20090337
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 16, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20090337
District Court No. 08-08-C-03130

Corey Botner, individually and as the father and natural guardian of D.B., a minor,

Plaintiff/Appellant

vs.

Bismarck Parks and Recreation District,

Defendant and Third-Party Plaintiff/Appellee

vs.

Child, Inc., d/b/a Early Childhood Learning Center,

Third-Party Defendant.

Appeal from Order Granting Summary Judgment and Judgment of Dismissal

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REPLY OF APPELLANT

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[2] I. INTRODUCTION

[3] Appellant Corey Botner (Botner), individually and as the father and natural guardian of D.B., a minor, served and filed the Brief of Appellant on January 15, 2010. Bismarck Parks and Recreation District (Bismarck Parks) served and filed its Brief of Appellee Bismarck Parks and Recreation District (Brief of Appellee) on February 4, 2010. This Reply of Appellant will serve as the reply brief of Botner.

[4] **II. LAW AND ARGUMENT**

[5] **A. Bismarck Parks continues to argue about disputed material facts.**

[6] Similar to what it did in its Brief in Support of Defendant's Motion for Summary Judgment to the district court, Bismarck Parks simply argues over and over facts that it says are in its favor. The bottom line is that most of these facts are disputed material facts. It should be up to a finder of fact to determine the weight of those disputed facts. Because this Court's review is de novo and there are material issues of fact in dispute, this Court should remand to the district court for trial on the merits.

[7] **B. Summary judgment was inappropriate in this case.**

[8] Bismarck Parks argues that it did not have a duty to retrofit the subject high dive with the alleged state of the art guardrails. Brief of Appellee at ¶ 23. There is no dispute that a landowner owes a duty to a lawful entrant to maintain its property in a reasonably safe condition under all the circumstances. Sternberger v. City of Williston, 556 N.W.2d 288, 290 (N.D. 1996). "The circumstances to consider are the likelihood of an injury to another, the seriousness of the injury, and the burden of avoiding the risk." Id. (citing O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977)). The North Dakota Supreme Court has stressed that the circumstances surrounding entry by a lawful entrant has a direct relationship on whether a landowner is liable to that entrant. Id. Foreseeing the likelihood of the entry and the potential injury, in part, helps to

establish the extent to which a landowner must go to avoid the risk to that lawful entrant. Id.

[9] Interestingly, in its Brief, Bismarck Parks spends almost two pages (§§ 23 to 26) arguing about duty while citing one case. It takes facts and argues those facts in a light that supports its position. The facts argued by Bismarck Parks are material facts that are largely in dispute.

[10] Bismarck Parks also makes fact-based arguments about alterations or additions to the high diving board making it subject to potential liability, products liability with respect to alterations, and it being "liable as a manufacturer." Most of these arguments are not relevant to the issues that were before the district court. Bismarck Parks had a duty in this case to make the Hillside Pool, which included the high diving board, reasonably safe for use by any legal entrant or to take it out of service. Bismarck Parks was the landowner and, thus, it had a duty to protect entrants from foreseeable danger. Whether the high diving board with guardrails that did not extend to the edge of the water was a foreseeable danger was a question for a finder of fact to decide. It was not an issue that should have been decided in a summary judgment motion.

[11] Bismarck Parks lists several Bismarck City Ordinances with respect to pools and pool ladders which, it argues, somehow shields it from liability. These ordinances have anything to do with the case. Just because the pool may have "technically" complied with some code provisions does not mean it was safe. Botner's claim is based on a breach of duty owed by Bismarck Parks to D.B. which is outside of any code or provision cited by Bismarck Parks.

[12] **C. Notice of a problem with the high diving board was not required.**

[13] Bismarck Parks argues that it did not have notice of an alleged defect in the high diving board. The district court determined there was "no evidence to suggest that Bismarck Parks knew or should have known that the handrails needed to extend to the water's edge. There is no evidence to suggest that the guardrails were not adequate or that the guardrails presented any foreseeable danger." App. 235-36.

[14] North Dakota law does not require that a landowner have notice of the danger but, instead, it must maintain its premise in a reasonably safe condition considering the circumstances. Sternberger, 556 N.W.2d at 290. Those circumstances may include whether it is likely someone would be injured, the seriousness of the potential injury to an entrant, and the potential burden on the landowner to avoid risk of injury. Id. Further, when a dangerous instrument such as a high diving board is permitted to be on the premise by a landowner, every reasonable step must be taken to prevent an injury to someone who enters the property where the danger can be reasonably foreseen. Doan v. City of Bismarck, 2001 ND 152, ¶ 13, 632 N.W.2d 815.

[15] **D. Bismarck Parks failed to properly supervise D.B.**

[16] Bismarck Parks argues that it was not negligent in its supervision of D.B. Its arguments are fact based. The district court in its Order recognized that when a lifeguard is on duty at a pool, "liability may be based on a failure to provide proper supervision, as through inattentiveness, failure to have a properly-

trained lifeguard, or on the basis that, under the circumstances, the ratio of lifeguards to pool users was insufficient in view of the number of swimmers involved.'" App. 235-36 (quotation omitted). The district court then cited to two lifeguard depositions with respect to actions taken by the lifeguards on the day of D.B.'s accident and determined that Bismarck Parks had no liability. The problem, however, is that it was not the district court's role to resolve factual disputes in favor of one party or the other. The district court should have determined that there were material facts in dispute and denied summary judgment.

[17] **E. Discretionary immunity does not bar Botner's claims.**

[18] Bismarck Parks argues that discretionary immunity bars Botner's claims because the decision of whether to replace an allegedly defective guardrail with a safer rail is a discretionary function. While a political subdivision is exempt under N.D.C.C. § 32-12.1-03(3) from liability for acts or omissions of an employee while engaged in a discretionary function or duty, discretionary immunity is not applicable in this case. There is a two part test to determine whether immunity applies.

[19] The two prongs are:

> (1) whether the conduct at issue is discretionary, involving an element of judgment or choice for the acting employee; and (2) if the act is discretionary, whether that judgment or choice is of the kind the discretionary function exception was designed to shield.

Kautzman v. McDonald, 2001 ND 20, ¶ 30, 621 N.W.2d 871 (citing Olson v. City of Garrison, 539 N.W.2d 663, 666-67 (N.D. 1995)).

[20] The first prong in the inquiry is "'whether the action is a matter of choice for the acting employee.'" Olson, 539 N.W.2d at 666 (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)). The Olson Court stated:

> "[C]onduct cannot be discretionary unless it involves an element of judgment or choice." *Id*. "Thus, the discretionary function exception will not apply when a ... statute, regulation, or policy specifically prescribes a course of action for an employee to follow [because] "the employee has no rightful option but to adhere to the directive," *id.*, and because "the government has restricted its own discretion" through the directive.

539 N.W.2d at 666 (citations omitted). Relying on this language, Bismarck Parks argues that because there is no statute mandating the type of guardrails to be used on the high diving board and it has never adopted any rules or regulations in this regard, its employees have discretion concerning the type of board, guardrail type, and location.

[21] The second inquiry is whether the official's judgment "is the kind that the discretionary function exception was designed to shield." Olson, 539 N.W.2d at 667 (quotations omitted). The focus of the second prong is on the nature of the actions taken and whether those actions would be susceptible to policy analysis. Kautzman, 2001 ND 20, ¶ 31, 621 N.W.2d 871 (citation omitted). The Olson Court stated:

> The purpose of the discretionary function exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Berkovitz*, 486 U.S. at 536-37, 108 S.Ct. at 1959, 100 L.Ed.2d at 541. When properly construed, the exception should shield only governmental action based on public policy considerations. *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1273, 113 L.Ed.2d at 346. Moreover, public policy considerations, social, economic, or political, must be distinguished from more objective

> standards based on, for example, scientific, engineering, or technical considerations. *Kennewick*, 880 F.2d at 1030. The latter are not protected by the discretionary function exception, *id.*, when the challenged conduct involves nothing more than a "follow the numbers" approach.

539 N.W.2d at 667-68.

[22] No social, economic, or political policies are implicated in deciding whether to retrofit a high diving board with a safe diving platform that would include railings all the way to the edge of the water. Rather, this would require ordinary individualized judgment made by an employee of Bismarck Parks as part of a routine work assignment. In this case, Bismarck Parks is not shielded from liability by discretionary immunity. Even if it was immune from liability with respect to the type of diving board chosen, that would not shield Bismarck Parks from claims of inadequate rules for use of the high diving board or from lack of appropriate supervision.

[23] **F. The high diving board was dangerous notwithstanding any arguments that the danger was open and obvious.**

[24] This issue was also not ruled on by the district court, but in its Brief of Appellee, Bismarck Parks' argues that the dangers associated with the use of the high diving board were open and obvious and that shields it from liability. This is a strange argument. The dangers of the high diving board were not open and obvious to a five-year-old child. Even if there were, the dangers would be many times more open and obvious to employees managing the pool and employees supervising the children using the pool.

[25] The Restatement outlines the general rule with respect to known and obvious dangers and indicates that a landowner will not be liable for harm caused by a danger that is known or obvious "unless the possessor should anticipate the harm despite such knowledge or obviousness." Groleau v. Bjornson Oil Co., Inc., 2004 ND 55, ¶ 6, 676 N.W.2d 763 (quoting § 343A of the Restatement (Second) of Torts). The Groleau Court quoted the comment to § 343 to clarify the landowner's duty even where the danger is known and obvious:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, ... is not ... conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Id. at ¶ 19 (quoting Restatement (Second) of Torts, § 343A, comment f (1965)).

[26] The determination of whether a dangerous condition would be "obvious" is determined through an objective standard:

> "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of

> the visitor, exercising ordinary perception, intelligence, and judgment.

Groleau, 2004 ND 55, ¶ 21, 676 N.W.2d 763 (quoting Restatement (Second) of Torts, § 343A, comment b (1965)). Whether a dangerous condition is known and obvious and, therefore, limits the landowner's duty to a lawful entrant, is ordinarily a question of fact for the trier of fact and only becomes a question of law for the court to decide if reasonable minds could reach only one conclusion. Id. (citations omitted). The determination is whether the condition would be obvious to an objective and reasonable person, and not necessarily the plaintiff's subjective knowledge. Id. In this case, the circumstances to consider include that D.B. was five years old at the time of this accident and is not held to the same standard of care as an adult. Kirchoffner v. Quam, 264 N.W.2d 203, 207-08 (N.D. 1978).

[27] Relying on an Illinois decision, the Groleau Court also stated that the term "obvious" has to include determination '"that both the condition and the risk are apparent to and would be appreciated by a reasonable person in the plaintiff's position exercising ordinary perception, intelligence, and judgment. Conditions may exist which, though seemingly innocuous in themselves, indeed present an unreasonable danger under certain circumstances."' Id. (quoting Simmons v. American Drug Stores, Inc., 768 N.E.2d 46, 51-52 (Ill. Ct. App. 2002)).

[28] The Groleau Court reversed the district court's determination that the condition over which the plaintiff fell was open and obvious because it was

elevated and found that there were genuine issues of material fact which should be resolved by a jury. Therefore, the summary judgment dismissing the plaintiff's claim against the defendant was inappropriate. Groleau, 2004 ND 55, ¶ 24, 676 N.W.2d 763.

[29] **III. CONCLUSION**

[30] The district court erred by granting summary judgment. Botner respectfully requests that this Court reverse the district court's summary judgment ruling and remand the case to the district court for further proceedings.

[31] Dated this 16th day of February, 2010.

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