STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0254

Morgan Goetz,
Respondent,

vs.

Independent School District No. 625,
St. Paul Schools,
Appellant.

Filed January 6, 2009
Reversed
Johnson, Judge

Ramsey County District Court
File No. 62-CV-07-1327

James S. Ballentine, William E. Jepsen, Schwebel, Goetz & Sieben, P.A., 5120 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2246 (for respondent)

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Fourteen-year-old Morgan Goetz was injured while performing a difficult gymnastics maneuver in an educational program offered by Independent School District No. 625. She later sued the school district for negligence. The school district moved for

summary judgment on the ground that it is entitled to recreational-use immunity, but the district court denied the motion. We conclude that the school district is entitled to recreational-use immunity and, therefore, reverse.

FACTS

Goetz began participating in gymnastics programs when she was five or six years old, and it appears from the record that she is a fairly skilled gymnast. She attempted the difficult Tsukahara vault for the first time in the autumn of 2001. When performing a Tsukahara vault, a gymnast runs along a long mat, jumps off a springboard, does a half twist, pushes off a pommel horse with her hands while upside down, does one and a half flips, and lands on her feet facing the horse.[1] During the 2001-2002 school year, Goetz performed the Tsukahara vault somewhat regularly; she did so at as many as three practices per week, approximately 10 times each practice session. Goetz also performed the Tsukahara vault approximately 20 times in competitions during that period, sometimes without a spotter.

In the summer of 2002, when she was 14 years old, Goetz participated in a community-education gymnastics program sponsored by the school district. On July 24, 2002, she performed the Tsukahara vault for the third time that summer. On her first attempt, Goetz under-rotated but managed to land on her knees. According to Goetz, one of her coaches asked her whether she would like to perform the vault again and whether

[1] The school district cited a video of Mitsuo Tsukahara performing his namesake vault at the 1976 Olympics. *See* http://www.youtube.com/watch?v=8TmYqSOYZr0 (last visited Dec. 16, 2008). Goetz did not object to the citation. We found the video to be helpful.

she needed assistance. Goetz responded by telling the coach that she did need assistance. When Goetz attempted the vault a second time, the coaches did not provide any assistance. Goetz under-rotated, landed on her head, and suffered injuries that are not described in detail in the summary judgment record.

Five years later, in July 2007, Goetz commenced this action, alleging that the school district was negligent because the gymnastics program staff acted "negligently, carelessly, and recklessly." In November 2007, the school district moved for summary judgment, arguing that it was entitled to recreational-use immunity under Minn. Stat. § 466.03, subd. 6e (2008), and also arguing that Goetz's claim was barred by the principle of assumption of risk. The district court denied the motion. The school district appeals.

D E C I S I O N

The school district argues that the district court erred by denying its motion for summary judgment on the issue of recreational-use immunity. An order denying summary judgment based on an assertion of immunity is immediately appealable. *McGovern v. City of Minneapolis*, 475 N.W.2d 71, 72 (Minn. 1991). When reviewing an order denying summary judgment on immunity grounds, an appellate court will conduct a de novo review to determine "whether there are genuine issues of material fact and whether the lower court erred in applying the law." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004).

A municipality generally is liable for the tortious conduct of an employee if the employee was acting within the scope of his or her employment. Minn. Stat. § 466.02

(2008). A municipality, however, has recreational-use immunity for claims based on "the construction, operation, or maintenance of any property" owned by the municipality that is intended for recreational use, except that the municipality remains liable "for conduct that would entitle a trespasser to damages against a private person." Minn. Stat. § 466.03, subd. 6e. The recreational-use immunity provided by this statute applies to a school district. Minn. Stat. § 466.01, subd. 1 (2008).

In the district court, Goetz argued that the school district was not entitled to recreational-use immunity. Goetz relied on section 324A of the Restatement (Second) of Torts, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965). The district court agreed with Goetz's theory and denied the school district's motion for summary judgment.

On appeal, however, Goetz has abandoned section 324A and instead focuses her argument on section 336 of the Restatement, which provides:

> A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.

Restatement (Second) of Torts § 336 (1965). In response, the school district argues that Goetz did not sufficiently preserve the issue, that the Minnesota courts have not adopted section 336 in the context of recreational-use immunity, and that section 335 is the applicable standard for the trespasser-liability exception to recreational-use immunity. Section 335 provides:

> 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
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> (a) the condition
>
> (i) is one which the possessor has created or maintains and
>
> (ii) is, to his knowledge, likely to cause death or seriously 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.

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

We need not consider whether Goetz properly preserved her argument for the trespasser-liability exception to recreational-use immunity, or whether section 335 or

section 336 is the more appropriate source of reference for the exception, because, in light of the applicable caselaw and the undisputed facts of this case, no trespasser exception applies. That is the holding of *Lloyd v. City of St. Paul*, 538 N.W.2d 921 (Minn. App. 1995), *review denied* (Minn. Dec. 20, 1995), in which the plaintiff, who was seated in a paddle boat on Como Lake, was injured because a city employee jumped onto the boat to free it from the dock. *Id*. at 922. This court concluded that "neither section 335 nor section 336 should be used in this case because the trespasser exemption itself is inapplicable." *Id*. at 923. We reasoned that the trespasser exception "appl[ies] to cases involving property marred by some hazard" but not to "a case of allegedly negligent conduct *unrelated to the condition of the park property*." *Id*. In short, recreational-use immunity applies to "the construction, operation, or maintenance of any property" that is owned by a municipality and is recreational in nature, Minn. Stat. § 466.03, subd. 6e, but the trespasser exception does not extend to the "operation" of recreational services that are provided to the public on such property, *Lloyd*, 538 N.W.2d at 923-24.

Even if we were to consider Goetz's argument that we should apply section 336 of the Restatement, we would be obligated to reject it and to apply section 335. The supreme court has applied section 335 in two prior cases that concerned the trespasser-liability exception to recreational-use immunity. *See Johnson v. Washington County*, 518 N.W.2d 594, 599-600 (Minn. 1994); *Sirek by Beaumaster v. State, Dep't of Natural Res.*, 496 N.W.2d 807, 810-11 (Minn. 1993); *see also Prokop v. Independent Sch. Dist. No. 625*, 754 N.W.2d 709, 714 (Minn. App. 2008) (applying section 335 to trespasser-liability exception to recreational-use immunity); *Lundstrom v. City of Apple Valley*, 587

N.W.2d 517, 519-20 n.1 (Minn. App. 1998) (applying section 335 and refusing to apply section 336 to trespasser-liability exception to recreational-use immunity); *Zacharias v. Department of Natural Res.*, 506 N.W.2d 313, 319-20 (Minn. App. 1993) (applying section 335 to trespasser-liability exception to recreational-use immunity), *review denied* (Minn. Nov. 16, 1993).

To apply section 335 would lead to the conclusion that, as a matter of law, there is no genuine issue of fact as to the school district's entitlement to recreational-use immunity. Under section 335, "'a landowner will be liable only for failing to exercise reasonable care to warn trespassers about hidden, artificial dangers created or maintained by the landowner.'" *Johnson*, 518 N.W.2d at 599 (quoting *Sirek*, 496 N.W.2d at 810). The vaulting horse may be an artificial condition, but its dangers certainly were not hidden. *See Johnson*, 518 N.W.2d at 599-600 (holding that artificially created outdoor swimming pond contained no hidden dangers); *Zacharias*, 506 N.W.2d at 319 (same); *see also Sirek*, 496 N.W.2d at 812 (holding that highway near trail's end was not hidden danger). This case, like both *Lloyd* and *Johnson*, "is exclusively a negligence claim . . . without a claim of dangerous condition." *Lloyd*, 538 N.W.2d at 924. In this situation, the landowner's actions that are "part of the 'operation' of" the recreational property are protected by recreational-use immunity. *See id.* (quoting *Johnson*, 518 N.W.2d at 600).

Goetz contends that applying *Lloyd* to this case is inconsistent with the supreme court's earlier decision in *Green-Glo Turf Farms, Inc. v. State*, 347 N.W.2d 491 (Minn. 1984). In *Green-Glo*, the plaintiff alleged that its crops were damaged by flooding

caused by an artificial system of shallow pools in the state-owned Carlos Avery Wildlife Management Area, which were designed to provide a habitat for waterfowl and other aquatic animals. *Id.* at 493. The supreme court held that the state[2] was immune from liability for damage to the plaintiff's crops. *Id*. at 494. The supreme court also said that, in certain circumstances that were not present in that case, the state would not be immune from liability for injuries "caused . . . by the state's negligence in carrying out dangerous activities or in maintaining dangerous artificial conditions without warnings." *Id*. *Green-Glo* is distinguishable because the alleged injury in that case was not a personal injury. In addition, the supreme court did not specifically apply section 335 of the Restatement but, rather, referred generally to sections 333 to 339 of the Restatement. *Id*. Here, it is more appropriate to apply *Johnson*, a subsequent supreme court case, which holds that municipalities are immune from liability for their employees' negligence in operational matters associated with recreational property. *Johnson*, 518 N.W.2d at 599-600.

In sum, in light of Goetz's evidence, the school district is, as a matter of law, not liable on the basis of recreational-use immunity.

Reversed.

[2] The caselaw applicable to the recreational-use immunity of the state and the recreational-use immunity of municipalities, as well as the trespasser-liability exception to each doctrine, is interchangeable. *Lloyd*, 538 N.W.2d at 923 n.1.