

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1830**

Freedom Kerkula, as Trustee for the Next of Kin of Grace Elizabeth Bettie,
Appellant,

vs.

City of Moorhead, et al.,
Defendants,

Minnesota Department of Natural Resources,
Respondent.

**Filed September 11, 2023
Affirmed
Smith, Tracy M., Judge**

Clay County District Court
File No. 14-CV-19-3419

Philip Sieff, Tony Schrank, Robins Kaplan LLP, Minneapolis, Minnesota; and

William L.H. Lubov, Golden Valley, Minnesota (for appellant)

Keith Ellison, Attorney General, Michael Goodwin, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and
Bratvold, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Freedom Kerkula, as trustee for her daughter Grace Elizabeth Bettie's
next of kin, challenges the summary-judgment dismissal of her wrongful-death negligence

action against respondent Minnesota Department of Natural Resources (DNR) on the ground of recreational-use immunity. Kerkula contends that the district court erred in granting the DNR's motion for summary judgment because genuine issues of material fact exist as to whether the trespasser exception to recreational-use immunity applies. We affirm.

FACTS

This is the second appeal in Kerkula's wrongful-death action arising out of the death of her daughter, Grace. *See Kerkula v. City of Moorhead*, No. A20-0657, 2021 WL 669024 (Minn. App. Feb. 22, 2021). Grace drowned at the age of nine in an artificially created swimming pond at Buffalo River State Park while participating in a summer youth program run by the City of Moorhead and the Moorhead Police Department. The pond was owned and operated by the DNR. Because this case comes to us on appeal from summary judgment, the underlying facts are presented in the light most favorable to Kerkula as the nonmoving party. *See Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019).

The Pond

The swimming pond at Buffalo River State Park was originally constructed in the 1930s and was reconstructed between 2001 and 2004 to add a filtration and chlorination system. The pond had a clay liner with sand on top and was filled with water from the Buffalo River. The pond's water was often murky, with limited visibility.

The pond had a zero-depth entry and sloped downwards to a maximum depth of about eight feet in the center of the pond. The water level varied due to shifting sand and evaporation. In addition, the steepness of the slope depended on where a swimmer entered

the pond and how far the swimmer was into the pond. The deeper section of the pond had a steeper slope.

The DNR marked the deeper parts of the pond with ropes and buoys floating on top of the water that were attached to poles fastened to the bottom of the pond. The ropes and buoys enclosed two adjacent areas in the middle of the pond. One area was approximately three to four feet deep, and the other was five to eight feet deep. The ropes and buoys were the same for both sections and did not have depth markings.

Next to the pond, on two lifeguard stands, the DNR placed warning signs that included topographical maps of the pond. The maps included the approximate location of the ropes and buoys and the approximate depths of the pond. According to the park manager, there may have been some discrepancies on the maps because the maps showed that parts of the pond were deeper than they were.

Grace's Death

On June 27, 2018, about 177 children, including Grace, visited Buffalo River State Park as part of the police department's summer youth program. One of the scheduled activities included swimming at the pond.

At the pond, the children were supervised by police department employees and volunteers. The DNR also had three lifeguards present. Before the children were allowed to swim, a DNR park naturalist spoke with the children and their adult chaperones about water safety and features of the pond. She pointed out the ropes and explained that the depth would change to deeper water past the ropes. She also told the children to look at the warning signs posted on the lifeguard stands.

After the children swam for a couple of hours, a child informed a lifeguard and chaperone that she could not find her friend. After searching on land and in the pond, the lifeguards found Grace in the deep part of the pond. Grace was pronounced dead at the scene.

Procedural History

Kerkula, Grace's mother, was appointed trustee for Grace's next of kin and initiated a wrongful-death action against the DNR, the city, and the city's police department. As relevant to this appeal, the DNR moved to dismiss the claim against it under Minnesota Rule of Civil Procedure 12.02(e), contending that it was entitled to recreational-use immunity under the state tort claims act. *See* Minn. Stat. § 3.736, subd. 3(i) (2022). The district court granted the DNR's motion to dismiss. Kerkula appealed, and we reversed the dismissal of the claim against the DNR. *Kerkula*, 2021 WL 669024, at *1. We concluded that Kerkula's complaint alleged sufficient facts to support the trespasser exception to recreational-use immunity and remanded for further proceedings.¹ *Id.* at *5.

Following discovery, the DNR moved for summary judgment, arguing that the undisputed facts established that it was entitled to recreational-use immunity and statutory discretionary-function immunity. Kerkula opposed the motion. The district court determined that there were no genuine issues of material fact and that the DNR was entitled

¹ The city also moved to dismiss Kerkula's claims against it and its police department, but the district court denied its motion. We affirmed that denial in the first appeal. *Kerkula*, 2021 WL 669024, at *7. Kerkula ultimately settled with the city, leaving only the claim against the DNR at issue in this appeal.

to recreational-use immunity. As a result, the district court granted the DNR's motion for summary judgment and dismissed Kerkula's claim.²

Kerkula appeals.

DECISION

Appellate courts review the grant of summary judgment de novo to determine whether the district court properly applied the law and whether there are genuine issues of material fact. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). The reviewing court will view the evidence in the light most favorable to the party against whom summary judgment is granted. *Henson*, 922 N.W.2d at 190. Summary judgment is proper if, based on the record, the moving party shows that “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. The record may include depositions, documents, affidavits, admissions, and interrogatory answers. Minn. R. Civ. P. 56.03(a). A genuine issue of material fact exists “when reasonable persons might draw different conclusions from the evidence presented.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Recreational-use immunity generally protects the state from liability for injuries caused by use of state parks and recreational areas. Minn. Stat. § 3.736, subd. 3(i). The legislature afforded this shield from liability to promote “the preservation of Minnesota’s outdoor recreational resources in light of the growing demand for outdoor recreational facilities.” *Green-Glo Turf Farms, Inc. v. State*, 347 N.W.2d 491, 495 (Minn. 1984)

² The district court did not reach the issue of statutory discretionary-function immunity.

(quotation omitted). Recreational-use immunity “preserves the state’s freedom to manage the areas in the best interests of the state and its citizenry.” *Id.*

Recreational-use immunity is not absolute. The state may still be liable for conduct that would entitle a trespasser to damages against a private person. Minn. Stat. § 3.736, subd. 3(i). In Kerkula’s first appeal to this court, we concluded that the adult-trespasser standard and not the heightened child-trespasser standard applies to this case. *Kerkula*, 2021 WL 669024, at *3-4. Minnesota has adopted the Restatement (Second) of Torts § 335 (1965) as the standard for the adult-trespasser exception to recreational-use immunity. *Johnson v. Washington County*, 518 N.W.2d 594, 599 (Minn. 1994) (applying Minn. Stat. § 466.04, the recreational-use immunity statute for municipalities, which involves the same trespasser-exception analysis under section 335).

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

(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 [sic] 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) Torts § 335. The burden is on the plaintiff to establish the elements to defeat an immunity claim. *Krieger v. City of St. Paul*, 762 N.W.2d 274, 276 (Minn. App. 2009). If a plaintiff fails to submit sufficient evidence to meet any one of these elements of the trespasser exception, recreational-use immunity bars their claim. *See id.* at 278.

Kerkula argues that the district court erred in granting summary judgment in favor of the DNR because there are genuine issues of material fact as to whether the trespasser exception applies. Kerkula argues that the pond contained an artificial condition—a dangerous drop-off³ concealed by murky water—and that the DNR failed to warn about the artificial condition.

“[C]hanges in natural environments do not create an ‘artificial’ condition where the affected terrain duplicates nature, except that an artificial condition will be found if there is some type of trap or concealment.” *Henry v. State*, 406 N.W.2d 608, 611 (Minn. App. 1987), *rev. denied* (Minn. Aug. 12, 1987). Generally, hidden conditions are determined based on “whether the condition was visible, not on whether the injured party actually saw the danger.” *Steinke v. City of Andover*, 525 N.W.2d 173, 177 (Minn. 1994). A condition is not concealed if a “brief inspection would have revealed the condition.” *Johnson v. State*, 478 N.W.2d 769, 773 (Minn. App. 1991), *rev. denied* (Minn. Feb. 27, 1992).

Although water has an inherent danger, the state has been held to be protected by recreational-use immunity for claims in connection with its artificially created swimming

³ Based on Kerkula’s briefing and her explanation at oral argument, Kerkula uses the term “drop-off” to refer to a steep slope where a person in the pond could take a step and unexpectedly find themselves underwater.

ponds when the ponds do not have a hidden dangerous condition beyond water's inherent danger. *See Zacharias v. Minn. Dep't of Nat. Res.*, 506 N.W.2d 313, 319-21 (Minn. App. 1993) (applying recreational-use immunity to wrongful-death action against DNR when child drowned in artificially created swimming pond at Flandrau State Park), *rev. denied* (Minn. Nov. 16, 1993); *see also Johnson*, 518 N.W.2d at 599-600 (applying recreational-use immunity to wrongful-death action against county when child drowned in artificially created pond in Lake Elmo Park Preserve).

The question here is whether the record presents a genuine issue of fact as to whether the Buffalo River State Park swimming pond contained a hidden dangerous condition. Viewing the evidence in the light most favorable to Kerkula, we conclude that it does not. Kerkula contends that the murky water concealed the steeper slope in the pond. The undisputed evidence shows that the pond had a steeper slope in the deeper portion of the pond and that the pond had known clarity issues. But Kerkula's argument that a dangerous condition was hidden does not account for the buoys and the ropes that marked off where the steeper slope in the pond occurred. DNR employees testified that the steeper slope of the pond was past the buoys and ropes. In addition, the topographical maps on the lifeguard stands showed the location of the ropes and the changing depths of the pond. Kerkula did not present any evidence that shows the pond's slope was steeper, or that the pond's depth unexpectedly increased, outside of the area marked by buoys and ropes. Thus, even if the deeper portion of the pond presented a danger beyond the inherent danger of water, the undisputed evidence establishes that the DNR did not have reason to believe that the

trespasser would not discover the danger given the ropes and buoys and the topographical maps.

Under the trespasser exception in section 335, a landowner is liable only “for failing to exercise reasonable care to warn trespassers about *hidden*, artificial dangers created or maintained by the landowner.” *Sirek by Beaumaster v. State, Dep’t of Nat. Res.*, 496 N.W.2d 807, 810 (Minn. 1993) (emphasis added). Because Kerkula did not offer evidence sufficient to create a dispute of fact regarding a hidden dangerous condition, the DNR had no duty to warn and the trespasser exception does not apply. The DNR is thus entitled to recreational-use immunity.

Grace’s death is a tragedy, and we acknowledge her family’s terrible loss. We recognize that the application of recreational-use immunity will prevent recovery from the DNR for Grace’s estate. There is no question that recreational-use immunity has harsh consequences. *See Ariola v. City of Stillwater*, 889 N.W.2d 340, 360 (Minn. App. 2017), *rev. denied* (Minn. Apr. 18, 2017). But when the record yields no genuine dispute that immunity applies, summary judgment must be affirmed.

In sum, because a genuine issue of fact does not exist with respect to whether the trespasser exception to recreational-use immunity applies, the district court did not err by granting summary judgment in favor of the DNR.⁴

Affirmed.

⁴ The DNR argues in the alternative that it is entitled to statutory discretionary-function immunity. Because we conclude that the DNR is entitled to recreational-use immunity, we do not address this alternative basis for affirming summary judgment.