IN THE COURT OF APPEALS OF IOWA

No. 9-240 / 08-1578
Filed June 17, 2009

**QUYNH DANG, A Minor, by QUI DANG,
Her Father and Next Friend, QUI DANG
and TRANG BUI,**
Plaintiffs-Appellants,

vs.

**DES MOINES COMMUNITY SCHOOL
DISTRICT, HOOVER HIGH SCHOOL,
MEREDITH MIDDLE SCHOOL and
MELISSA BRINKMAN,**
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Plaintiffs appeal from a district court ruling granting summary judgment in favor of the defendants. **AFFIRMED.**

A. Zane Blessum, Winterset, and Catherine K. Levine, Des Moines, for appellants.

Andrew J. Bracken and Jason M. Craig of Ahlers & Cooney, P.C., Des Moines, for appellees.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

Quynh Dang and her parents, Qui Dang and Trang Bui, appeal from a district court ruling granting summary judgment in favor of the Des Moines Community School District, Hoover High School, Meredith Middle School, and Melissa Brinkman. The plaintiffs claim the district court erred in finding Iowa Code section 670.4(12) (2007) exempted the defendants from liability. We affirm.

On January 13, 2006, eleven-year-old Quynh suffered permanent brain damage after nearly drowning in the Hoover High School swimming pool. She was at the pool for an annual pool party sponsored by the school district for Meredith Middle School sixth graders.[1] The event was supervised by three teachers, including Melissa Brinkman, who also acted as a lifeguard for the event.

Quynh's father, individually and on her behalf, and her mother sued the defendants, alleging the school district was grossly negligent in, among other things, "[f]ailing to properly supervise the children in the swimming pool." The defendants filed a motion for summary judgment, asserting Iowa Code section 670.4(12) exempted the school district and its employee from liability. The district court agreed and entered summary judgment in favor of the defendants. The plaintiffs appeal.

Where, as here, the only dispute in an appeal from a summary judgment ruling concerns legal consequences flowing from undisputed facts, our review is

[1] Prior to Quynh's attendance at the party, one of her parents signed a permission slip stating, "I give my son/daughter permission to attend the pool party on January 13th."

limited to whether the district court correctly applied the law. *Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997). We conclude it did.

Iowa Code chapter 670 governs tort liability of governmental subdivisions, including school districts, subjecting them to liability for the torts of their officers and employees unless the tort falls within one of the exemptions spelled out in section 670.4. *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 18 (Iowa 2000); *see also* Iowa Code §§ 670.1(2), 670.2. The exemption at issue in this case is section 670.4(12), which states that the liability imposed by section 670.2 shall have no application to "[a] claim relating to a swimming pool . . . unless the claim is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes actual malice or a criminal offense." Iowa Code § 670.4(12).

The plaintiffs claim this exemption should not be read so broadly as to immunize the defendants from liability in a case involving negligent supervision of school children. However, in *Baker*, our supreme court squarely rejected an "attempt to narrow the statute's focus." 560 N.W.2d at 582. The plaintiff in that case argued section 670.4(12) should not apply when "the claim relates to negligent supervision of municipal employees rather than failure to comply with swimming pool regulations." *Id.* at 581. The court determined that argument was "defeated by the broad language of section 670.4(12). By its very terms, the exemption applies to any 'act or omission' that falls short of actual malice or crime." *Id.* at 582 (quoting Iowa Code § 670.4(12)).

The plaintiffs have not alleged the defendants acted with actual malice or criminally on the day Quynh was injured; in fact, their petition specifically asserts the defendants were grossly negligent in failing to supervise the children in the swimming pool. *Compare Sechler v. State*, 340 N.W.2d 759, 764 (Iowa 1983) (defining gross negligence as "something less than recklessness or wantonness") *with Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 529 (Iowa 2007) (stating actual malice may be shown by "such things as personal spite, hatred, or ill-will"). Rather, the plaintiffs argue the immunity set forth in section 670.4(12) should not apply given the "special relationship [that exists] between a school and its students."

We recognize

> [t]he law charges school districts with the care and control of children and requires the school district to exercise the same standard of care toward the children that a parent of ordinary prudence would observe in comparable circumstances.

Ette ex rel. Ette v. Linn-Mar Cmty. Sch. Dist., 656 N.W.2d 62, 69 (Iowa 2002) (citation omitted). However, our supreme court has previously held in a different context the fact that a negligence claim rests on a special duty does not prevent the extinguishment of that claim when immunity has been granted by statute for such negligence. *See Cubit v. Mahaska County*, 677 N.W.2d 777, 786 (Iowa 2004). Furthermore, we have "no power to read a limitation into the statute that is not supported by the words chosen by the general assembly." *Id.* at 782. By definition, "municipality" includes a school district. Iowa Code § 670.1(2). The plaintiffs' argument requests that we read an exception into this statute that is contrary to its express language. This we cannot do. *See Cubit*, 677 N.W.2d at

782 (stating our only task is to apply the language of the statutory immunity as written).

Clearly the suit before us, like that in *Baker*, 560 N.W.2d at 582, fits the broad classification of a "claim relating to a swimming pool." Iowa Code § 670.4(12). The plaintiffs' attempts to distinguish *Baker* from the facts presented here are unavailing.[2] The district court was therefore correct in concluding the defendants were immunized from the liability imposed by section 670.2 under the exemption contained in section 670.4(12). The court's detailed, thorough, and well-reasoned ruling dismissing the plaintiffs' claims against the defendants is affirmed. *See* Iowa Ct. R. 21.29(*d*), (*e*).

AFFIRMED.

Vogel, J. concurs; Sackett, C.J. dissents.

[2] During oral arguments in this matter, the plaintiffs asserted their negligent supervision claim was different than that presented in *Baker* because they were not alleging the defendants were negligent in supervising Quyhn once she was in the swimming pool; instead, the plaintiffs contended they were alleging the defendants were negligent in allowing Quyhn to enter the swimming pool area at the high school in the first place. However, the plaintiffs' claim throughout the district court proceedings and in their brief on appeal focused on the defendants' alleged negligence in "[f]ailing to supervise children *in the swimming pool*." We do not consider substantive issues raised for the first time on appeal. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002).

SACKETT, C.J. (dissents)

I do not believe, as does the majority, that the Iowa legislature in passing Iowa Code section 670.4(12) (2007), intended to exempt a school district from liability where an eleven-year-old child in its care and under its supervision for the school day is injured seriously in a swimming pool because of the district's failure to care adequately for the child entrusted to its care.

I find *Baker v. Ottumwa*, 560 N.W.2d 578, 581 (Iowa 1997) to be distinguishable, for unlike *Baker*, this is not a claim relating to a swimming pool where a patron placed himself in the pool. This is a claim based on a school district's failure to care adequately for an eleven-year-old child entrusted to its care and its decision to allow the child in the swimming pool without assuring that she had adequate swimming skills and/or adequate supervision. I would reverse the summary judgment, as I believe there is evidence from which a fact finder could determine the school district was liable for failure to care adequately for a child entrusted to its care.