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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1658**

Connie Kuehl,
Respondent,

vs.

Metropolitan Airports Commission,
Appellant.

**Filed July 17, 2007
Reversed; motion denied
Minge, Judge**

Hennepin County District Court
File No. 27-CV-05-017306

H. Rick Fritz, 1700 West Highway 36, Suite 820, Roseville, MN 55113 (for respondent)

Timothy R. Schupp, Andrea D. Kiehl, Flynn, Gaskins & Bennett LLP, 333 South Seventh Street, Suite 2900, Minneapolis, MN 55402 (for appellant)

Considered and decided by Minge, Presiding Judge; Toussaint, Chief Judge; and Kalitowski, Judge.

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

MINGE, Judge

Appellant challenges the district court's denial of its motion for summary judgment. Appellant argues that based on the mere-slipperiness rule and, in the alternative, statutory immunity under Minn. Stat. § 466.03, subd. 6 (2006), the district court should have accorded appellant governmental immunity. Respondent moves to strike an issue proposed by appellant in its statement of the case. Because we conclude that there are no genuine issues of material fact, that appellant is entitled to immunity under the mere-slipperiness rule, and that respondent's motion to strike is moot, we reverse and deny respondent's motion.

FACTS

Appellant Metropolitan Airports Commission (MAC) is a governmental entity established to provide and coordinate aviation services in the Twin Cities metropolitan area. Minn. Stat. §§ 473.602, .608 (2006).

MAC operates the Minneapolis-St. Paul International Airport, including several parking ramps located at the airport. This case arises from a slip-and-fall incident that occurred in the parking ramp next to a building used by Northwest Airlines and the U.S. Postal Service. Northwest Airlines employees and U.S. Postal workers park in the ramp free of charge. Respondent Connie Kuehl worked for Northwest Airlines at the time of the incident and regularly parked on the top level of the ramp.

On the morning of November 5, 2003, Kuehl slipped on a thin patch of glare ice as she walked from her car to the elevator on the top level of the parking ramp. Kuehl claims that because the ice blended in with the concrete color of the lot's surface, she did not notice the ice before she fell. There had been no precipitation on November 5, there was no snow on the roads or ground when Kuehl drove to work, and there was no snow on the ramp. The previous day it had snowed, followed by a light freezing drizzle which ended at approximately 10:00 a.m.; total precipitation had been .03 inches.

At the time of the slip-and-fall incident, MAC had hired an independent contractor to complete snow and ice removal. The contract provided:

Vendor shall be responsible to monitor weather conditions and when the snowfall is at 1" must arrive on site within two (2) hours and start snow operations. There may be times that MAC's designated representative may call for additional snow removal or sanding (drifting, icy conditions, etc.).

There is no indication in the record that a MAC representative called the contractor to request sanding of the parking lot.

Kuehl sued MAC for negligence, seeking damages for injuries sustained as a result of the fall. Following discovery, MAC moved for summary judgment, claiming that it was entitled to governmental immunity under the mere-slipperiness rule and under Minn. Stat. § 466.03, subd. 6 (2006). The district court denied MAC's summary-judgment motion. This appeal follows.

DECISION

I.

Before proceeding to the merits, we consider Kuehl's motion to strike the third issue proposed by MAC in its statement of the case. That issue is whether Kuehl produced sufficient evidence of MAC's breach of duty to survive summary judgment. Kuehl moved to strike this issue because it is not related to MAC's immunity arguments. The United States Supreme Court has rejected extension of immediate review to additional issues in immunity appeals, unless those issues are inextricably intertwined with immunity issues.

Swint v. Chambers County Comm'n, 514 U.S. 35, 50-51, 115 S. Ct. 1203, 1212 (1995).

Although listed in the statement of the case, MAC does not address this third issue in its brief. Issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Because this issue was not briefed, we conclude that Kuehl's motion to strike is moot and deny the motion. Should the opportunity arise, our denial of Kuehl's motion does not foreclose MAC's opportunity to raise this summary judgment challenge in the future.

II.

The basic issue on this appeal is whether the district court erred in denying MAC's motion for summary judgment based on governmental immunity. "Generally, an order denying a motion for summary judgment is not appealable," but an immediate appeal is permissible when a district court denies a summary judgment motion based on a claim of governmental immunity. *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 832 (Minn. 1995).

On appeal from a denial of summary judgment, this court determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Otis v. Anoka-Hennepin Sch. Dist. No. 11*, 611 N.W.2d 390, 392 (Minn. App. 2000). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). No genuine issue of material fact exists if the evidence "merely creates a metaphysical doubt as to a factual issue." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The applicability of immunity is a question of law, which we review de novo. *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996). The party asserting an immunity defense has the burden of demonstrating facts that support the claim. *Gerber v. Neveaux*, 578 N.W.2d 399, 402 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). When we review a summary judgment denying a claim of governmental immunity, we presume the truth of the facts alleged by the nonmoving party. *Burns v. State*, 570 N.W.2d 17, 19 (Minn. App. 1997).

A. *Applicability of the Mere-Slipperiness Rule*

More narrowly stated, the issue is whether the district court erred by concluding that MAC was not entitled to governmental immunity under the mere-slipperiness rule. The mere-slipperiness rule is well established. *See Doyle v. City of Roseville*, 524 N.W.2d 461, 463 (Minn. 1994). Under this rule, a municipality will not be held liable for "injuries sustained in a fall on newly formed glare ice although a

municipality is liable if it negligently permits an accumulation of ice and snow to remain on a sidewalk for such a period of time that slippery and dangerous ridges, hummocks, depressions, and other irregularities develop there.” *Id.*

More than a century ago, our supreme court described the original rationale for the rule:

Upon such a state of facts, there can be no recovery against the city, unless it is the duty of such municipalities to keep their sidewalks clear of ice. In this climate such a thing would be a physical impossibility, and an attempt to do it would involve an amount of expense that would bankrupt any city. . . . An unbroken line of authorities holds that mere slipperiness of a sidewalk by either ice or snow is not a defect for which cities are liable; that their obligation to keep their streets in a safe condition does not extend to the removal of ice which constitutes no other defect than slipperiness.

Henkes v. City of Minneapolis, 42 Minn. 530, 531-32, 44 N.W. 1026, 1027 (1890).

The supreme court limited the mere-slipperiness rule in *Bufkin v. City of Duluth*, 291 N.W.2d 225 (Minn. 1980). Bufkin was attending an event at the Duluth arena auditorium, for which the auditorium charged admission and hoped to generate a profit. *Id.* at 226. As Bufkin walked on a sidewalk leading to the entrance of the auditorium, he slipped on a smooth patch of ice, which was obscured by light snow. *Id.* The city acknowledged that it attempted to remove ice and snow from the sidewalks at the arena prior to an event. *Id.* Emphasizing the city’s attempt to generate a profit and the minimal burden imposed on the city by requiring it to maintain the heavily traveled sidewalks near the auditorium entrance, the court reasoned that “the scope of the [mere-slipperiness] rule is defined by the reason for its existence.” *Id.* The court concluded that the city should be held to the same standard as any business engaged in activity for profit, and held that the mere-slipperiness rule was inapplicable. *Id.*

Doyle is the supreme court’s most recent case applying the mere-slipperiness rule. 524 N.W.2d at 463. Doyle was attending a high school hockey game at the Roseville Ice Arena. *Id.* at 462. When she entered the arena, she noticed water from melted snow in the parking lot, but no ice. *Id.* When Doyle left the arena three hours later it was much colder, and as she approached her car, she slipped and fell on a ““very thin layer of glare ice”” in the parking lot. *Id.* She sued the city for negligence. *Id.* Reviewing the district court’s grant of summary judgment in favor of the city, the supreme court held that the city was entitled to immunity based on the mere-slipperiness rule. *Id.* at 464. The court considered *Bufkin* inapposite because the Duluth arena spectators paid an admission fee and the city admitted that it operated the arena to make a profit. *Id.* at 463-64. In contrast, “there [was] no evidence . . . that the City [of Roseville] operated the ice arena for

profit.” *Id.* The court also emphasized the short period of time that the ice was in existence and that it was merely slippery: “Whether the ice had formed 2 hours or 5 minutes before [Doyle’s] unfortunate tumble is unknown, but it is readily apparent that it had not remained there long enough for the formation of ridges, hummocks, depressions or other irregularities on which municipal liability is founded.” *Id.* at 464.

Here, the district court concluded that the mere-slipperiness rule did not protect MAC from liability:

As in *Bufkin* we believe that the scope of the rule is defined by the reason for its existence and that in the circumstances of this case, it is not applicable. *Henkes*, in establishing the ‘mere slipperiness’ rule explained that this rule is based on the practical consideration that it would be an unsupportable burden to require a city to keep all of its sidewalks free of ice. In this case, the location of the accident is a private parking ramp and therefore the application of the ‘mere slipperiness’ rule would be inconsistent with the policy justifications for the rule’s existence.

(Quotations and citations omitted.) MAC argues that the district court erred by failing to grant it governmental immunity based on the mere-slipperiness rule and erroneously relied on *Bufkin* in support of its decision.

The case before us has elements of both the *Doyle* and *Bufkin* situations. The parking ramp is ancillary to the operation of an office building at an airport and is furnished for employees who work in that building. In this sense, it is related to a business activity, like the Duluth arena in *Bufkin*. But there is no showing that MAC operates the parking ramp or the adjacent building to make a profit. Furthermore, the slip and fall here occurred in a portion of a parking ramp used by vehicles, not in front of a dedicated, heavily used pedestrian walkway, let alone a building entrance. Moreover, the plain language of the mere-slipperiness rule supports according MAC immunity. Here, it is not disputed that the condition of the ice was smooth, and there was no evidence that MAC, any more than Kuehl, noticed or could reasonably be expected to notice this ice or that MAC attempted to deal with such patches of ice. Certainly, there was no evidence of ridges or other pronounced and dangerous irregularities that would indicate an especially risky condition or prolonged failure to maintain the area. Accordingly, we conclude that the district court erred in holding the mere-slipperiness rule inapplicable.

B. Artificial-Condition Exception to the Mere-Slipperiness Rule

Kuehl contends that even if the mere-slipperiness doctrine is applicable, she has generated enough evidence to produce a material-fact issue whether the ice on which she fell was caused by an artificial condition and not mere slipperiness.

The artificial-condition exception is recognized in Minnesota caselaw. “The authorities differentiate between conditions arising from natural causes; causes over which the municipality has no control, illustrated by the falling of snow and sleet from the clouds, and those of artificial creation.” *Nichols v. Village of Buhl*, 152 Minn. 494, 497, 193 N.W. 28, 29 (1922); *see also Otis*, 611 N.W.2d at 392-93 (recognizing the artificial-condition exception). For example, in *Nichols*, residents were permitted to transport water in buckets from a faucet at the village hall, and, as a result, water spilled onto the sidewalk and froze in patches. 152 Minn. at 498, 193 N.W. at 29-30. After the city was sued for a slip-and-fall incident, the supreme court held that the city was not protected by the mere-slipperiness rule because the hazardous condition was “created by artificial means.” *Id.*

But the caselaw is not easily reconciled. In its seminal *Henkes* case, the supreme court applied the mere-slipperiness rule even though the icy condition was the result of water that escaped from a fire hose and ran onto the sidewalk one week before the slip-and-fall incident. *Henkes*, 42 Minn. at 530, 44 N.W. at 1027. In fact, the *Henkes* court declined to embrace an artificial-condition exception: “Appellant seems to argue that the fact that this ice was in part the result of an artificial cause, and not wholly of natural causes, such as the fall of rain or snow makes a difference. But no such a distinction can be maintained.” *Id.* at 531, 44 N.W. at 1027.

In *Otis v. Anoka-Hennepin Sch. Dist. No. 11*, this court held that the mere-slipperiness rule was applicable to a slip-and-fall case, even though the icy condition was caused by the municipality’s shoveling of snow, which then melted and ran onto the sidewalk and formed ice. 611 N.W.2d at 392-93; *see also Teske v. Steele County*, 170 N.W.2d 234, 235 (Minn. 1969) (“The plowing and piling of snow adjacent to driveways and sidewalks and the use of salt to remove the ice are factors of causation which . . . are entirely speculative and remote.”).

Here, Kuehl argues that the design of the parking lot caused an artificial accumulation of ice near drains on the parking-ramp surface where she fell. Kuehl offered an investigative report from a registered engineer indicating that the parking lot contained a depression between two drains, allowing water to regularly pond in that specific area. This design condition is subtle and passive. It is associated with the initial construction. In a large parking area some minimal ice accumulation is inevitable, even if a surface is sloped to facilitate drainage. The ice did not result from noticeable activity in an area designated for or used by pedestrians. This is not a type of artificial condition that supports an exception to the mere-slipperiness

rule.

Because we conclude that MAC is entitled to immunity under the mere-slipperiness rule, we do not reach whether MAC is also entitled to immunity under Minn. Stat. § 466.03, subd. 6 (2006). Because there are no genuine issues of material fact regarding the condition of the parking-ramp surface that affect the application of the mere-slipperiness rule and because the district court failed to apply the rule, we reverse.

Reversed; motion denied.

Dated: