STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0925

Eric Michael Spry,
Respondent,

vs.

City of Wadena,
Appellant.

Filed December 3, 2012
Affirmed
Klaphake, Judge[*]

Wadena County District Court
File No. 80-CV-11-574

Corey J. Quinton, Oppegard, Wolf & Quinton, Moorhead, Minnesota (for respondent)

Rylee J. Retzer, League of Minnesota Cities, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Hooten, Judge; and Klaphake, Judge.

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

KLAPHAKE, Judge

Appellant City of Wadena challenges the district court's denial of its motion for summary judgment based on recreational-use immunity under Minn. Stat. § 466.03, subd. 6e (2010), in a negligence action arising out of injuries suffered by respondent Eric Spry

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

when he was injured by a buffalo at a city park. Because genuine issues of material fact exist as to (1) whether the buffalo or the area surrounding the buffalo enclosure were conditions that the city knew were likely to cause death or serious bodily harm, (2) whether such dangerous conditions were hidden, and (3) whether the city exercised reasonable care to warn the public of such hidden dangerous conditions, we conclude that the district court did not err by denying the city's motion for summary judgment. We affirm.

D E C I S I O N

The district court must grant summary judgment when, based on the entire record, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. We review the district court's decision de novo "to determine whether genuine issues of material fact exist, and whether the district court correctly applied the law." *Savela v. City of Duluth*, 806 N.W.2d 793, 796 (Minn. 2011). In so doing, we review the evidence "in a light most favorable to the nonmoving party." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). "Immunity is a legal question reviewed de novo." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004).

The city has owned and maintained buffalo in Sunnybrook Park since acquiring the park in 1980.[1] On August 20, 2005, respondent visited Sunnybrook Park for the first time. After walking on park trails, respondent disposed of a soda can in a garbage

[1] We recognize that throughout the record the animals are referred to as buffalo, which is an acceptable synonym for the American bison.

container located directly against the fence of the buffalo pen. A few feet from the garbage container, respondent dropped his eyeglasses. Because the grass was long, respondent bent over looking for his eyeglasses, with his head about three feet from the fence of the buffalo pen. Just as respondent found his eyeglasses and prepared to stand up, a buffalo approached the fence and head-butted the left side of his head. Respondent brought a negligence action against the city for injuries he sustained, and the city moved the district court for summary judgment on the basis of recreational-use immunity under Minn. Stat. § 466.03, subd. 6e. The court denied the city's motion, concluding that issues of material fact precluded granting summary judgment on the basis of immunity.

Although a municipality is generally liable for its torts and the torts of its officers, employees, and agents under Minn. Stat. § 466.02 (2010), a municipality is immunized from liability for claims enumerated in Minn. Stat. § 466.03. Section 466.03 subdivision 6e grants recreational-use immunity to municipalities for:

> [a]ny 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.

"For purposes of determining this limited liability under the subdivision, Minnesota has adopted the standard of care owed to a trespasser found in the Restatement (Second) of Torts § 335 (1965)." *Unzen v. City of Duluth*, 683 N.W.2d 875, 879 (Minn. App. 2004),

review denied (Minn. Oct. 27, 2004). Under the trespasser standard, the city "is liable for failure to warn of an artificial condition [it] has created or maintained only if (1) the artificial condition is likely to cause death or serious bodily harm; (2) the [city] 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 succeed on a motion for summary judgment in reliance on recreational-use immunity, the city must demonstrate that the plaintiff is unable to prove the elements of the trespasser standard of liability. *Zacharias v. Minn. Dep't of Natural Res.*, 506 N.W.2d 313, 320 (Minn. App. 1993), *review denied* (Minn. Nov. 16, 1993). Respondent then must show that there are genuine issues of material fact as to whether the city's conduct "would cause a private person to be liable to a trespasser." *Id.* To preclude immunity, respondent must prove that all of the elements in section 335 are satisfied. *Shaffer v. Spirit Mountain Recreation Area Auth.*, 541 N.W.2d 357, 360 (Minn. App. 1995).

It is undisputed that the city maintains the buffalo enclosure at Sunnybrook Park. The city argues that the district court erred in denying its motion for summary judgment because the evidence in the record neither establishes nor creates a material issue of fact on whether the buffalo or the area surrounding the buffalo pen were hidden dangerous conditions that the city knew were likely to cause death or serious bodily harm. We disagree.

Generally, conditions that are likely to cause death or serious bodily harm "have inherently dangerous propensities, such as a high voltage electrical wire." *Stiele ex rel.*

Gladieux v. City of Crystal, 646 N.W.2d 251, 255 (Minn. App. 2002) (quotation omitted). "The Restatement requires the condition to be likely to cause serious bodily harm, not that serious bodily harm 'might' actually result." *Johnson v. State*, 478 N.W.2d 769, 773 (Minn. App. 1991), *review denied* (Minn. Feb. 27, 1992). The injury does not define this requirement because if so, "any artificial condition 'could be' likely to cause death or serious bodily harm under the right circumstances." *Id.* And, the evidence must establish that a defendant had "actual knowledge" about any danger the conditions posed. *Prokop v. Indep. School Dist. No. 625*, 754 N.W.2d 709, 715 (Minn. App. 2008).

In support of its motion for summary judgment, the city provided deposition testimony by Bradley Swenson, the Wadena City Administrator, and Ronald Bucholz, the Wadena Public Works Director, and documents showing that the fence enclosing the buffalo was approved for the purpose of containing the buffalo by the United States Department of Agriculture. Bucholz explained that the fence consisted of woven wire between wooden posts. Bucholz said that the city periodically inspects the fence and repairs the wire and replaces posts as necessary. Posted signs on the fence perimeter stated the following: "FOR YOUR SAFETY, Please Keep A Safe Distance From Fence (15 Ft. Minimum), DO NOT TEASE OR PROVOKE THE ANIMALS." Nevertheless, Bucholz said that he had observed members of the public within 15 feet of the fence. Bucholz never observed buffalo pushing on the fence, but acknowledged that in places the wire was pushed out. Swenson said that he did not know whether buffalo can be dangerous or would be considered a dangerous animal, but that "[a]ny animal is dangerous if you provoke it, I suppose." Bucholz explained that for safety purposes, the

city instructs its employees that they must be accompanied by a loader when entering the pen.

Swenson and Bucholz testified that the city is responsible for the maintenance and placement of the garbage receptacles in the park. Bucholz explained that normally the garbage container at issue is not located directly against the fence. Neither man could provide an explanation for the garbage container's location against the fence on the day respondent was injured.

Viewing the evidence in the light most favorable to respondent, we conclude that this evidence is sufficient to create a question of material fact on whether the city had actual knowledge that the buffalo or the area surrounding the buffalo pen were conditions likely to cause death or serious bodily harm.

The city argues that no evidence demonstrates that the city had actual knowledge that the buffalo or the area surrounding the buffalo pen were conditions likely to cause death or serious bodily harm because before the incident involving respondent, the city received no reports of individuals injured by buffalo or complaints about the conditions of the buffalo pen. "The lack of complaints has been held to be sufficient to demonstrate lack of knowledge." *Prokop*, 754 N.W.2d at 715; *see Steinke v. City of Andover*, 525 N.W.2d 173, 177 (Minn. 1994) (holding no evidence supported that city knew ditch posed serious threat of physical harm, in part, because city received no accident reports or complaints). But the garbage container's location next to the fence on the day of the incident created a different circumstance than previously existed when the garbage container was properly placed in its location away from the fence. Because the facts are

sufficient to support a finding that the city placed a garbage container in an area that the warning signs instructed the public not enter, a reasonable person could infer that the city had knowledge of this dangerous condition that placed park patrons at risk.

The city also argues that the buffalo and the area surrounding the buffalo enclosure were not hidden conditions. Under the trespasser standard, a landowner is liable only if the artificial dangers are hidden. *Steinke*, 525 N.W.2d at 177. "Generally, whether a condition was hidden depends on whether the condition was visible, not on whether the injured party actually saw the danger." *Id.* "When a brief inspection would have revealed the condition, it is not concealed." *Johnson*, 478 N.W.2d at 773. Viewing the evidence in a light most favorable to respondent, we conclude that the placement of the garbage can directly next to the fence, from which a park visitor could reasonably infer that being near the fence is not dangerous, creates a genuine issue of material fact as to whether the buffalo or the area surrounding the buffalo enclosure were hidden dangerous conditions. *Cf. Unzen*, 683 N.W.2d at 877, 880 (holding that dangerous condition of nosing on edge of stair step being slightly higher than surface of stair step was hidden because evidence established that it was difficult to see raised edging).

The city also contends that nothing in the record demonstrates that it failed to exercise reasonable care to warn the public of a dangerous condition. A landowner is

liable to a trespasser if the landowner fails "to exercise reasonable care to warn trespassers about hidden, artificial dangers." *Steinke*, 525 N.W.2d at 177 (quotation omitted). The record shows that the city posted signs along the perimeter of the buffalo fence stating the following: "FOR YOUR SAFETY, Please Keep A Safe Distance From Fence (15 Ft. Minimum), DO NOT TEASE OR PROVOKE THE ANIMALS." And, respondent acknowledged that he read one of these signs. But, the placement of the garbage container next to the fence and Bucholz's acknowledgement that he had observed members of the public standing or walking within 15 feet of the fence raise a genuine issues of material fact as to whether the city exercised reasonable care to warn members of the public of a hidden dangerous condition.

Because the record contains evidence sufficient to raise material issues of fact concerning whether the city knew that the buffalo or the area surrounding the buffalo enclosure were conditions likely to cause death or serious bodily harm, whether the conditions were hidden, and whether the city exercised reasonable care to warn members of the public of such conditions, the district court did not err by denying the city's motion for summary judgment based on recreational-use immunity.

Affirmed.