

IN THE COURT OF APPEALS OF IOWA

No. 6-066 / 05-0224
Filed May 10, 2006

THOMAS J. WALTERS,
Plaintiff-Appellant,

vs.

DANETTE M. BOCKERT,
HEATHER BOCKERT, a Minor,
And THE STATE OF IOWA,
Defendants-Appellees.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, III, Judge.

The plaintiff appeals from the order granting summary judgment and dismissing their action against the State of Iowa for its alleged negligence in the maintenance of a roadway. **AFFIRMED.**

G. William Smits of Gross & Welch, P.C. Omaha, for appellant.

Thomas J. Miller, Attorney General, Robin G. Formaker and Richard E. Mull, Assistant Attorneys General, and Matthew D. Wilber, County Attorney, for appellee-State.

Heard by Zimmer, P.J., and Miller and Hecht, JJ.

HECHT, J.

Thomas Walters filed suit alleging negligence against Heather Bockert, as driver, and Roger and Danette Bockert, as owners, of a vehicle that collided with Walters's vehicle. Walters subsequently amended his petition to add a claim against the State of Iowa alleging the negligence of the State's employees in the maintenance of the shoulder of the highway was a substantial factor in causing the collision. The district court granted summary judgment in favor of the State. Walters appeals from the summary judgment ruling. We affirm.

Background Facts and Proceedings.

A reasonable fact finder could find the following facts from the summary judgment record when that record is viewed in the light most favorable to Walters. On October 15, 2001, the Bockert and Walters vehicles were both traveling westbound on a four-lane, divided highway. The passenger side of the Bockert vehicle encountered the shoulder of the highway. As she attempted to return to the roadway, Heather Bockert lost control of the vehicle she was operating and it collided with the Walters vehicle which veered into the ditch and overturned. Walters suffered a variety of severe injuries including multiple fractures, which eventually required the amputation of a leg.

Heather Bockert and her father Roger returned to the accident scene on October 16, 2001. While there, they observed a rut or depression in the shoulder of the road, with a "scuff" coming out of it. Heather described the rut as about four to six inches deep, eight to twelve inches wide, and between eight and fourteen inches in length. Roger gave a similar description, except that he

believed the rut was “a couple of yards [long] at most.” Heather and Roger surmised the rut caused Heather to lose control just before the collision occurred.

The State filed a motion for summary judgment asserting (1) it had no notice of the alleged defect in the shoulder of the roadway prior to the crash, (2) absence of a genuine issue of material fact suggesting the alleged shoulder defect was a proximate cause of the collision, (3) the State’s immunity pursuant to Iowa Code section 669.14(1) (2001), and (4) the district court lacked subject matter jurisdiction as a consequence of the inadequacy of Walters’s state appeal board claim. The district court concluded “the State’s decisions concerning the shoulder at the site of the accident fall within the umbrella of discretionary function immunity,” and granted summary judgment in favor of the State.

Summary Judgment.

We review rulings on summary judgment for correction of errors of law. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005). Summary judgment is appropriate under Iowa Rule of Civil Procedure 1.981 only when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. We examine the record before the district court in the light most favorable to the party resisting the motion to determine whether any genuine issue of material fact exists and whether that court correctly applied the law. *Wernimont v. Wernimont*, 686 N.W.2d 186, 189 (Iowa 2004). If the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Delaney v.*

Int'l Union UAW Local No. 94 of John Deere Mfg. Co., 675 N.W.2d 832, 834 (Iowa 2004).

Discretionary Function Immunity.

Iowa Code section 669.14(1) provides immunity from

[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an officer or employee of the state, whether or not the discretion is abused.

A panel of this court applied this statute in *Davison v. State*, 671 N.W.2d 519 (Iowa Ct. App. 2003). In that case, the plaintiffs, who had been injured in an auto accident, claimed the State was negligent (1) in failing to perform proper inspections of the highway, (2) in failing to adequately maintain and repair the highway, and (3) in failing to take reasonable measures to warn motorists of the dangerous conditions created by a badly deteriorated roadway.¹ *Davison*, 671 N.W.2d. at 520. We affirmed the district court's conclusion that the State was immune from liability for those claims, and concluded "the [DOT's] decisions on how to inspect and maintain the State's road system involves weighing alternatives and making choices with respect to public policy and planning." *Id.* at 521. Walters contends, however, that *Davison* "does not stand for the proposition that once maintenance procedures have been established, any act or decision in implementing them, or failure to follow them, at the operational level is also immune." However, the planning vs. operational distinction that formerly controlled our discretionary function analysis no longer prevails. *Goodman v. City of LeClaire*, 587 N.W.2d 232, 238 (Iowa 1998).

¹ The plaintiffs claimed the "badly deteriorated roadway" caused a wagon to detach from the vehicle pulling it, which in turn sent the wagon into the path of their vehicle.

The State is entitled to immunity in this case only if it satisfies a two-part test as set forth in *Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S. Ct. 1954, 1958-59, 100 L. Ed. 2d 531, 540-41 (1988). First, the State must show there was an element of judgment or discretion involved in the State's decision. *Graber v. City of Ankeny*, 656 N.W.2d 157, 161 (Iowa 2003). If we find the State did not have discretion in the execution of the particular function, immunity is not available. If, however, we find the State exercised judgment in the exercise of the particular function, then we must determine whether that judgment is the type that the legislature intended to shield from liability when section 669.14(1) was adopted. *Id.* The general rule is clear: liability is the rule and immunity the exception. *Id.* Thus, we will narrowly construe the discretionary function exception.

In his petition, Walters alleges the crash occurred "because of the Iowa Department of Transportation's *improper maintenance* of the highway shoulder in allowing the depression to exist and the failure of the Iowa Department of Transportation to *repair and maintain* the shoulder of the road." (Emphasis supplied). Walters first asserts the negligent failure to repair and maintain the shoulder of the road did not implicate a protected discretionary function because the DOT had promulgated and violated its own maintenance standard. That standard, designated as "function code 634" provides:

Work to correct drop off at the edge of the slab on unpaved shoulders (edge ruts) *should be planned* when the drop off reaches 1 to 1 ½ inch. Generally, a cycle can be determined and planned for each road. This cycle *can be developed from experience* and may be affected by traffic volumes, pavement width, soil conditions, topography, rainfall, etc. Occasional ruts and washes may occur on shoulders from traffic, rain storms and other causes. These

should be repaired *as soon as practical* after the DOT has notification of the condition.

(emphasis added). Walters contends this DOT policy specifically prescribed a shoulder repair standard, eliminated any discretion or choice as to the types and timing of maintenance and repairs, and precluded the State's immunity defense in this case. He reasons that discretionary function immunity generally will not apply when a governmental regulation or policy specifically prescribes a course of action for an employee to follow. Simply put, Walters contends that if the employee's conduct "cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." *Berkovitz*, 486 U.S. at 536, 108 S. Ct. at 1958-59, 100 L. Ed. 2d at 540-41.

We conclude, however, that the DOT's function code was not so complete, specific, and thorough as to eliminate judgments or choices by the State's employees as they made maintenance and repair decisions relevant to this case. Indeed, the function code clearly preserves for DOT employees a great deal of discretion and judgment to plan and schedule their work based on the agency's experience. The substance of the function code expressly acknowledges that numerous factors outside the agency's control affect the need for and timing of shoulder maintenance and repair. In particular, traffic volumes, road width, soil conditions, weather, and other factors influencing the demand for agency resources dictate the agency's expectation that repairs should be undertaken "as soon as practical." This somewhat vague articulation of the window of time for making repairs acknowledges that the incidence of shoulder

defects and the corresponding need for maintenance and repairs may vary from time to time and place to place. The same rather imprecise delineation of the timeline for repairs implies that competing demands upon agency resources will affect the timing of maintenance and repairs. These competing demands are implicitly suggested in the DOT's scheduling guide which documents that 1.8% of its total maintenance hours should be devoted to road shoulder maintenance. In short, we are not persuaded that the DOT policy announced in function code 634 excludes the exercise of judgment by DOT employees. The code clearly does not establish a non-discretionary duty beyond the reach of section 669.14(1).

The question remains, however, whether the district court correctly concluded that the judgment exercised by DOT employees is of the type shielded by statutory immunity. Walters contends that even if the DOT does exercise some judgment in deciding which shoulder defects to repair and when to repair them, such discretion is not of a type the legislature intended to immunize in section 669.14(1). In *Anderson v. State*, 692 N.W.2d 360 (Iowa 2005), our supreme court recently undertook a review of Iowa caselaw that defines the scope of discretionary function immunity. The court noted

[t]he common thread running through [the] decisions defeating the discretionary function immunity [is] the record in each [] case[] did not show the governmental entity based its actions on the required policy considerations, as distinguished from an action arising out of the day-to-day activities of the business of government. Unless a governmental entity can demonstrate that when it exercised its judgment, it genuinely *could have* considered and balanced factors supported by social, economic, or political policies, we will not recognize the discretionary function immunity.

Anderson, 692 N.W.2d at 366 (emphasis added). Thus, our resolution of this issue must focus on whether the State has demonstrated social, economic, or

political considerations could have informed the State's judgment as to when road shoulders will be routinely maintained, the nature and extent of shoulder defects requiring repair, and the timeline on which such repair should be undertaken.

After a careful review of the summary judgment record, we affirm the district court's determination that the State's shoulder maintenance and repair decisions are based on a variety of political and economic factors. Function code 634 and the DOT's scheduling guides reveal that the agency must allocate its limited resources among competing priorities. As we have noted, the agency's scheduling guide has determined that shoulder maintenance and repair can command only 1.8% of its total road maintenance hours. Other road maintenance and repair functions such as those addressed in DOT function codes 612 (joint and crack filling) and 613 (pavement replacement) must be considered and prioritized when allocating limited resources to shoulder maintenance and repair functions. The State has sufficiently demonstrated it could have entertained economic and political considerations as it exercised judgment in the allocation of resources to shoulder maintenance and repair functions. See *Anderson*, 692 N.W.2d at 366 (asking whether the defendant "could have" considered and balanced such factors as it exercised judgment). Accordingly, we affirm the district court's summary judgment ruling.

AFFIRMED.