

CASE NO. A08-750

State of Minnesota
In Court of Appeals

JOAN M. KRIEGER,

Respondent,

vs.

CITY OF ST. PAUL,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

A. Did the Trial Court Err in Denying the City's Claim for Recreational Immunity?

The Trial Court denied the City's claim for recreational immunity. List of apposite cases and statutory provisions: Minn. Stat. § 466.03, subd. 6(e); *Johnson v. State of Minnesota*, 478 N.W.2d 769 (Minn. Ct. App. 1991).

B. Did the Trial Court Err in Denying the City's Claim for Statutory (Discretionary) Immunity?

The Trial Court denied the City's claim for statutory immunity. Apposite authority: Minn. Stat. § 466.03, subd. 6; *Steinke v. City of Andover*, 525 N.W.2d 173 (Minn. 1994).

C. Did the Trial Court Err in Denying the City's Claim for Official Immunity?

The Trial Court denied the City's claim for official immunity. Apposite authority: *Holmquist v. State*, 425 N.W.2d 230 (Minn. 1988); *Bailey v. City of St. Paul*, 678 N.W.2d 697 (Minn. Ct. App. 2004).

STATEMENT OF THE CASE

In her Complaint dated December 7, 2005, which was later filed with the Ramsey County District Court, Respondent Joan Krieger (hereinafter Ms. Krieger or Plaintiff) brought suit against Appellant City of St. Paul (hereinafter City) in regard to a March 3, 2004, accident occurring at the North Dale Recreation Center, 1414 North St. Albans, St. Paul, Minnesota. Plaintiff claimed that while exiting the building in the darkness, she did

not see a hole in the temporary blacktop sidewalk “and fell, catching herself before striking the ground” Plaintiff claimed that the hole in question was either purposefully or inadvertently created by a back hoe during an ongoing construction project. Ms. Krieger asserted that after the above-referenced accident, the City and/or its agents placed an orange warning cone in the area of the hole.

The City filed a Notice of Motion and Motion for Summary Judgment dated June 14, 2007, which was heard on July 16, 2007, by Judge Teresa R. Warner of the Ramsey County District Court. At that time, the City asserted that it was entitled to dismissal of Plaintiff’s lawsuit based upon recreational immunity pursuant to Minn. Stat. § 466.03, subd. 6(e), official immunity and vicarious immunity, as well as an argument that Plaintiff had failed to demonstrate that the City had either actual or constructive notice of a defect in the sidewalk.

By Order and Memorandum dated September 6, 2007, Judge Warner denied the City’s Motion for Summary Judgment in its entirety. A 96. At page 7 of her decision, the Judge noted that Plaintiff had argued that recreational immunity did not apply “. . . because it generally applies to a facility where recreation occurs and not a building whose sidewalk is improperly maintained.” A 102. In rejecting Plaintiff’s argument, Judge Warner at page 8 of her decision commented: “Here, the property is a community Recreation Center that is clearly used for provision of recreational services. A 103. The sidewalk is part of the same property and facilitated the use of the Rec Center. For these

reasons, recreational immunity applies.” Judge Warner in denying the City’s claim for recreational immunity stated that there was a genuine issue of material fact as to whether the alleged gouge or defect in the sidewalk was hidden. At page 9 of her Memorandum, the Court commented as follows:

This Court must view the facts in a light most favorable to Plaintiff. Plaintiff has presented evidence that brings into question the sufficiency of the lighting at the time she tripped and fell. With little to no evidence regarding the gouge itself, this Court cannot conclude, as a matter of law, that the gouge was not hidden or that a brief inspection would have revealed it. This should properly be determined by the trier of fact.

A 104.

Regarding the City’s claim of immunity based upon the doctrine of official immunity, Judge Warner commented at page 10 of her Memorandum as follows:

Plaintiff has not alleged any causes of action against public officials, but appears to have included paragraph 7 in support of her contention that there was insufficient lighting at the Rec Center and that she notified the City of this prior to March 3, 2004. This Court is presently aware of no claims to which official immunity would apply. If this changes, the issue of official immunity may be reconsidered.

A 105.

Regarding Plaintiff’s negligence claim, the Court stated that Plaintiff had met its burden of establishing a *prima facie* case of negligence.

Attached hereto at A 107 is copy of an Amended Scheduling Order dated November 7, 2007, by Judge Steven D. Wheeler of the Ramsey County District Court.

Pursuant to the terms of this Order, all discovery was to be completed by January 17, 2008.

After the completion of discovery, the City filed its Second Motion for Summary Judgment dated January 15, 2008, asserting entitlement to dismissal of Plaintiff's lawsuit based upon discretionary (statutory) immunity, official immunity and recreational immunity. Copies of the City's motion papers are attached hereto beginning at A 109.

The Second Motion for Summary Judgment of the City was heard by Judge Wheeler on February 14, 2008. A 258-282. Ms. Krieger's counsel, Mr. Fluegel, argued regarding the City's recreational immunity defense and agreed that his client had to prove notice to the City of a condition so dangerous and potentially injurious that it might lead to death or serious bodily injury. At pages 15 through 17 of the hearing transcript, Plaintiff's counsel then stated:

Here is what I've got to say about that. Two things. The first, deja vu all over again, because we argued this almost a year ago, I think to Judge Warner, and she concluded there was a fact issue. And the only thing I could really give her is what I will briefly cover with you, and that is that I made the argument that the duty that exists on the part of a landowner is variable based upon the circumstances of who are my entrants, what is the condition of my property, and to what use will it be put.

I might have a higher obligation to mitigate against even minor tripping hazards if I'm aware that my common entrants are elderly, infirm individuals entering in the dark because we cannot afford to light, and that might increase my duty. That seemed to get Judge Warner's attention, because she denied recreational immunity, ruling that there were genuine issues of fact. And that's the only one I argued, so I'm assuming that's what we prevailed on. You would – if you do choose to revisit this issue and not to apply the law of the case –

THE COURT: I'm not going to revisit any issues. Judge Warner is somebody I have high regard for. If this issue was argued to her, it's not going to be – I'm not going to change any decision that she made.

MR. FLUEGEL: It's our point of greatest vulnerability, and I concede that, because there is a published case that says that if you trip over a simple rise in a sidewalk at a recreational facility, all other things being equal – and I really think that's the important operative phrase – it doesn't place the governmental owner on notice that you could fall and die over just a small rise in concrete. And I think that that's the focus of the government here in defending this.

If we could – if that's the rule of law, then why aren't we going to Court on this issue? And I think the answer is because Judge Warner determined that the duty that you have and the obligation to be on notice of risk is variable dependent upon who is entering the property. And our client is an elderly women who taught a sewing course basically. And they're on notice that this recreational facility is not all athletically inclined squash court users. It includes people of her type and nature visiting for that purpose.

A 272-274.

Attached hereto at A 248-257 is Judge Wheeler's April 22, 2008 Memorandum and Order. Regarding the issue of discretionary immunity, Judge Wheeler at page 5 of his Memorandum stated as follows:

In this case, it is St. Paul's position that the professional judgments of its staff architect are the basis for discretionary immunity. However, this is a case where St. Paul made the policy decision to reconstruct the Rec Center and their architect utilized his professional judgment in implementation of that policy. Therefore, discretionary immunity does not apply.

A 252.

Regarding the City's defense of official immunity, Judge Wheeler at page 6 of his Memorandum stated the following:

In its first Summary Judgment Motion, St. Paul claimed official immunity based upon the decisions of its architect Mr. Tourtelotte, concerning the lighting at the Rec Center. In this Motion for Summary Judgment, St. Paul is again claiming official immunity based on the decisions of Mr. Tourtelotte concerning the lighting at the Rec Center. The claim in this Motion for Summary Judgment is the same claim that was advanced in the First Motion for Summary Judgment and Judge Warner denied this claim in her September 6, 2007 Order and that is the law of the case. Therefore, official immunity does not apply in this case.

A 253.

Regarding the City's claim of applicability of the doctrine of recreational immunity, the Court at page 9 stated as follows:

In this case, the alleged cause of the trip is an undefined and unknown depression or defect in the temporary asphalt sidewalk. In her deposition, Plaintiff states '. . . I got maybe a third of the way when my foot and shoe caught in that gap, that open piece . . .'. (p. 23, lines 5-7). There is a question of material fact concerning what, in any, depression or defect was in the temporary asphalt sidewalk at approximately 9:00 p.m. on March 3, 2004. While a raised sidewalk joint has been found not to be an inherently dangerous condition (*See Lois A. Johnson, et al. v. State of Minnesota*, 478 N.W.2d 769 (Minn. Ct. App. 1991), *review denied*, February 27, 1992), because the characteristics of the depression or defect in this case are in question, the Court cannot say as a matter of law that any such depression or defect was or was not likely to cause serious bodily harm. Therefore, summary judgment is not appropriate on that issue.

A 256.

Appellant City filed its Notice of Appeal dated April 30, 2008, regarding its appeal from Judge Wheeler's April 22, 2008 Order. Judge Wheeler's court reporter filed a Certificate of Filing and Delivery dated May 6, 2008, regarding the February 14, 2008 hearing transcript.

STATEMENT OF THE FACTS

According to her deposition taken on December 12, 2007, Joan Krieger taught a crocheting class at the North Dale Recreation Center on March 3, 2004, the date of her accident. A 136. Ms. Krieger stated that during the fall session of 2003, there was a temporary asphalt sidewalk from St. Albans Street to the entrance of the North Dale Recreation Center. A 137. Ms. Krieger confirmed that on six occasions during the fall of 2003, she walked across the temporary asphalt sidewalk “with light.” A 137. Ms. Krieger denied observing any problems with the temporary asphalt sidewalk in the fall of 2003, nor was she aware of any gouge in the sidewalk. A 137.

At page 21 of her deposition, Ms. Krieger testified that prior to March 3, 2004, she did not notice any defects in the temporary asphalt sidewalk. Nor did she notice anything that would constitute a tripping hazard prior to March 3, 2004. A 140.

Regarding the March 3, 2004 accident, Ms. Krieger stated that all of her students left and then she turned out the lights, closed the door and walked out of the building carrying a suitcase in her left hand and a purse in her right hand. “And I started walking down here until I got maybe a third of the way when my foot and shoe caught in that gap, that open piece, and I bent forward and – to prevent myself from falling and probably breaking my glasses – I had this heavy bag in my hand – and I jerked myself back so I wouldn’t fall. And being embarrassed that I did that, I looked around to see if anybody was watching and I went on to my car and drove home.” A 140. At page 26 of her

deposition, Ms. Krieger was asked if she actually saw the defect in the sidewalk on the date of her accident. A 141. She agreed that she never saw it on March 3, 2004. Ms. Krieger also agreed that she never investigated the defect in the sidewalk following her accident, nor did she have her husband investigate for her. A 141.

Ms. Krieger was questioned as to whether she knew if any one other than herself had complained of any problems with the temporary asphalt. Her response was "I haven't heard of any." A 142. Ms. Krieger was asked if there were any photographs that were taken of the temporary asphalt sidewalk in question that showed the defect. Ms. Krieger denied the existence of any photographs of the alleged defect. A 142.

Ms. Krieger stated that she may have been told by her husband that a red or yellow safety cone was put on the spot where she fell after her accident. A 142.

Ms. Krieger was next shown as her deposition Exhibit 5, a June 22, 2004 letter from her grandson Jerome Krieger, Director of the North Dale Recreation Center, which indicated that she informed him on June 22, 2004, regarding her accident. A 176. When asked if it was true that her notice of the accident to the City would have occurred five or six weeks after her accident of March 3, 2004, Ms. Krieger testified as follows:

I didn't tell anybody right away. That was the 3rd, and I was breaking in new shoes and I blamed my back pain and leg pain on my new shoes. And I went back to Tillges on the 10th and I said – blame my shoes to them and they said, well we'll try a different pair of shoes so they gave me a different pair of shoes and I went back on the 12th and he said it can't be the shoes; you must have fallen or hurt yourself. And then I thought back to what happened. And I was so embarrassed because it happened, I didn't want to tell anybody. And I didn't tell Jer right away either.

A 143.

According to the June 22, 2004 letter from Jerome Krieger, Ms. Krieger “stumbled off the right edge of the blacktop pathway. A 176. She said she didn’t fall to the ground, but was able to catch herself from completely falling. However, she did not notify my staff or anyone else until at least five or six weeks after it had happened.” a 176

Plaintiff’s Deposition Exhibit 6 was a handwritten Notice of Claim dated July 26, 2004. A 177. According to this Notice, Ms. Krieger indicated that on March 3, 2004, the following occurred: “No lights outside No. Dale Rec Center. Blacktop walk had a hole and I stepped in it. I jerked heavy bag in left hand to prevent me from falling. We talked to Mayor Kelly at district meeting about getting outdoor lights. I was afraid one of my ladies from class would get hurt.” A 177. On the second page of this document, Ms. Krieger drew a diagram of the alleged hole. A 178. She was then questioned as follows:

Q. And would it be a fair statement that what you’ve depicted there is once again based upon not what you actually saw but what you felt during that accident event itself; Right?

A. Right.

A 145.

Joan Krieger was questioned regarding her answer to the City’s Interrogatory No. 8 in which she stated that employees of Defendant Larson Contracting, Inc., which performed work at the North Dale Recreation Center construction project, made or created a gouge or hole in the temporary bituminous sidewalk that constituted a hazard.

A 148. Ms. Krieger was then asked where she got the information that the gouge or hole in the sidewalk was created by use of a back hoe. She responded: "My husband saw them." A 148.

Ms. Krieger indicated that she did not know how the defect that caused her to stumble on March 3, 2004, was created, when it was created, or how long it had been in existence prior to her accident. A 149.

Attached as Exhibit 7 to Plaintiff's Deposition is a First Report of Injury which lists a date of claimed injury of March 3, 2004. A 179. This form states that Ms. Krieger advised her employer of this injury on June 8, 2004. This document lists a description of the accident as follows: "Joan was leaving No. Dale Rec Ctr after teaching her community ed class. No. Dale's outside grounds is/was under construction. Joan fell or stumbled on an uneven part of the walkway." A 179.

Ms. Krieger was questioned regarding her deposition Exhibit 8, a November 20, 2003 letter from Como Community Council Chairman Mark Rindfleisch to Brian Tourtelotte, City Architect. A 180. In said letter, Mr. Rindfleisch noted that there were no working lights around the new North Dale Recreation Center and requested that action be taken immediately to install either permanent lighting or temporary lighting. A 180.

Ms. Krieger recalled that around Christmas 2003, she talked to Mayor Kelly and his aide Mr. Johnson recommending that the City have some lights for the Winter Carnival Junior Royalty event that was held in January 2004. A 149-150.

Attached as Exhibit 9 to Plaintiff's deposition is a December 9, 2003 letter from Brian Tourtelotte to Mark Rindfleisch responding to Mr. Rindfleisch's November 20, 2003 letter. A 181. In pertinent part, Mr. Tourtelotte's letter states as follows:

I spoke today with Sue McColl about the concern for safe lighting near their entryway to the new building. As I understand it, the concern was expressed at a time you conducted a meeting at North Dale when the exterior lights were not functioning. In fact, we were having difficulty for some time trouble shooting the problem with the exterior lights. We believe they are now fixed and have not experienced any problems with them recently.

I visited the site Friday, December 5, and found that the combination of the lights at the entry, the exterior lights on the gym wall bumpout, and the streetlight at the intersection of North St. Albans and Parkview Avenue do a reasonable job of lighting the entry area. This will be much improved when the site lighting is completed. But for right now, I believe that the lighting is adequate.

A 181.

In regard to Mr. Tourtelotte's December 9, 2003 letter, Ms. Krieger testified that the streetlights at the intersection of North St. Albans and Parkview Avenue were on but didn't "cover" the long blacktop walk at that time. A 152.

Attached as Exhibit B to the City's Notice of Motion and Motion for Summary Judgment dated January 15, 2008, is a condensed copy of the deposition of Gerald Krieger. A 200-210. At page 10 of his deposition, Mr. Krieger agreed that he frequently drove his wife to the North Dale Recreation Center for her knitting and crocheting classes that began at 7:00 p.m., and that he would customarily pick her up when her classes came to a close at 9:00 p.m. A 202. Mr. Krieger stated that while waiting to pick his wife up

from her classes, he would normally park his vehicle in such a way so that the headlights would shine over the front entrance to the Rec Center. A 203. Mr. Krieger testified that he informed Brian Tourtelotte prior to his wife's accident that the exterior of the building did not have any lighting. A 203-204.

Regarding Plaintiff's claim that construction equipment may have caused the alleged defect in the temporary sidewalk, Mr. Krieger was questioned as follows:

Q. Mr. Krieger, did you ever see any type of Bobcat or Bobcat-like equipment cause a gouge or some type of defect in the temporary asphalt?

A. Yes.

Q. And when was that?

A. I don't know the date.

Q. Was that before or after your wife's accident?

A. It was after.

Q. And why is your recollection indicating to you that it was after?

A. Because they put an orange cone over that asphalt so nobody else would trip on it.

A 204.

The first Affidavit of Brian Tourtelotte dated June 14, 2007, was submitted by the City in Support of its initial Motion for Summary Judgment. A 63-69. In his Affidavit, Mr. Tourtelotte indicated that he was a Landscape Architect III employed by the Parks and Recreation Division of the City of St. Paul. He noted that he was licensed by the

State of Minnesota as a landscape architect and that his duties included design and project management of highly complex development projects. A 63.

Mr. Tourtelotte in his initial Affidavit also stated that he was the Project Manager regarding the North Dale Recreation Center construction project. A 64. He noted that the North Dale Recreation Center including the sidewalk where Plaintiff claimed to have fallen was all designated as “park property.” A 64. The witness stated that the basic construction of the Rec Center’s new building was substantially completed on April 15, 2003. A 64. However, construction work continued well into 2005, both in and around the building itself. A 64.

In his June 14, 2007 Affidavit, Mr. Tourtelotte stated that a concern about the amount of exterior lighting at the Rec Center was brought to his attention by letter dated November 20, 2003, from Mark Rindfleisch. A 64.

Paragraph 10 of his June 14, 2007 Affidavit states: “On Friday night, December 5, 2003, I went out to the North Dale Recreation Center to investigate how well lit the building entrance area was.” A 64. Mr. Tourtelotte noted that he responded to Mr. Rindfleisch’s concern by letter dated December 9, 2003, noting that in Mr. Tourtelotte’s opinion the combination of lights at the entry, the exterior lights on the gym wall bumpout and the streetlight at the intersection of North St. Albans and Parkview Avenue did a reasonable job of lighting the area. A 64-65.

Paragraph 13 of Mr. Tourtelotte's June 14, 2007 Affidavit states that he walked on the temporary asphalt walkway to and from the Rec Center many times prior to Plaintiff's alleged accident, and never saw any slipping or tripping hazards or any other such defects in the walkway. A 65.

The third Affidavit of Brian Tourtelotte dated January 15, 2008, which was submitted by the City in Support of its Second Motion for Summary Judgment referenced a January 2004 Winter Carnival Event. A 237-238. Paragraph 7 of Mr. Tourtelotte's Third Affidavit states as follows:

I understand that Plaintiff has implied since additional temporary lighting was added at the new North Dale Community Center in January of 2004 for a Winter Carnival event something akin to this should have been in place on a more permanent basis. I believe that the Winter Carnival organization arranged for this temporary lighting and I understand the reason was because some of the staging and pageantry was being held out by the entrance. It is very common for temporary lighting to be added for such events.

A 238.

Attached to the City's Second Motion for Summary Judgment was the Affidavit of Ruth Schumi dated January 15, 2008. A 243-244. In her Affidavit, Ms. Schumi noted that she was a Park and Recreation Service Area Coordinator at the time of Plaintiff's alleged accident. She noted that her duties included management of various recreation centers including the North Dale Recreation Center. A 244.

Paragraph 5 of Ms. Schumi's January 15, 2008 Affidavit states as follows: "As part of my duties as Service Area Coordinator, I visited the North Dale Recreation Center

approximately three days a week both in the day and in the evening. A 244. From the time the temporary asphalt walkway was put down until March 3, 2004, I walked over the temporary asphalt walkway many times. I did not observe any hole or depression in the asphalt nor did I observe any tripping hazard or other defect on the asphalt itself.” A 244.

STANDARD OF REVIEW

Summary judgment is appropriate when no material issues of fact exist and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Whether recreational, statutory (discretionary) or official immunity apply are questions of law for an appellate court to review without deference to the trial court. *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 786 (Minn. 1989). An order denying immunity is immediately appealable. *McGovern v. City of Minneapolis*, 475 N.W.2d 71 (Minn. 1991). Summary judgment is appropriate when a municipality establishes that its actions are immune from liability. *Soucek v. Banham*, 503 N.W.2d 153, 160 (Minn. Ct. App. 1993).

ARGUMENT

1. **The Trial Court Erred in Denying the City's Claim for Recreational Immunity.**

Appellant City of St. Paul is immune from Respondent Joan Krieger's negligence claims based upon the doctrine of recreational immunity pursuant to Minn. Stat. § 466.03 subd. 6(e). Said section provides that a municipality is entitled to recreational use immunity from any claim based upon the operation or maintenance of any property owned that is permitted to be used as an open area for recreational purposes or for the provision of recreational services if the claim arises from a loss incurred by a user of recreational property or services. The statute goes on to state that nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person. Accordingly, a municipality is entitled to recreational-use immunity unless its conduct would entitle a trespasser to recover damages against a private person. *Schaffer v. Spirit Mountain Recreation Area Auth.*, 541 N.W.2d 357, 360 (Minn. Ct. App. 1995).

In the case entitled *Stiele v. City of Crystal*, 646 N.W.2d 251 (Minn. Ct. App. 2002), the Court of Appeals ruled that the municipality was immune based upon the recreational immunity doctrine. The court confirmed the applicability of the general trespasser standard found in § 335 of the Restatement (Second) of Torts (1965) which provides as follows:

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if (a) the condition (I) is one which the possessor has created or maintains and (ii) is to his knowledge, likely to cause death or serious bodily harm to such trespassers and (iii) is of such a nature that he has reason to believe that such trespassers will not discover it and (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

The *Stiele* court indicated that a plaintiff must establish all elements of § 335 in order to defeat an immunity claim. *Stiele*, 646 N.W.2d 255.

In this case, Plaintiff has alleged that on the evening of March 3, 2004, she lost her balance but did not fall as the result of stepping on a gouge in a temporary bituminous walkway leading from the North Dale Recreational Center. Plaintiff has alleged that she complained to the Mayor's Office prior to her accident about a need for exterior lighting at the building. She asserted in paragraph 7 of her Complaint that despite actual notice to the City of the hazard posed by the absence of adequate exterior lighting, the City allowed a contractor it had hired to create hazards at the site of the building grounds including what is describe in paragraph 8 as a "hole in the temporary blacktop sidewalk." A 2-3. Plaintiff alleged in paragraph 10 of her Complaint that after her accident, the City or its agents placed an orange warning cone in the area of the alleged hole. A 3-4. Plaintiff maintains the City should have placed an orange cone as a reasonable means of warning to Plaintiff prior to her accident.

Plaintiff has a duty in this case demonstrate that there was a hazard or defect present regarding the temporary sidewalk. Here, Plaintiff admitted that she was not aware of a hazard or defect in the temporary sidewalk prior to her accident. Plaintiff states that she “felt” but never actually saw the alleged defect. Plaintiff never provided a description of the defect or alleged gouge. Plaintiff did not photograph the alleged defect nor did she otherwise investigate her claim that a defect caused her to lose her balance on the date of her accident.

Plaintiff’s husband Gerald Krieger indicated that he saw a Bobcat create a gouge in the temporary sidewalk after the accident occurred. A 204-205. He further stated that following his wife’s accident an orange warning cone was placed in the area of the alleged gouge. A 204. Mr. Krieger admitted that he never took photographs of the alleged dangerous condition. A 205.

After the City brought its first Motion for Summary Judgment, Plaintiffs submitted an Affidavit from a Raymond Arntson who described himself as a “certified safety professional.” In his Affidavit, Mr. Arntson claimed that a building owner owed a continuous and ongoing duty to ascertain the nature of any tripping hazard and at a minimum place adequate warnings relating to said hazards which might not be visible absent proper lighting. Mr. Arntson also opined that it was more probable than not that the alleged gouge was created by the bucket of a Bobcat type of machinery being scraped across the surface of the temporary walkway. Mr. Arntson’s opinion that a warning cone

should have been placed next to the “gouge” in the walkway presupposes that there was in fact such a defect on the date of Plaintiff’s accident. The record in this case does not support such a conclusion. The fact that Mr. Krieger observed a Bobcat in the vicinity of the temporary sidewalk after the accident occurred, which in his opinion created an unspecified gouge on the walkway, is not probative evidence that there was in fact a defect in existence at the time of the accident.

Plaintiffs’ allegation that the City had a duty to warn not only presupposes the existence of a defect but also assumes that the City had either actual or constructive notice of the defect. The Affidavits of City employees Brian Tourtelotte and Ruth Schumi confirm that the City had no knowledge of a defect or problem with the walkway prior to March 3, 2004. A 63, 79, 237, 243.

While the temporary sidewalk was an artificial condition, Plaintiffs’ also need to establish that the City created or maintained a defect regarding said condition. It is beyond dispute that the City did not create the temporary sidewalk. Nor is there any evidence that the City maintained the sidewalk in a defective condition.

The third factor which Plaintiff has failed to prove pursuant to § 335 is that the alleged gouge was “likely to cause death or serious bodily harm.” The Minnesota Court of Appeals in the case entitled *Johnson v. State of Minnesota*, 478 N.W.2d 769 (Minn. Ct. App. 1991) involved a claim by a plaintiff that she tripped on a raised joint in a sidewalk at a travel information center located at a state rest area. Plaintiff Johnson asserted that

the state failed to warn visitors of the raised sidewalk joint. The Court of Appeals ruled that the trial court had properly granted summary judgment on grounds of governmental immunity since there was no evidence that the state had knowledge that the sidewalk was likely to cause death or serious bodily injury, and the sidewalk was not a concealed danger. *Johnson*, 478 N.W.2d at 773.

In *Johnson*, it was undisputed that state employees knew of the raised sidewalk joint which was not repaired prior to plaintiff's accident. While the court found that the sidewalk was an artificial condition created by the state, and that the state had failed to warn visitors of the raised sidewalk, the court determined that defendant state did not have knowledge that the sidewalk was likely to cause death or serious bodily harm, nor did the court find that the sidewalk was a concealed danger. At page 773 of its decision, the *Johnson* court commented as follows:

The state knew of the condition of the sidewalk. The sidewalk was not in a condition likely to cause death or serious bodily harm. Conditions found to satisfy this requirement generally have inherently dangerous propensities such as a high voltage electrical wire.

See Restatement (Second) of Torts § 335 (1965) (illustration).

The restatement requires the condition to be likely to cause serious bodily harm, not that serious bodily harm "might" actually result. The injury suffered does not define the requirement. Otherwise any artificial condition "could be" likely to cause death or serious bodily harm under the right circumstances. The remote possibility that death or serious bodily harm could result any time a person falls does not make a raised sidewalk joint rise to the level of an inherently dangerous condition. The trial court properly found as a matter of law that the raised sidewalk was not likely to cause death or serious bodily harm.

In this case, the alleged gouge or hole was not a condition likely to cause death or serious bodily harm. The mere fact that a person might fall and injure herself as a result of a gouge in the temporary sidewalk is not sufficient to establish this element.

The *Johnson* court also found that the raised sidewalk was not a concealed danger, commenting as follows:

The test is not whether the injured party saw the danger, but whether it was in fact visible. *Munoz v. Applebaum's Food Market, Inc.*, 293 Minn. 433, 434, 196 N.W.2d 921, 922 (1972) (test for higher invitee level of duty). When a brief inspection would have revealed the condition, it is not concealed. *Watters*, 354 N.W.2d at 851. While the state did not call attention to the raised joint by a posted warning, it was not concealed. Appellant has not raised any facts to the contrary, and admits not looking down as she walked over the sidewalk joint. The trial court properly found the raised sidewalk joint was not a concealed condition.

Johnson, 478 N.W.2d at 773.

In this case, Plaintiff will undoubtedly argue that the alleged gouge was concealed because of the time of night. In her Complaint, Plaintiff alleged the absence of adequate exterior lighting which allowed building contractors to create hazards at the site. The Minnesota Supreme Court in the case entitled *Bojko v. City of Minneapolis*, 154 Minn. 167, 168, 191 N.W. 399, 400 (1923) stated the general rule as follows:

The authority conferred upon defendant to light its streets and other public places is governmental in character, is permissive, not made an absolute duty and a negligent performance thereof, or a failure to perform at all, does not render the municipality liable in damages. *Miller v. City of St. Paul*, 38 Minn. 134, 36 N.W. 271 (1888); *McHugh v. City of St. Paul*, 67 Minn. 441, 70 N.W. 5 (1897).

Here, Plaintiff walked on the temporary asphalt sidewalk leading to the Rec Center on six occasions in the fall of 2003 when it was light out. She did not observe any gouge or any other defect in the sidewalk during those incidents. A 137.

Plaintiff's counsel has previously argued to the Court as evidenced by the hearing transcript of the February 14, 2008 Motion hearing before Judge Wheeler that an alleged tripping hazard can produce a serious injury particularly where there are elderly visitors to the site. However, Plaintiff cannot produce any legal authority for the proposition that a subjective standard must be applied based upon the alleged physical infirmity of the Plaintiff.

In fact, the *Johnson* case cited above rejected such an argument. As stated, the court indicated that the rule required Plaintiff to prove that the condition was likely to cause serious bodily harm, not that serious bodily harm "might" actually result, stating: "The injury suffered does not define the requirement. Otherwise, any artificial condition 'could be' likely to cause death or serious bodily harm under the right circumstances." *Johnson*, 478 N.W.2d at 773. In the present case, Plaintiff Krieger did not actually fall down but merely stumbled before regaining her balance. Even if this Court were to assume the Plaintiff has demonstrated that there was a gouge on the temporary sidewalk caused by the scraping of a Bobcat that caused her to trip on March 3, 2004, the record does not support a finding that said condition was likely to cause serious bodily harm or death as required by law. Therefore, the City is entitled to an order reversing the trial

court denial of recreational immunity and affirming the City's entitlement from suit based on that defense.

2. **The Trial Court Erred in Denying the City's Claim for Statutory (Discretionary) Immunity.**

In her Complaint, Plaintiff alleged in paragraph 6 that she advised the Mayor's Office prior to her accident about the need for exterior lighting at the building in question.

A 2. In paragraph 7 of her Complaint, Plaintiff states that despite the actual notice of the hazard posed by the absence of adequate exterior lighting, the City allowed contractors it hired to create hazards at the site of the building grounds during the course of construction "without adequate lighting or other reasonable means to alert entrance of the building to adequately detect hazards in the walking surface of the building's grounds as they traverse from the building to their cars in the adjoining parking lot." A 2-3.

Paragraph 9 of Plaintiff's Complaint indicates that Plaintiff "in the darkness" did not see the hazard of the alleged hole and fell, catching herself before striking the ground. A 3.

Minn. Stat. § 466.03, subd. 6 precludes liability against a municipality against any claim based upon the performance or failure to perform a discretionary function or duty, whether or not the discretion is abused. The discretionary function exemption or statutory immunity from tort liability recognizes "that the courts, through the vehicle of a negligence action, are not the appropriate forum to review and second-guess the acts of government which involve 'the exercise of judgment or discretion.'" *Cairl v. State*, 323

N.W.2d 20, 23 (Minn. 1982) (quoting *Susla v. State*, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976)).

The Restatement of Torts sets forth the policy underlying the discretionary immunity doctrine as follows:

The basis of the immunity has not been so much a desire to protect an erring officer as it has been a recognition of need of preserving independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits. This, together with the manifest unfairness of placing any person in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight, has led to a general rule that tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function.

Restatement (Second) of Torts § 895D at comment 6.

Discretionary immunity protects the government only when it can produce evidence that its conduct was of a policy-making nature involving social, political or economic considerations, rather than merely professional or scientific judgments. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994).

In this case, Plaintiff has not contended that there was a code violation regarding lighting because there is no evidence supporting a code violation. As stated above, the general rule in the State of Minnesota is that a municipality has no duty to light any area within the City. Rather, Plaintiff second-guesses the City's design specifications for temporary exterior lighting while the new North Dale Recreation Center was under

construction. Plaintiff has not defined by expert testimony or otherwise what the lighting should have been but merely asserts that it was inadequate. Plaintiffs' claim is barred by the discretionary immunity doctrine pursuant to Minn. Stat. § 466.03, subd. 6.

Brian Tourtelotte, the City's architect, used his professional judgment in weighing financial and economic considerations, and further weighed the harm and benefits for persons, i.e. the social effects, of temporary lighting and concluded that the interior lighting illuminating the exterior and the street lighting was sufficient given the use of the building. *See* A 63, 79, 237. Mr. Tourtelotte's decision squarely falls within the discretionary immunity category. *See Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1998).

While Plaintiff has not amended the assertions contained in her Complaint and Amended Complaint relating to the alleged inadequate lighting, her counsel has most recently asserted to the trial court that Plaintiff's fundamental claim was not for lack of adequate lighting. Instead, Plaintiff asserts that there was a duty to warn of tripping hazards which would not be visible absent proper lighting. In particular, Plaintiff has argued that an orange cone should have been placed in the vicinity of the alleged defect. Even assuming for the sake of argument the existence of a defect of which the City was aware prior to Plaintiff's accident, Plaintiff has alleged that she was proceeding in darkness at the time of her stumble. Under these circumstances, the placement of a warning cone may well have created a larger unobserved hazard for Plaintiff to encounter.

Under these circumstances, Plaintiffs' lawsuit against the City should be dismissed based upon the doctrine of statutory (discretionary) immunity.

3. **The Trial Court Erred in Denying the City's Claim Based Upon the Doctrine of Official Immunity.**

As discussed above, Plaintiff Krieger claims that the City was negligent in inadequately lighting the temporary asphalt sidewalk area. Official immunity bars this negligence claim against the City.

“Official immunity applies when the public official’s conduct involves the exercise of discretion, but it does not protect ministerial acts or malicious conduct.” *Bailey v. City of St. Paul*, 678 N.W.2d 697, 700 (Minn. Ct. App. 2004) (citing *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998)). Professional decisions made by professionals and project supervisors are discretionary for purposes of official immunity. *Ireland v. Crow’s Nest Yachts, Inc.*, 552 N.W.2d 269 (Minn. Ct. App. 1996) (engineers deciding placement and alteration of road signals); *Monnens v. Speeter, et al.*, No. A04-801, 2004 LEXIS 1485 (Minn. Ct. App. Dec. 28, 2004), unpublished decision attached at A 34 (decision of project supervisor on how to replace road service). “If official immunity applies to a public official’s conduct, then vicarious official immunity will generally apply to the government employer.” *Bailey*, 678 N.W.2d at 700 (citing *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992)).

As noted in the case law above, the decisions of Mr. Tourtelotte are professional decisions which official immunity protects. A landscape architect is a professional that

generally needs and is given the freedom to exercise his discretion to make the varied and complex decisions which arise when designing and executing a building plan. Mr. Tourtelotte had to weigh engineering, architectural and other professional-related issues on all aspects of the construction including the lighting.

In this instance, Mr. Tourtelotte responded to a specific complaint of inadequate lighting of the exterior at the Rec Center that was made to him in November 2003. As indicated in his December 9, 2003 letter, Mr. Tourtelotte inspected the exterior of the Rec Center on December 5, 2005, and specifically found based upon his inspection as well as his professional judgment that the combination of lights at the entry to the building, the exterior lights on the gym wall bumpout, and the streetlight of the intersection of North St. Albans and Parkview did a reasonable job of lighting the area. Mr. Tourtelotte's determination in this regard was discretionary not ministerial. Mr. Tourtelotte's professional judgment relating to the exterior lighting at the Rec Center is entitled to legal protection pursuant to the doctrine of official immunity. As Mr. Tourtelotte's discretionary decision was made without malice, his employer City of St. Paul is also protected from suit under the doctrine of vicarious official immunity.

CONCLUSION

Appellant City of St. Paul is entitled to dismissal of Plaintiffs' lawsuit against it based upon recreational immunity pursuant to Minn. Stat. § 466.03, subd. 6(e). The record in this case establishes that the City had no notice of a dangerous condition likely to cause death or serious bodily injury. In addition, the City is entitled to immunity to suit based upon statutory (discretionary) immunity pursuant to Minn. Stat. § 466.03, subd. 6. Finally, Plaintiffs' lawsuit against the City should be dismissed based upon the doctrine of official immunity as well as the doctrine of vicarious official immunity.

Date: June 5, 2008

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