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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1358**

Lynn Baker Handelman-Seigel,
Appellant,

vs.

City of Edina,
Defendant,

Independent School District #273,
Respondent.

**Filed May 20, 2019
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CV-17-7211

Thomas F. DeVincke, Malkerson Gunn Martin LLP, Minneapolis, Minnesota (for appellant)

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Considered and decided by Cochran, Presiding Judge; Hooten, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this appeal from a district court's grant of summary judgment dismissing appellant's claim that respondent's negligence caused her to slip and fall, appellant argues

that the district court erred in applying recreational-use immunity under Minn. Stat. § 466.03, subds. 1, 6e, 23 (2018) and the “mere slipperiness” rule. We affirm.

FACTS

On January 31, 2015, appellant Lynn Baker Handelman-Seigel attended a youth basketball tournament at the Edina Community Center (ECC). On her way into the ECC, outside door number 8 of the facility, appellant slipped and fell on a patch of black ice that she described as approximately two basketballs long and one basketball wide. Appellant first thought that she only sprained her ankle and attended the basketball tournament as planned. Appellant later discovered that she had a broken ankle and suffered what she describes as a “serious knee injury.” To address her injuries, appellant asserts that she underwent one surgery and will need “additional surgery.”

In May of 2017, appellant filed suit against respondent Independent School District #273 (ISD #273), which owns and operates the ECC, alleging negligence.¹ In June of 2018, the district court granted summary judgment for respondent, finding that both the “mere slipperiness” rule and statutory recreational-use immunity, Minn. Stat. § 466.03, subds. 1, 6e, 23, shielded respondent from liability against appellant’s claims. This appeal follows.

D E C I S I O N

Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue of material fact and that they are entitled to judgment as a matter of

¹ Appellant also sued the city of Edina and other then-unknown corporations, but subsequently dismissed these other defendants.

law. Minn. R. Civ. P. 56.01. A genuine issue of material fact exists when the nonmoving party presents evidence that creates a doubt as to a factual issue that is “probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). “[T]here must be evidence on which the jury could reasonably find for the nonmoving party.” *Id.* (quotation omitted).

Negligence is the failure to exercise the care that persons of ordinary prudence would exercise under similar circumstances. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). “The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

Statutory recreational-use immunity shields respondent from liability

Generally, school districts are subject to liability for their torts. *See* Minn. Stat. § 466.02 (2018). But the legislature has carved out special exceptions where municipal organizations are granted immunity from specific tort claims, two of which are relevant here. Under Minn. Stat. § 466.03, subd. 6e, municipal organizations are immune from:

Any claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or from any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of park and recreation property or services. Nothing in this subdivision limits the liability of a municipality

for conduct that would entitle a trespasser to damages against a private person, except as provided in subdivision 23.

While Minn. Stat. § 466.03, subd. 23(a), provides immunity against, “Any claim for a loss or injury arising from the use of school property or a school facility made available for public recreational activity.” But Minn. Stat. § 466.03, subd. 23(b) carves out the exception that, “Nothing in this subdivision: (1) limits the liability of a school district for conduct that would entitle a trespasser to damages against a private person.”

Appellant does not dispute that these statutes apply to the instant facts. Instead, appellant argues that the exceptions found in subdivisions 6e and 23(b)(1), which allows liability when a trespasser would be able to recover from a landowner, applies to defeat this immunity.

Under Minnesota law:

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.

Johnson v. Washington Cty., 518 N.W.2d 594, 599 (Minn. 1994) (quoting Restatement (Second) of Torts § 335).

Here, appellant has submitted absolutely no evidence that respondent created the ice, or that respondent had either actual or constructive notice of the ice such that a factfinder could possibly conclude that respondent “maintained” the condition. Appellant claims that the condition was caused by “event goers’ disposing of half full bottles of water on the sidewalk areas at ECC.” But even assuming this is true, appellant did not submit any evidence that respondent knew of or maintained the condition.

In contrast, the school custodian submitted an affidavit declaring that custodial and maintenance staff walk the ECC sidewalks and entryways every day and are trained to treat any accumulation of snow or ice with “ice melt.” This same affidavit also declared that the closest “Snow and Ice Event” that occurred before appellant’s fall happened two days before, and the custodial staff laid down 110 pounds of “ice melt” around the ECC to address any accumulation. This un rebutted evidence can only support the conclusion that, even if the ice was caused by some spectator spilling a water bottle the day of appellant’s fall, respondent did not have actual or constructive notice of the accumulation.²

² Appellant asserted at oral argument that there is a genuine issue of material fact about whether the ice she slipped on formed after the storm on January 29. This argument is forfeited because appellant did not raise it in her initial brief and new theories cannot be raised at oral argument. See *State v. Tracy*, 667 N.W.2d 141, 145 (Minn. App. 2003) (holding in part that a party cannot raise a new argument at oral argument that had not been briefed). Even if appellant had raised the issue in her initial brief, while it does not take much to raise a genuine issue of material fact, appellant needed to have *some* evidence to contradict respondent’s evidence that 110 pounds of ice melt was applied to the sidewalks around the ECC and cleared the area of ice. See *DLH, Inc.*, 566 N.W.2d at 71 (“[T]here must be *evidence* on which the jury could reasonably find for the” nonmoving party)

Appellant cannot meet the requirement in § 335(a)(i) that the artificial condition be one that respondent created or maintained, and therefore cannot show that an exception to statutory recreational-use immunity could apply.³

Affirmed.

(quotation omitted) (emphasis added)). And even if it were true that the ice formed on January 29, appellant has also not submitted evidence that respondent knew of, created, or maintained the condition, as would be required to defeat respondent's statutory immunity.

³ Because we affirm the district court's grant of summary judgment on the grounds that statutory recreational-use immunity applies, we need not address appellant's additional argument that the district court erred when it applied the "mere slipperiness" rule.