, at *2; *Gustafson*, 2010 WL 608017, at *2.

This case is unlike others where we concluded that a snowplow driver's actions were ministerial and not discretionary. Steele compares this case to our decision in *Fernow v. Gould*, No. A10-223, 2010 WL 3463694 (Minn. App. Sept. 7, 2010). In *Fernow*, a snowplow crossed into oncoming traffic for an unknown reason. 2010 WL 3463694, at *2-3. The snowplow driver testified that "it was just a freaky deal, the truck took off to the left, and there is no explanation for it." *Id*. at *3 (quotations omitted). We reasoned that there was "no evidence that, at the time of the collision, [the snowplow driver] made decisions regarding speed, time, and manner of plowing." *Id.* Steele seems to argue that whether LaFavor was going to stop at the stop sign was a foregone conclusion because LaFavor did not notice the stop sign until the plow was partially past the stop sign and therefore could not have stopped. But *Fernow* is distinguishable. Although the accident in both cases may have been inevitable, the decision in *Fernow* did not turn on the inevitability of the accident but rather the lack of decision-making by the snowplow driver. *Id.* (reasoning that the snowplow driver made no "decisions regarding speed, time, and manner of plowing"). Although the facts viewed in the light most favorable to Steele establish that the plow was already partially in the intersection when LaFavor became aware of the stop sign, LaFavor still engaged in decision-making. He applied the brakes to slow down and considered pressing the brakes harder but chose not to do so for fear of an accident.

In *Shariss*, we concluded that official immunity was not available because the snowplow driver was "not actively engaged in snow-removal operations" and was "perform[ing] a discrete act that required little or no independent judgment" at the time of the accident. 852 N.W.2d at 283. There, the snowplow driver decided to reverse his plow to make room for a passing school bus while queued for a load of snow to dump at a designated site. *Id.* at 280. Unlike in *Shariss*, LaFavor was plowing at the time of the accident. And the act here was not discrete.

Because LaFavor's failure to stop at the stop sign was a discretionary action as a matter of law, we conclude that the district court did not err by determining that official immunity applied and granting the city's motion for summary judgment.

## III. Summary judgment was appropriate even if the cause of LaFavor's distraction was unknown.

Steele asserts that summary judgment was inappropriate because the cause of the thud is unknown and permitting summary judgment where the cause of the thud is unknown would essentially eviscerate the summary-judgment standard. We disagree.

In support of this argument, Steele again points to *Fernow*, where the snowplow crossed into oncoming traffic for an unknown reason, and we ultimately concluded that official immunity did not apply. 2010 WL 3463694, at *2-3. Steele asserts that the fact that the cause of the thud was unknown makes this case analogous. But unlike the circumstances in *Fernow*, the reason that the snowplow here did not stop at a stop sign is known. LaFavor was investigating the cause of the thud, did not see the stop sign until the plow was partially in the intersection, and continued forward because he concluded that

was a better course of action than slamming on the brakes. And the "unknown" factor in *Fernow* showed a lack of decision-making by the snowplow driver, which is unlike the circumstances in this case, where the undisputed facts establish that LaFavor engaged in decision-making.

Steele also asserts that the purpose of official immunity would be frustrated if summary judgment were permitted because "the exercise of judgment and discretion requires the existence of an identifiable factor." Steele cites no authority for this proposition. Official immunity is designed to "protect public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties," but "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 (quotation omitted). The existence of the thud is not a disputed fact. And the cause of the thud is not a material fact. The existence of the thud caused LaFavor to make choices about how to continue operating the plow. He chose to look around to confirm there was nothing amiss. He chose to continue driving while looking around. He was aware that stopping without correctly lifting the underbelly of the plow could result in getting stuck and that he would need to "curl the blade back and then back up again, get speed again, and then hit the furrow." Even though LaFavor did not know the cause of the sound, and the cause of the sound may not have ever been identified, the fact that the thud occurred caused LaFavor to weigh considerations and make discretionary decisions leading up to the choice not to stop at the stop sign. *See Alexandria Accident*, 561 N.W.2d at 549 (reasoning that a snowplow driver's assessment of conditions and

reliance on his judgment were decisions made with "sufficient discretion to fall within the protection of official immunity"). Thus, the purpose of official immunity is served even if the cause of the thud is not identifiable.

Steele forfeited the factual dispute he raises on appeal and LaFavor's failure to stop at the stop sign was discretionary as a matter of law, regardless of whether the cause of the thud was known. The district court properly determined that official immunity applied, and we affirm the grant of summary judgment.

**Affirmed.**