

IN THE COURT OF APPEALS OF IOWA

No. 9-606 / 09-0163
Filed September 17, 2009

TIMOTHY A. LARSEN and LENA M. KARR,
Administrators of the Estate of Paige Marie Larsen,
Deceased, TIMOTHY A. LARSEN and LENA M. KARR,
Plaintiffs-Appellants,

vs.

CITY OF REINBECK, IOWA and JULIE SMITH,
Defendants-Appellees.

Appeal from the Iowa District Court for Grundy County, Jon C. Fister,
Judge.

Plaintiffs appeal the decision of a district court to grant a motion for
summary judgment in favor of a city, contending that the city was not immune
from liability in connection with their daughter's drowning at a swimming pool.

AFFIRMED.

D. Raymond Walton of Beecher Law Offices, Waterloo, and John Walker,
Waterloo, for appellants.

Jim DeKoster and Beth Hansen of Swisher & Cohrt, P.L.C., Waterloo, for
appellee.

Henry Bevel, Waterloo, for Julie Smith.

Considered by Vaitheswaran, P.J., and Mansfield, J. and Schechtman,
S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

Timothy Larsen and Lena Karr lost their three-year-old daughter in a drowning accident at a swimming pool owned and operated by the City of Reinbeck. They sued the city for negligence in providing a safe pool.¹ The city filed an answer asserting in part that it was immune from liability under Iowa Code section 670.4(12) (2007). The city simultaneously moved for summary judgment on the immunity ground. Larsen and Karr responded by amending their petition to clarify that their claim extended to officers or employees of the city who violated pertinent regulations governing municipal swimming pools. The district court concluded that the city was immune from liability and granted the city's motion for summary judgment. This appeal followed.

Iowa Code section 670.4(12) holds municipalities immune from liability for the following tort:

A claim relating to a swimming pool or spa as defined in section 135I.1 which has been inspected by a municipality or the state in accordance with chapter 135I, or a swimming pool or spa inspection program which has been certified by the state in accordance with that chapter, whether or not owned or operated by a municipality, 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.

Larsen and Karr contend that the city is not entitled to immunity under this provision because their claim against it "is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes . . . a criminal offense." Iowa Code § 670.4(12). The crux of their argument is that the act or omission constituting the criminal offense may be grounded in violations of

¹ They also sued the child's daycare provider. That portion of the lawsuit is not at issue on appeal.

administrative regulations implementing the swimming pool statute in addition to violations of the statute itself. They specifically cite violations of rules promulgated by the Iowa Department of Public Health, the agency charged with administering Iowa Code chapter 135I. See *Id.* § 135I.4(5); Iowa Admin. Code r. 641-15.4(4)(e), (i)(3) (2008). The city counters that the legislature only saw fit to criminalize statutory violations.

The city is partially correct. Section 135I.5 states, “A person who violates a provision of this chapter commits a simple misdemeanor.” By its terms, this provision only criminalizes violations of Chapter 135I. It says nothing about criminalizing violations of implementing regulations. See *State v. Watts*, 186 N.W.2d 611, 614 (Iowa 1971) (“There can be no doubt that the legislature may render the violation of an agency’s rules a criminal offense, the only question is whether the statute granting authority to the agency is fitted with sufficient standards.”). As Larsen and Karr concede that the summary judgment record shows no violations of chapter 135I, section 135I.5 would support the city’s argument that the criminal offense exception to section 670.4(12) does not apply.

Our analysis cannot end here, however, because the statute creating the Iowa Department of Public Health and setting forth its duties contains a provision that criminalizes violations “of the rules of the department.” See Iowa Code § 135.38; *City of Waukee v. City Dev. Bd.*, 514 N.W.2d 83, 88 (Iowa 1994) (stating administrative bodies possess only the power that is “specifically conferred or necessarily implied from the statute creating them”). Larsen and Karr point to this provision as “clear evidence of the legislature’s intent to make violations of the rules of the Department generally punishable as simple

misdemeanors in its area of authority, including that involving public swimming pools under Chapter 135I.” Their argument is facially appealing, as chapter 135 is the umbrella statute that specifies the general obligations of the department, and the reach of section 135.38 is not unambiguously limited to chapter 135. See Iowa Code § 135.11. However, when the cited language of section 135.38 is read in context, we believe section 135.38 only criminalizes violations of rules pertaining to chapter 135.

We begin with the language of section 135.38. See *State v. Spencer*, 737 N.W.2d 124, 129 (Iowa 2007) (“We determine legislative intent from the words chosen by the legislature, not what it should or might have said.” (quoting *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004))). In its entirety, that provision states:

Any person who knowingly violates any provision of this chapter, or of the rules of the department, or any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a simple misdemeanor.

The reference to “this chapter” immediately before the reference to “rules of the department” suggests an intent to only criminalize violations of the rules implementing chapter 135.

We next examine section 135.38 in relation to chapter 135 as a whole. *Spencer*, 737 N.W.2d at 130 (“[W]e look at a statute in its entirety.”). That chapter contains general provisions applicable to the administration of the entire department and specific provisions relating to the administration of particular programs such as “lead abatement” and “newborn and infant hearing screening.” See Iowa Code §§ 135.100–.105D, .131. The provisions relating to these

specific programs do not include separate penalty mandates; the only penalty provision in the chapter is section 135.38. In contrast, certain programs that are under the purview of the department but have their own chapter in the Iowa Code also have their own penalty provisions. See, e.g., *id.* §§ 136B.5 (“A person who violates a provision of this chapter is guilty of a serious misdemeanor.”); 136C.4(1) (“It is unlawful to operate or use radiation machines or radioactive material in violation of this chapter or of any rule adopted pursuant to this chapter. Persons convicted of violating a provision of this chapter are guilty of a serious misdemeanor.”). We conclude from this organizational scheme that the penalty provision in chapter 135 was intended to apply only to the programs in that chapter. See *McElroy v. State*, 637 N.W.2d 488, 494 (Iowa 2001) (“Typically, when a general and specific statute cover the same matter, the specific statute governs over any conflict with the general statute.”).

We return to the penalty provision in the swimming pool statute, chapter 135I. As noted, this provision unambiguously criminalizes violations of the statute alone. See Iowa Code § 135I.5. Unlike section 135.38, the provision makes no mention of the implementing rules. For that reason, the district court did not err in concluding that the “criminal offense” exception to the immunity doctrine set forth in section 670.4(12) was inapplicable. We affirm the court’s grant of the city’s motion for summary judgment.

AFFIRMED.