STATE OF MINNESOTA
IN COURT OF APPEALS
A07-556

Jack Raymond Sandford, et al.,
Respondents,

vs.

City of Hopkins,
Appellant.

Filed April 8, 2008
Reversed
Johnson, Judge

Hennepin County District Court
File No. 27-CV-06-7098

Howard S. Carp, David G. Johnson, Borkon, Ramstead, Mariani, Fishman & Carp, Ltd., 5401 Gamble Drive, Suite 100, Minneapolis, MN 55416 (for respondents)

Ryan M. Zipf, League of Minnesota Cities, 145 University Avenue West, St. Paul, MN 55103 (for appellant)

Considered and decided by Lansing, Presiding Judge; Willis, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Jack Raymond Sandford injured his ankle while skating on an indoor ice rink owned and operated by the City of Hopkins. After he sued to recover damages, the city moved for summary judgment based on recreational-use immunity. The district court

denied the motion. In this interlocutory appeal, the city argues that there are no genuine disputes of material fact on Sandford's elements of proof in light of the city's assertion of recreational-use immunity. We conclude that, as a matter of law, the evidence is insufficient to demonstrate that the condition of the ice rink was likely to cause death or serious bodily harm or that the city had knowledge of such a condition. Thus, we reverse the district court's denial of the city's motion for summary judgment.

FACTS

On October 9, 2004, Anthony DeGuilio rented two hours of ice time at the Hopkins Pavilion, an indoor ice arena owned and operated by the City of Hopkins. DeGuilio hosted a skating party for his daughter's birthday and invited a group of parents and children to join them in general skating and a pick-up game of hockey. Jack Sandford and his son were among DeGuilio's guests.

At about 9:30 p.m., approximately one and one-half hours after the party had begun, Sandford fell and injured his right ankle. He testified in a deposition that when the puck was moving toward the boards on one side of the rink, he "decided to shoot off like a rocket and try to beat around one kid." He testified that after reaching the puck, "it felt like my ankle hit a pothole" and that "something grabbed my ankle." His ankle buckled, he heard a "double pop," and he fell. Sandford later was diagnosed with a broken bone in his ankle.

Sandford testified that the injury was caused by what he described as a "divot" near the side boards that was approximately four to five inches wide. He described the ice as melting or sloping downward toward the side boards along the length of the boards.

He did not inspect the ice before skating and had not noticed the condition along the boards before he fell.

Sandford and his wife sued the city, alleging, in relevant part, that the city was negligent in its maintenance and operation of the rink. The city moved for summary judgment based on recreational-use immunity and vicarious official immunity. The district court denied the motion. The city appeals.

D E C I S I O N

An order denying summary judgment based on an assertion of immunity is immediately appealable because immunity is effectively lost if the case is erroneously allowed to go to trial. *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 Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004).

A municipality generally is liable for the tortious conduct of its employees if the employees are acting within the scope of employment. Minn. Stat. § 466.02 (2004). 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 to be used for recreational services, 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 (2004).

The standard for liability to adult trespassers is set forth in the *Restatement (Second) of Torts* § 335 (1965), which the Minnesota Supreme Court adopted in *Green-Glo Turf Farms, Inc. v. State*, 347 N.W.2d 491, 494 (Minn. 1984). The *Restatement* 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.

Restatement (Second) of Torts § 335.

Accordingly, under the recreational-use-immunity statute, a city may be held liable for its conduct "only if (1) the artificial condition is likely to cause death or serious bodily harm; (2) the landowner has actual knowledge of that danger; and (3) the danger is concealed or hidden from the trespasser." *Lundstrom v. City of Apple Valley*, 587 N.W.2d 517, 520 (Minn. App. 1998). To prevail on a motion for summary judgment, a defendant asserting recreational-use immunity initially must demonstrate facts showing

that the plaintiff is unable to prove the requirements of the trespasser standard of liability. The plaintiff then must show that there are genuine issues of material fact as to whether the defendant's conduct would cause a private person to be liable to a trespasser. *Zacharias v. Minnesota Dep't of Natural Res.*, 506 N.W.2d 313, 320 (Minn. App. 1993), *review denied* (Minn. Nov. 16, 1993).

The district court concluded that genuine issues of material fact exist with respect to each of the three issues. The city challenges the district court's conclusion with respect to each issue.

A. Likelihood of Death or Serious Bodily Harm

The first issue is whether the condition of the ice was "likely to cause death or serious bodily harm" to a person who encounters the condition. *Lundstrom*, 587 N.W.2d at 520. The district court identified certain "dangers posed by sloping ice" that it deemed to be sufficient to satisfy this requirement, namely, "broken ankles and bones, concussions, or other serious bodily harm." The district court did not identify the evidence on which it relied and did not analyze the likelihood of such harm.

On appeal, the city argues that the first requirement has not been satisfied because the condition of the ice does not have "inherently dangerous propensities," as do conditions such as high-voltage power lines or excavations. *Johnson v. State*, 478 N.W.2d 769, 773 (Minn. App. 1991) (citing *Restatement (Second) of Torts* § 335 (illustration)), *review denied* (Minn. Feb. 27, 1992). Conditions with "inherently dangerous propensities" typically present a likelihood of death or serious bodily harm. *Id.* But in *Johnson*, a raised joint in a sidewalk was held to be unlikely to cause death or

serious bodily harm because "[t]he 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." *Id.* Similarly, in *Stiele ex rel. Gladieux v. City of Crystal*, 646 N.W.2d 251 (Minn. App. 2002), a signpost in a park was held to be unlikely to cause death or serious bodily harm. *Id.* at 255.

The conditions on the surface of the ice rink that caused Sandford's injuries are not comparable to the inherently dangerous conditions described in prior cases, such as high-voltage electrical wires or excavations. *Johnson*, 478 N.W.2d at 773. Rather, the condition of the ice is similar to a raised joint in a sidewalk, which has been held to be unlikely to cause death or serious bodily harm. *See id.* The remote possibility that death or serious bodily harm might result from an ice-skating accident due to a flaw or irregularity in the surface of the ice does not mean that it is likely to happen. *See id.*

To determine whether a particular condition on recreational property is likely to cause death or serious bodily harm, we also may consider the frequency with which similar cases arise. In *Unzen v. City of Duluth*, 683 N.W.2d 875 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004), this court noted that the case law was "replete with instances where falling down a flight of stairs has caused death or serious bodily injury." *Id.* at 881. This observation led the court to conclude that a staircase presented a likelihood of death or serious bodily harm where the metal nosing on the edge of a stairstep was slightly higher than the surface of the stairstep. *Id.* at 877.

A review of the case law of this court does not reveal any prior cases in which flaws or irregularities in the surface of an ice-skating rink actually caused death or serious

bodily harm. A survey of case law from other jurisdictions confirms that cases of death or serious bodily harm arising from ice skating are rare. *See* Carolyn Kelly MacWilliam, Annotation, *Liability of Owner or Operator of Skating Rink for Injury to Patron*, 38 A.L.R. 5th 107, §§ 7-8, 12 (1996 & Supp.). It simply cannot be said, as was said in *Unzen*, that the case law is "replete with instances" of the same type of incident causing "death or serious bodily injury." 683 N.W.2d at 881. Thus, we conclude that flaws or irregularities in the surface of an ice-skating rink are unlikely to cause death or serious bodily harm. This is true notwithstanding *Stucci v. City of St. Paul*, 403 N.W.2d 850 (Minn. App. 1987), *review denied* (Minn. May 28, 1987), where a girl cut her hand after she fell while skating. *Stucci* is a different type of case because the girl's fall was not caused by flaws or irregularities in the surface of the ice. Furthermore, the girl's injuries were caused by fragments of broken glass that lay *under* the surface of the ice, which apparently was not sufficiently frozen. *Id.* at 851.

Sandford relies on *Lishinski v. City of Duluth*, 634 N.W.2d 456 (Minn. App. 2001), *review denied* (Minn. Jan. 15, 2002), which concerned the hazards of in-line skating on an outdoor recreational path. *Id*. at 460. The *Lishinski* case, however, did not address the issue whether the condition of the path was likely to cause death or serious bodily harm because that issue was not disputed by the parties. Rather, the disputed issue in that case was whether the unsafe nature of the paved, curving pathway was hidden or concealed. *Id.* Despite the fact that it involved a form of skating, *Lishinksi* does not support a conclusion that the Hopkins Pavilion ice rink was likely to cause death or serious bodily harm. The plaintiff in *Lishinski* was engaged in a different type of skating

on a different type of surface. More importantly, the plaintiff's death was due to the fact that she left the pathway and landed on the rocky shoreline of Lake Superior. *Id.* at 457-58. There is no reason to believe that a similar type of accident is likely to occur at an indoor ice rink.

Sandford also contends that the affidavit of his expert witness is sufficient to prove that the condition was likely to cause death or serious bodily harm. The affidavit merely states, in a conclusory manner, that the ice contained an "inherently dangerous void." This affidavit is insufficient to create a genuine issue of material fact. *See Potter v. Pohlad*, 560 N.W.2d 389, 395 (Minn. App. 1997) (holding that expert affidavit containing only conclusory statements on pertinent issue did not create fact issue precluding summary judgment), *review denied* (Minn. June 11, 1997).

Thus, the evidence is insufficient as a matter of law to prove that the condition of the ice was likely to cause death or serious bodily harm.

B. Knowledge of the Condition

The second issue is whether the city had knowledge of a condition that is likely to cause death or serious bodily harm. *Lundstrom*, 587 N.W.2d at 520. Although we have concluded that the condition of the ice was not likely to cause death or serious bodily harm, we nonetheless will analyze whether the city had knowledge of the risk of death or serious bodily harm, however slight that risk may be.

The district court concluded that the city "had constructive and actual knowledge of the dangers posed by sloping ice near the rink's edge, through its responsibility to maintain safe rink conditions and from skaters' complaints." The city argues that "actual

knowledge" is required and that the record does not contain evidence that the city had actual knowledge of the condition of the ice or the risk, if any, of death or serious bodily harm to persons skating on the rink. This court has held that a plaintiff must prove "actual knowledge" to avoid a finding of recreational-use immunity. *Lundstrom*, 587 N.W.2d at 520; *Cobb v. State*, 441 N.W.2d 839, 841 (Minn. App. 1989); *but see Noland v. Soo Line R.R. Co.*, 474 N.W.2d 4, 6 (Minn. App. 1991) (inquiring whether landowner "realized or should have realized the potential danger" rather than requiring "actual knowledge"), *review denied* (Minn. Sept. 13, 1991).

There is no evidence in the record that the city had actual knowledge of the sloping of the ice along the side boards where Sandford was injured or the propensity of such a condition to cause serious bodily harm. Sandford argues that DeGuilio "repeatedly complained of problems with the edges of the hockey rink." Evidence of prior reports may be used to show knowledge. *See Stiele*, 646 N.W.2d at 255 (noting the absence of prior complaints). The record reveals only one alleged report concerning the condition of the ice along the side boards, and that is a statement that DeGuilio made to an unidentified Zamboni driver three weeks earlier. The record shows that the surface of the ice at the skating rink was "fluid and ever-changing." It is undisputed that the city's practice at the Hopkins Pavilion was to groom the ice thoroughly on a weekly basis. It also is undisputed that the city did not receive any complaints about the condition of the ice on the day of Sandford's accident. Thus, DeGuilio's comment to a city employee three weeks before Sandford's accident did not provide the city with actual knowledge of the condition that caused Sandford's injury on October 9, 2004. Accordingly, even if

there were a likelihood of death or serious bodily harm, the evidence is insufficient as a matter of law to prove that the city had actual knowledge of the condition of the ice or the likelihood of death or serious bodily harm.

C. Whether the Condition was Concealed or Hidden

The third issue is whether the condition of the ice was "concealed or hidden," *Lundstrom*, 587 N.W.2d at 520, in the sense that the condition was "of such a nature that [the city] ha[d] reason to believe that [skaters] will not discover it," *Restatement (Second) of Torts* § 335(a)(iii). The district court reasoned that "the condition of sloping ice at the rink's edge is not visible to the naked eye, and thus hidden from skaters using the ice."

The city argues that the condition was visible because Sandford himself saw it after he fell and because other persons playing hockey during the party also testified that the condition was visible to them after Sandford fell. Sandford argues that there was "reason to believe that [skaters] will not discover" the condition, *Restatement (Second) of Torts* § 335(a)(iii), because he did not notice the condition until *after* he fell. The record also contains evidence that the whiteness of the ice made it difficult to discern the texture of its surface. In short, the evidentiary record on this issue is in conflict such that a genuine issue of material fact exists.

In sum, Sandford has failed to establish a genuine issue of material fact on two issues on which he carries the burden of proof, either of which is fatal to his claim. Thus, the district court erred in denying the city's motion for summary judgment based on recreational-use immunity.

The city also moved for summary judgment on the basis of vicarious official immunity. The district court erroneously applied the separate and distinct concept of statutory discretionary immunity. Because we have concluded that the city is protected by recreational-use immunity, and because there is no meaningful analysis of vicarious official immunity for this court to review, we decline to consider the city's alternative basis of immunity.

Reversed.