**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-983**

Dustin Schramel, a minor, by Kelli Schramel,
his mother and natural guardian, et al.,
Respondents,

vs.

Independent School District 748,
Appellant,

PlayPower LT Farmington, Inc.,
Respondent.

**Filed February 22, 2011**
**Affirmed in part, reversed in part, and remanded**
**Larkin, Judge**

Stearns County District Court
File No. 73-C5-06-002204

L. Michael Hall, Megan J. McKenzie, Hall Law, P.A., St. Cloud, Minnesota (for respondents Schramel, et al.)

William L. Davidson, Timothy J. O'Connor, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for appellant)

Wayne D. Struble, David N. Lutz, Shane V. Bohnen, Bowman and Brooke LLP, Minneapolis, Minnesota (for respondent PlayPower)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Crippen, Judge.*

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

**LARKIN**, Judge

Appellant challenges the district court's denial, in part, of its motion for summary judgment, arguing that it is immune from suit under Minn. Stat. § 466.03, subd. 6e (2010), the recreational-use-immunity statute, and under the common-law doctrine of official immunity. In a related appeal, the district court's partial award of summary judgment for appellant based on statutory immunity under Minn. Stat. § 466.03, subd. 6 (2010), is challenged. Because appellant is immune from suit under the recreational-use-immunity statute, we affirm in part, reverse in part, and remand.

**FACTS**

Appellant Independent School District 748 is a municipal corporation organized and existing under the laws of the state of Minnesota. At all times relevant to this appeal, the school district employed principal Randy Husmann and teacher Mitze Olson at Oak Ridge Elementary School.

On January 7, 2005, Olson allowed her fourth-grade class ten or twelve minutes of free time at the end of the school day for good behavior. Approximately fifteen of Olson's students, including nine-year-old respondent Dustin Schramel, elected to play outside while the rest of her students remained indoors. Some of the children played on a

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

basketball court, while others used the playground equipment. The playground equipment was wet, slippery, and icy.[1] Olson supervised the children who elected to play outside and positioned herself on a sidewalk where she could monitor both groups of students.

The students were prohibited, by rule, from playing tag on the playground equipment. Yet some of the children, including Dustin, engaged in a game of tag on the equipment. While Dustin was on or near an inverted arch climber, a component of the playground equipment, he attempted to avoid being tagged by a classmate who was "it." Dustin either slipped or misstepped on one of the top rungs of the climber, fell, and landed with a bar between his legs. Dustin suffered significant injuries to his urethra and surrounding tissue as a result of the fall.

Dustin's mother commenced this action on behalf of her minor son, asserting multiple claims of negligence against the school district and product-liability claims against PlayPower LT Farmington, Inc.,[2] the manufacturer of the playground equipment. The school district moved for summary judgment, arguing that it was entitled to (1) statutory immunity under Minn. Stat. § 466.03, subd. 6; (2) recreational-use immunity under Minn. Stat. § 466.03, subd. 6e; and (3) official immunity under common law. The

[1] "In reviewing a denial of summary judgment based on a claim of immunity, this court presumes the truth of the facts alleged by the nonmoving party." *Fear v. Indep. Sch. Dist. 911*, 634 N.W.2d 204, 209 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

[2] Although PlayPower LT Farmington, Inc. is a respondent in this appeal and has submitted an appellate brief arguing that the school district is not entitled to summary judgment based on recreational-use or official immunity, our use of the term "respondents" does not include PlayPower.

district court granted the school district's motion for summary judgment as to claims based on negligent procurement of the playground equipment and negligent supervision by the school staff, concluding that the school district was entitled to statutory immunity on these claims. But the district court denied the school district's motion for summary judgment as to claims based on Olson's alleged negligence in allowing the children to play tag on the playground equipment, reasoning that the common-law doctrine of official immunity is inapplicable and that genuine issues of material fact preclude summary judgment under the recreational-use-immunity statute. This appeal follows.

**D E C I S I O N**

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "The applicability of immunity is a question of law, which this court reviews de novo." *Sletten v. Ramsey Cnty.*, 675 N.W.2d 291, 299 (Minn. 2004) (addressing official immunity).

"An order denying an immunity defense by way of summary judgment is appealable because immunity from suit is effectively lost if a case is erroneously permitted to go to trial." *Fear v. Indep. Sch. Dist. 911*, 634 N.W.2d 204, 209 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). "In reviewing a denial of summary judgment based on a claim of immunity, this court presumes the truth of the facts alleged by the nonmoving party." *Id.* An order granting partial summary judgment is generally not appealable as of right, *Karlstad State Bank v. Fritsche*, 374 N.W.2d 177, 184 (Minn. App. 1985), but an otherwise nonappealable order may be raised by notice of a related appeal. Minn. R. Civ. App. P. 103.02, subd. 2 (providing that "[a]fter one party timely files a notice of appeal, any other party may seek review of a judgment or order in the same action by serving and filing a notice of related appeal"); *see also Kostelnik v. Kostelnik*, 367 N.W.2d 665, 668-69 (Minn. App. 1985) (addressing earlier version of rule which referred to similar "notice of review"), *review denied* (Minn. July 26, 1985).

Appellant contends that the district court erred in concluding that it is not immune from suit under the recreational-use-immunity statute and under the common-law doctrine of official immunity. Municipalities[3] are immune from liability 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 . . . if the claim arises from a loss incurred by a user of park and recreation property or services.

[3] School districts are defined as municipalities under statute. Minn. Stat. § 466.01, subd. 1 (2010).

Minn. Stat. § 466.03, subd. 6e. But the statute also provides that "[n]othing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person." *Id.* "[W]hile this statute does not wholly absolve state agencies from liability, it enables them to treat visitors, in the tort context, as trespassers rather than licensees or invitees." *Sirek by Beaumaster v. State Dep't of Nat. Res.*, 496 N.W.2d 807, 809 (Minn. 1993). Under the trespasser exception, appellant "is liable only if it violated the standard of care that a private landowner owes to a trespasser." *Martin v. Spirit Mountain Recreation Area Auth*., 566 N.W.2d 719, 721 (Minn. 1997).

But we must first determine whether the trespasser exception applies in this case. In *Lloyd v. City of St. Paul*, this court concluded that the trespasser exception only applies to cases involving property marred by some hazard and not to claims based on negligent conduct. 538 N.W.2d 921, 923-24 (Minn. App. 1995), *review denied* (Minn. Dec. 20, 1995). The *Lloyd* plaintiffs were seated with their niece in a paddle boat at the Como Lake paddle boat concession in St. Paul when the concession supervisor jumped onto one of the boat's pontoons in an attempt to disengage the boat from the dock. *Id.* at 922. The boat flipped over, and Lloyd was injured as he, his wife, and their niece fell into the lake. *Id.* at 923. On appeal, the parties asserted that the issue was whether section 335 or section 336 of Restatement (Second) of Torts should be used to define "trespasser" for purposes of the recreational-use immunity exception. *Id.* This court disagreed, concluding that "the trespasser exemption itself is inapplicable." *Id*. We explained that "[t]he exemption, and those sections, apply to cases involving property marred by some

hazard. This, however, is a case of allegedly negligent conduct unrelated to the condition of the park property." *Id.* (emphasis omitted).

Our holding in *Lloyd* was based on *Johnson v. Washington Cnty.*, 518 N.W.2d 594 (Minn. 1994), and *Zacharias v. Minnesota Dep't of Natural Res.*, 506 N.W.2d 313 (Minn. App. 1993), *review denied* (Minn. Nov. 16, 1993). Those cases involved wrongful-death suits brought after children drowned in swimming ponds. *Johnson*, 518 N.W.2d at 597; *Zacharias*, 506 N.W.2d at 315. The pond in *Johnson* was operated by a county, and the pond in *Zacharias* was operated by the state.[4] *Johnson*, 518 N.W.2d at 599; *Zacharias*, 506 N.W.2d at 315. Each case involved claims based on the allegedly defective conditions of the swimming ponds, as well as claims of negligent lifeguard conduct. *Johnson*, 518 N.W.2d at 599-600; *Zacharias*, 506 N.W.2d at 316. The *Johnson* and *Zacharias* courts applied the trespasser exception to the claims based on the defective conditions of the swimming ponds but did not apply the exception to the claims based on the negligent conduct of the lifeguards. *Johnson*, 518 N.W.2d at 599-600; *Zacharias*, 506 N.W.2d at 320-21. For this reason, the *Lloyd* court concluded that the trespasser exception does not apply to claims based on negligent conduct. *See* 538 N.W.2d at 924 (citing *Johnson*, 518 N.W.2d at 600) (relying on the *Johnson* court's holding that the allegedly negligent conduct of the lifeguards was protected by recreational-use immunity and noting that *Johnson* did not consider the possibility of liability under the trespasser exception).

[4] "The municipality recreational-immunity statute at issue in the present case is analogous to the state recreational-immunity statute and has been interpreted consistently with it." *Lloyd*, 538 N.W.2d at 923 n.1.

In this case, the district court acknowledged the holdings of *Johnson* and *Lloyd*, but concluded that the trespasser exception applies even though respondents' claims are based on allegations of negligent conduct.[5] The district court relied on *Fear v. Indep. Sch. Dist. No.* 911, 634 N.W.2d 204 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). In *Fear*, a third-grade student was injured when he fell from a snow pile on a school playground. 634 N.W.2d at 208. The snow pile was created when the school district removed snow from the parking lot and piled it on the playground. *Id.* The *Fear* student sued the school, the school district, various district employees, and the snow-removal contractor for negligence. *Id.* at 209. The defendants moved for summary judgment on multiple grounds, including recreational-use immunity. *Id.* The district court denied the motion on all grounds except as to recreational-use immunity. *Id*. The district court concluded that "whether the school district is entitled to recreational use immunity is an issue of material fact to be determined at trial." *Id*. at 213.

On appeal, the defendants asserted that the negligence claim was barred under the recreational-use immunity statute, arguing that the general-trespasser standard, rather than the child-trespasser standard, should be applied, contrary to the conclusion of the district court. *Id*. at 212-13 (citing Restatement (Second) of Torts § 335 (1965) (setting forth the general-trespasser standard) and Restatement (Second) of Torts § 339 (1965)

[5] Respondents allege that appellant's employees were negligent in several respects. Respondents allege that teacher Olson failed to properly supervise the children on the playground equipment, to enforce existing playground rules, and to effectively communicate the playground rules to her students. Respondents allege that principal Husmann failed to adequately and properly supervise and evaluate playground supervisors and to enforce reasonable school rules.

(setting forth the child-trespasser standard)). This court concluded that the child-trespasser standard should apply. *Id.* at 214.

The district court here reasoned that *Fear*, which also involved a claim of negligent supervision, suggests that the trespasser exception applies to claims based on negligent conduct, contrary to the holding of *Lloyd*. We do not agree that *Fear* abrogates the rule in *Lloyd* that the trespasser exception does not apply to claims based solely on negligent conduct. First, the *Fear* defendants did not argue that the trespasser exception was inapplicable to any claim based on negligent conduct. In fact, the *Fear* decision does not mention *Lloyd* or its holding. Instead, the defendants challenged the district court's decision to apply the child-trespasser standard when determining whether the defendants were entitled to recreational-use immunity. *Id*. at 212-13.

Second, the *Fear* court did not ultimately determine whether the school district was entitled to recreational-use immunity; instead, the court concluded that "whether the school district is entitled to recreational immunity under [the child-trespasser standard] is a question of material fact to be determined at trial." *Id.* at 214. Under the child-trespasser standard, liability is imposed for injuries "caused by an artificial condition upon the land." Restatement (Second) of Torts § 339. Because liability cannot be established under the child-trespasser standard unless the underlying injury was "caused by an artificial condition upon the land," application of the standard to any negligent-conduct claim in *Fear* would not have resulted in liability. Thus, while *Fear* might suggest a departure from the *Lloyd* holding, upon closer examination, *Fear* and *Lloyd* are consistent.

Nonetheless, we recognize that respondents' negligence theory differs from the plaintiffs' theory in *Lloyd* in that the playground equipment was wet, slippery, and icy, whereas *Lloyd* did not involve any allegation related to the condition of the park property. *See Lloyd*, 538 N.W.2d at 923 ("This, however, is a case of allegedly negligent conduct unrelated to the condition of the park property." (emphasis omitted)). Respondents emphasize this distinction, arguing that their claims are based both on the conduct of appellant's employees and on the wet, icy, and slippery condition of the equipment. But although respondents' negligence theory encompasses the wet, slippery, and icy condition of the playground equipment, respondents' primary theory of liability is that Dustin sustained his injuries because he was negligently allowed to play tag, in violation of a "no-tag" rule, on the playground equipment. This theory is ultimately based on conduct: allowing Dustin to play tag on playground equipment in violation of an established rule. Respondents acknowledge this fact in their brief stating, "[i]n the present case, Respondent Dustin Schramel et al's claims against [the school district] are based on the conduct of its employees, Principal Randy Husmann and teacher Mitze Olson."

And despite respondents' reliance, in part, on the wet, slippery, and icy condition of the equipment, respondents do not assert that this condition provides an independent basis for liability. If respondents had claimed that the allegedly defective condition of the equipment provided a basis for liability, in and of itself, we would follow the supreme court's approach in *Johnson*: we would consider claims based on the condition of the equipment separately from claims based on the conduct of appellant's employees and

apply the trespasser exception to the condition-based claims. *See Johnson*, 518 N.W.2d at 600. But because respondents do not claim that the condition of the equipment, in and of itself, establishes a basis for liability, we do not engage in this approach. We instead conclude that all of respondents' claims are conduct based, even though respondents' negligence theory encompasses the condition of the equipment. And because the claims are based on negligent conduct, the trespasser exception does not apply. *Lloyd*, 538 N.W.2d at 923-24.

But even if we were to apply the trespasser exception and the child-trespasser standard in this case,[6] we would nonetheless conclude that appellant is entitled to recreational-use immunity. Under the child-trespasser standard, appellant is immune unless it realized or should have realized that the wet, icy, and slippery condition of the playground equipment involved "an unreasonable risk of death or serious bodily harm" to children.[7] Restatement (Second) of Torts § 339; *see also Cobb v. State, Dep't Natural*

[6] In determining the standard of care owed to trespassers, Minnesota follows "the standard of conduct imposed under the law of trespass as defined in Restatement (Second) of Torts §§ 333-339." *Sirek*, 496 N.W.2d at 809. Appellant asserts that section 335 should apply, whereas respondents argue for application of section 339 or 336. Section 336 imposes liability for injuries caused by the land possessor's "failure to carry on his [or her] activities upon the land with reasonable care for the trespasser's safety." Restatement (Second) of Torts § 336 (1965). *Lloyd* rejected the proposition that "Section 336 of Restatement (Second) of Torts should be used to define 'trespasser' for purposes of the immunity exception," instead concluding that the trespasser exception itself was inapplicable. 538 N.W.2d at 923. We adhere to this precedent.

[7] Section 339 provides that:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

*Res.*, 441 N.W.2d 839, 841 (Minn. App. 1989) (stating that each of the requirements of the applicable trespasser-standard must be met before liability will attach).

Dustin was injured on an inverted arch climber consisting of three rungs mounted on a curved ladder. The middle and top rungs, respectively, extended only 2'4" and 2'9" above the ground. One student testified that, at the time of Dustin's injury, the equipment was "kind of slippery," and another testified that it had "some snow on it." But there is no evidence or argument that the condition of the equipment was in such poor condition that appellant should not have allowed the children to play on it.

Respondents cite *Unzen v. City of Duluth*, 683 N.W.2d 875 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004), and contend that a seemingly harmless apparatus can be dangerous, arguing: "The fact that the condition at issue is common and rarely

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> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
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> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
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> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Restatement (Second) of Torts § 339 (emphasis added).

results in serious injury does not preclude a finding that the condition nevertheless involves an 'unreasonable risk of death or serious injury.'" In *Unzen*, a golfer sued the city of Duluth after he fell down the clubhouse stairs at a city-owned golf course. *Id.* at 877-78. Applying the general-trespasser standard, this court concluded that there was "ample evidence in the record supporting the district court's conclusion that the stairs 'would be to the city's knowledge a condition likely to cause death or serious bodily harm to persons if they tripped and fell.'" *Id.* at 880.

But *Unzen* is readily distinguishable on its facts. First, there was evidence that prior to Unzen's fall, approximately *twelve* people had fallen down the same staircase and management was aware of the dangerous condition created by metal nosing on the stairs on which people were tripping. *Id.* at 881. Here, there is no evidence that any other child has been injured on appellant's playground equipment or similar equipment. Second, the *Unzen* court reasoned that "our case law is replete with instances where falling down a flight of stairs has caused death or serious bodily harm." *Id.* Respondents here do not cite precedent indicating that falls from similar pieces of playground equipment have led to death or serious bodily harm.

"[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently 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). The record here does not suggest that the playground equipment—even in its wet, slippery, and icy condition—presented an

unreasonable risk of death or serious bodily harm. Thus, even if the trespasser exception to the recreational-use-immunity statute were applicable, appellant would be entitled to summary judgment as a matter of law because there is insufficient evidence to establish a genuine issue of material fact regarding whether a wet, icy, and slippery three-foot-high inverted arch climber on a playground involves an unreasonable risk of death or serious bodily harm to children.

Finally, respondents raised a statutory-interpretation argument for the first time at oral argument. Because this argument was not raised or considered in the district court, and the parties did not brief the argument on appeal, we do not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally an appellate court will not consider matters not argued to and considered by the district court). Respondents also offer a policy-based argument that recreational-use immunity should not apply when a teacher fails to adequately supervise children on a school playground during compulsory-school-attendance hours. But because we are not a policy-making court, we do not consider this argument. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them.").

In conclusion, because respondents' claims are based on the allegedly negligent conduct of appellant's employees, the trespasser exception to the recreational-use-immunity statute does not apply and appellant is entitled to immunity under the statute. We therefore reverse the district court's denial of summary judgment for appellant and remand for entry of judgment in appellant's favor, consistent with this opinion, without

addressing the parties' arguments regarding statutory immunity under Minn. Stat. § 466.03, subd. 6, or official immunity under common law. And because the recreational-use-immunity bar extends to respondents' claims based on the purchase, installation, and inspection of the playground equipment, as well as to respondents' claims based on the negligent supervision of school staff in relation to the operation of the playground, we affirm the district court's award of summary judgment in favor of appellant on these claims. *See* Minn. Stat. § 466.03, subd. 6e (providing immunity on "[a]ny claim based upon the construction, operation, or maintenance of any property . . . used as a park . . . if the claim arises from a loss incurred by a user of park"); *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995) (stating that summary judgment should be affirmed if it can be sustained on any ground), *review denied* (Minn. Feb. 13, 1996).

**Affirmed in part, reversed in part, and remanded.**

Dated:

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Judge Michelle A. Larkin