COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP234 **Cir. Ct. No. 2004CV161**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SARA FATA,

PLAINTIFF-APPELLANT,

METALCRAFT OF MAYVILLE,

SUBROGATED-PLAINTIFF,

V.

SCHOOL DISTRICT OF HORICON AND EMC PROPERTY & CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dodge County: JAMES O. MILLER, Judge. *Reversed and cause remanded.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 DEININGER, J. Sara Fata, a former track and field athlete at Horicon High School, appeals a judgment that dismissed her personal injury action against the Horicon School District. She claims the circuit court erred by disregarding, as a "sham affidavit," her affidavit submitted in opposition to the District's summary judgment motion. She also contends the circuit court should not have concluded that the District was immune under WIS. STAT. § 893.80(4) (2003-04)[1] from liability for her injury as a matter of law. We conclude Fata's affidavit is not a "sham affidavit" and that it creates a dispute of material fact regarding whether the District is entitled to discretionary-act immunity. Accordingly, we reverse the appealed judgment and remand for further proceedings on Fata's claims.

BACKGROUND

¶2 Sara Fata, then a student at Horicon High School and a member of its girls' track team, injured her knee while attempting a high jump during the team's first practice of the season. As she ran toward the bar, she realized that she would not be able to complete the jump. She pushed the bar out of the way and fell or jumped into the high jump "pit," which consisted of several large foam pads or mats that rested on wooden pallets and provided a soft landing area several feet above the ground. Fata claims her leg became trapped in a gap between the foam mats, which, when she fell to one side, resulted in torn knee ligaments.[2]

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] An assistant coach who witnessed Fata's aborted high jump testified in a deposition that Fata's knee injury appeared to have occurred prior to her landing as she approached the bar. For purposes of determining whether the District is entitled to summary judgment on its claim of (continued)

¶3 Fata brought this action against the Horicon School District, alleging negligence and a violation of the Safe Place Statute, WIS. STAT. § 101.11.[3] The District moved for summary judgment, asserting that it was immune from liability for Fata's injury on all claims because, at the time Fata was injured, its employees were engaged in performing discretionary acts for which immunity is afforded under WIS. STAT. § 893.80(4). The circuit court, after determining that it would disregard an affidavit from Fata as a "sham affidavit," granted the District's motion for summary judgment and dismissed Fata's claims. The court also denied Fata's motion asking it to reconsider its determination that her affidavit was a sham affidavit.

ANALYSIS

¶4 The case comes before us on summary judgment and our review is thus de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Before addressing whether summary judgment is appropriate on the present record, we must determine whether we should consider Fata's affidavit submitted in opposition to the District's summary judgment motion. Whether an affidavit should be disregarded as a "sham affidavit" is also a question

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immunity, we accept Fata's account that her injury occurred after she landed when her leg became trapped in a gap between the foam pads.

[3] The District argued, and the circuit court concluded, that governmental immunity for discretionary acts extends to alleged violations of the Safe Place Statute and, further, that the statute does not itself create a ministerial duty. Fata's arguments on appeal focus exclusively on her claim that the District was negligent in not properly securing or covering the high jump pads, which she alleges constituted the breach of a ministerial duty. Accordingly, we do not address in this opinion any issues regarding Fata's Safe Place claim.

that we answer de novo. *See* ***Yahnke v. Carson***, 2000 WI 74, 236 Wis. 2d 257, ¶22, 613 N.W.2d 102.[4] We conclude that Fata's affidavit is not a sham affidavit.

¶5 A sham affidavit is an affidavit of a party or other witness submitted in opposition to a motion for summary judgment that purports to create an issue of material fact by averring facts that directly contradict the affiant's prior deposition testimony with no reasonable explanation for the contradiction. *See* ***id***., ¶¶15-18. The sham affidavit rule as adopted and explicated by the Wisconsin Supreme Court is as follows:

> [F]or purposes of evaluating motions for summary judgment pursuant to WIS. STAT. § 802.08, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. To determine whether the witness's explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects

[4] The supreme court did not explicitly state a standard of review in ***Yahnke v. Carson***, 2000 WI 74, 236 Wis. 2d 257, 613 N.W.2d 102, for the question whether an affidavit is a sham affidavit, nor does a standard appear to have been stated in any published decision to date. The supreme court began its analysis in ***Yahnke*** with the customary description of the de novo standard for reviewing an order granting summary judgment. *See* ***id***., ¶10. The court concluded its analysis by "[a]pplying the [sham affidavit] rule here," ***id***., ¶¶22-23, giving an explanation that can only be characterized as a de novo determination of whether the affidavit in question was a sham affidavit. *See* ***id***. Moreover, we conclude that de novo review is appropriate because determining whether an affidavit is a sham affidavit involves the examination and analysis of the "paper record" on summary judgment, not deciding questions of witness credibility. *See* ***id***., ¶¶11, 21.

> confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain.

Id., ¶21.

¶6 At her deposition, Fata was asked these questions and gave these answers:

> Q: Other than what you've told me in terms of the cover not being there, anything else that you believe the Horicon School District did wrong that contributed to your injury?
>
> A: Just not double checking to see if the covers were on the mats.
>
> Q: I understand. You've told me that.
>
> A: Right.
>
> Q: But other than that, anything else?
>
> A: Proper, proper training of the—you know, proper training of putting the covers on the mats or—but other than that, no.

In her affidavit submitted in opposition to the District's summary judgment motion, Fata averred that, at the time of her injury, "three sections [of high jump pads] were not bound or secured together in any fashion." She also averred that "[m]y injury would not have occurred had the three sections been bound or secured together."

¶7 The District contends that Fata's affidavit is a sham affidavit because her averments that the landing pads were not bound or secured together and this failure contributed to her injury contradict her deposition testimony that the lack of a single, unified cover over the three pads caused her injury. The District notes that Fata's expert stated in a report submitted with Fata's witness list that, after reviewing the depositions of Fata and her two track coaches, he

concluded that the District's failure "to provide a covering pad for the high jump landing pit as per National High School Track and Field Rules … was a proximate cause of the injury to Ms. Fata." The District further asserts that Fata did not claim the landing pads were not bound or secured together until she learned that the operative rule at the time of her injury required only that the landing pads be *either* covered with a common cover *or* attached together. The District thus maintains that its alleged failure to bind or secure the high jump landing pads together, "suddenly recalled by Fata four years after the accident and almost a year after her deposition, was properly disregarded as [a] sham." We disagree.

¶8 Fata did *not* testify at her deposition that the high jump landing pads *were* bound or secured together at the time of her injury. We thus conclude that her later averment that the pads were not bound or secured does not "directly contradict[]" anything in her deposition testimony. *See* ***Yahnke***, 236 Wis. 2d 257, ¶23.

¶9 No questions were asked of Fata during her deposition regarding the binding or securing of the pads to each other. Fata testified that on her aborted jump, "I landed in the gap, the crack [between landing pads]…. My ankle went inside the crack, my knee went the opposite direction, and I was down." Her testimony thus plainly pointed to a gap or crack between the landing pads as causing or contributing to her knee injury. Fata faulted her coaches for not ensuring that the cover, which "usually" covered the landing pads and which Fata believed was required by "a rule," was in place at the time she suffered her injury. When asked whether the District "did anything else wrong that contributed to your injury," Fata again pointed to the coaches' alleged failure to verify that the cover was in place over the landing pads. When asked the same question again a few

questions later, she gave the response we have quoted above, citing a possible lack of "proper training of putting the covers on the mats … but other than that, no."

¶10 We conclude that Fata's averment regarding the failure to bind the landing pads together can only be characterized as a supplementation of her deposition testimony, not a contradiction of it. Had Fata testified at her deposition that the landing pads were bound together at the time of her injury, or that a lack of binding played no role in causing her injuries, we would agree with the District that her later averments to the contrary, absent an adequate explanation of the contradiction, should not be allowed to prevent summary judgment in favor of the District. As we have described, however, that is not what happened.

¶11 Fata's inability to come up with additional factors contributing to her injury in response to open-ended questions at her deposition does not directly contradict her later averments regarding the District's failure to bind the landing pads. She was not testifying at her deposition as an expert on the applicable rules for high jump landing areas or the standard of care pertaining to them. She simply gave an account of how she was injured, one that clearly implicated gaps or cracks between the landing pads as a contributing factor. The District was thus on notice that any failure on its part to take appropriate steps to prevent the presence of gaps or cracks from occurring between the pads might be cited as causal negligence on its part. The fact that Fata testified to only one such failure and could not name others at her deposition should not preclude her from later supplementing her response by averring another failure on the District's part that may have contributed to the gaps or cracks between the landing pads.

¶12 Not only does Fata's affidavit not directly contradict her deposition testimony, we also conclude that she provided an adequate explanation for

belatedly citing a failure to bind the pads together as a cause of her injury. In support of her motion for reconsideration, Fata averred that, at the time of her deposition, she believed that the operative rule called for the pads to be covered with a "single unified cover," and that she was unaware that the rule in effect at the time of her injury allowed, alternatively, that the pads be bound together. She explains that she did not respond to counsel's open-ended question by citing the District's failure to bind or secure the pads together because she did not know at the time that such a failure might also be negligent conduct on the District's part. She also asserts that, at the time of her deposition, neither her counsel nor the District's counsel was aware of the rules for high jump landing pads in effect at the time she was injured. Regardless of whether Fata's belief is correct that counsel did not know of the operative rules, as we have noted, neither counsel asked Fata whether the pads were bound or secured together.

¶13 We thus conclude that Fata has provided an "adequate" explanation of why she first mentioned in her affidavit the District's failure to bind or secure the landing pads together. *See* ***Yahnke***, 236 Wis. 2d 257, ¶21. It appears that Fata did not have "access to pertinent … information," being the operative rule governing landing pads, until after her deposition testimony was given. *See* ***id***. Furthermore, Fata's earlier deposition testimony reflects a "legitimate lack of clarity" regarding the topic of the attachment of the pads, given that she was not specifically asked about this aspect of the pads during her deposition. *See* ***id***. Accordingly, because Fata's affidavit does not directly contradict her deposition testimony, and because she adequately explains the supplementation of her earlier testimony, we conclude that Fata's affidavit is not a sham affidavit. We must, therefore, consider it along with the other submissions by the parties in reviewing the appealed summary judgment.

¶14 Fata also claims the circuit court improperly rejected an affidavit she submitted that authenticated photographs of the high jump landing area taken by a classmate a year before Fata's injury. The circuit court gave two reasons for rejecting the classmate's affidavit: Fata did not include the classmate on her previously filed witness list, and photographs showing the condition of the high jump landing area a year before Fata's injury were not relevant because they proved nothing about the condition of the landing area at the time of the injury.

¶15 The District argues that we must uphold the circuit court's ruling on the classmate affidavit because the court correctly ruled that the photographs documenting condition of the jumping pit a year before the accident were not relevant, and would thus not be admissible at trial. *See* WIS. STAT. §§ 904.01; 904.02. The District also points out that circuit courts have broad discretion in dealing with scheduling order violations, and it asserts that the circuit court did not erroneously exercise its discretion in rejecting the affidavit as a sanction for Fata's failure to identify the classmate as a potential witness on the witness list she submitted. *See* ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶¶25, 29, 265 Wis. 2d 703, 666 N.W.2d 38.

¶16 We agree with the District and the circuit court that the classmate's affidavit and photographs taken a year before Fata's injury are not relevant to any disputed material fact in this case. The central issue on summary judgment is whether the pads were either covered or attached together at the time of Fata's injury. How the landing area pads may have appeared a year earlier makes it no more or less probable that the pads were either covered or attached together on the day of the accident. *See* WIS. STAT. § 904.01. Like the circuit court, we will not consider the classmate's affidavit in determining whether the record contains any

disputed facts that would preclude awarding summary judgment to the District on its claim of immunity for the discretionary acts of its employees.

¶17 Accordingly, we deem Fata's affidavit but not her classmate's affidavit to be a proper part of the record on summary judgment. With the addition of Fata's affidavit, we conclude the record on summary judgment reveals a disputed issue of material fact regarding whether the District breached a ministerial duty with respect to the condition of the high jump landing area at the time Fata was injured. The District is thus not entitled to summary judgment on its claim of immunity from liability for the discretionary acts of its employees.

¶18 WISCONSIN STAT. § 893.80(4) provides, in relevant part, as follows:

> No suit may be brought against any … governmental subdivision or any agency thereof … or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

The statute codifies for local governments in Wisconsin what is variously referred to as the doctrine or rule of "governmental immunity," "public officer immunity" or "discretionary-act immunity." Although the underpinnings of the rule for local government officials differ from those of a parallel rule applicable to state officers and employees, many "concepts and theories [discussed in case law] are generally applicable to both state and municipal officers and the tests for immunity are similar." *See* ***Kimps v. Hill***, 200 Wis. 2d 1, 10 n.6, 546 N.W.2d 151 (1996).

¶19 The statutory language immunizing "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions," WIS. STAT. § 893.80(4), would seem to cover only a narrow class of official actions or decisions. "Case law, however, has defined the phrase as being synonymous with

'discretionary' acts." ***Hoskins v. Dodge County***, 2002 WI App 40, ¶14, 251 Wis. 2d 276, 642 N.W.2d 213. Although immune from suit for discretionary acts, a public officer or employee is not shielded from liability for the negligent performance of a purely "ministerial" duty. ***Kimps***, 200 Wis. 2d at 10. "The test for determining whether a duty is discretionary (and therefore within the scope of immunity) or ministerial (and not so protected) is that the latter is found 'only when [the duty] is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.'" ***Id***. at 10-11 (citing ***C.L. v. Olson***, 143 Wis. 2d 701, 711-12, 422 N.W.2d 614 (1988)).

¶20 Fata contends that the following rule, contained in the "Track and Field 2001 and Cross Country Rules Book," published by the National Federation of State High School Associations, imposed a ministerial duty on the District to conform its high jump landing area to the requirements of the rule:

> Rule 7 Jumping Events
>
> ….
>
> SECTION 3 HIGH JUMP
>
> ….
>
> ART. 3 … The landing pad shall not be less than 16 feet … wide by 8 feet … deep. The material in the pad shall be high enough and of a composition that will provide a safe landing….
>
> *When the landing pad is made up of two or more sections, they shall be attached or include a common cover or pad extending over all sections.*

(Emphasis added; hereafter referred to as "Rule 7.3.")

¶21 Fata maintains that the quoted rule was "imposed by law" on the District because the District was contractually bound to observe it by virtue of its membership in the Wisconsin Interscholastic Athletic Association (WIAA), the rules of which incorporate the cited National Federation rule for high jump landing areas.[5] In its circuit court brief in support of its motion for summary judgment, the District argued that "neither Rule 7[.3], *nor any other rule or law*, 'imposes'" a definite, non-discretionary requirement. (Emphasis added.) The District does not dispute on appeal that the rule in question meets the "imposed by law" requirement for a ministerial duty, contending only that the rule "implicates discretion and permits choices on the part of school officials," a contention we address below. The District has thus essentially conceded that the requirements of Rule 7.3 were "imposed by law" on the District for purposes of the ministerial duty analysis. Accordingly, we assume without deciding that the District was required by law to abide by Rule 7.3 governing high jump landing areas.[6]

¶22 As we have explained, the District's sole contention is that Rule 7.3 does not give rise to a ministerial duty because its requirements are *not* "'absolute, certain and imperative.'" *See* ***Kimps***, 200 Wis. 2d at 10-11. The Rule's requirements are discretionary, in the District's view, because the rule allows the District to choose to either "attach" the landing pads to one another or to cover them with a "common cover." The District further notes that the specific method

[5] *See* ***School Dist. of Slinger v. WIAA***, 210 Wis. 2d 365, 367-68, 563 N.W.2d 585 (Ct. App. 1997) ("The WIAA is a voluntary, unincorporated and nonprofit organization consisting of all 425 public high schools in the state of Wisconsin…. All membership schools agree to 'adopt[] the rules of the association….'").

[6] For a recent discussion of the "imposed by law" requirement, see ***Meyers v. Schultz***, 2004 WI App 234, ¶¶14-19, 277 Wis. 2d 845, 690 N.W.2d 873.

or methods of attaching the pads, as well as the dimensions and composition of a common cover, are left completely to the discretion of District employees. According to the District, because so many details are left to the discretion of District personnel, the Rule cannot be viewed as imposing any ministerial duty on its coaches.

¶23 In support of its contention that Rule 7.3 imposes only discretionary duties, the District points to cases where this court and the supreme court have concluded that allegedly negligent acts of public employees were not ministerial but discretionary and thus immune from suit. Typical of the cases on which the District relies is ***Bauder v. Delavan-Darien School Dist.***, 207 Wis. 2d 310, 558 N.W.2d 881 (Ct. App. 1996), a case that, like this one, arose out of an injury to a student participating in an athletic activity at a public school. The plaintiff in ***Bauder*** suffered an eye injury when a soccer ball struck him during gym class. ***Id***. at 312. The injured student argued that because Wisconsin public schools are required by law to offer physical education classes, "the actions of the physical education teacher in carrying out this duty are ministerial." ***Id***. at 313. We rejected the contention, stating that "[w]hile the obligation to provide physical education classes is mandated, and thus ministerial, the manner in which those classes are conducted is not specified either by state statute or by the school district under the facts of this case." ***Id***. at 314.[7]

[7] Cases in which the supreme court has rejected a claim of ministerial duty and determined discretionary-act immunity to apply include ***Scott v. Savers Property and Casualty Insurance Co.***, 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715 (school guidance counselor giving scholarship eligibility information to a student); ***Kimps v. Hill***, 200 Wis. 2d 1, 546 N.W.2d 151 (1996) (university professor teaching and supervising a physical education class); ***C.L. v. Olson***, 143 Wis. 2d 701, 422 N.W.2d 614 (1988) (parole agent granting a parolee permission to drive).

¶24 Unlike in ***Bauder*** where the plaintiff could point to no rule or statute that directed the manner in which a gym teacher should conduct his or her soccer class, Rule 7.3 directed the District, at the time of Fata's injury, to provide a high jump landing area whose separate foam pads were either attached together or covered with a common cover. We conclude that, if the District failed to do at least one of these two things, it breached a ministerial duty and it may be held liable to Fata if the breach constituted negligence and was a substantial factor in producing her injury.

¶25 We acknowledge that Rule 7.3 provides District employees with choices regarding whether to attach or cover the pads and how specifically to accomplish either task. Thus, if the District can establish that the individual landing pads were either attached or secured to each other in some fashion, or that they were covered by a "common cover or pad extending over all sections," it will have discharged the duty imposed by the rule. Neither its choice of which action to take or the details of how it accomplished one or the other of the required actions would be actionable because the choice of method and implementation would be discretionary acts for which the District enjoys immunity under WIS. STAT. § 893.80(4).[8]

[8] As the supreme court has explained, it is important to not confuse the question of a public employee's negligence with that of his or her immunity for discretionary acts. *See* ***Kimps***, 200 Wis. 2d at 11-12 ("A party cannot work backwards from a consequence to create a duty that is 'absolute, certain and imperative.'"); ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314 ("The immunity defense assumes negligence…."). The District's ministerial duty was to either attach the high jump landing area pads or cover them with a common cover. If it did neither, it may be held liable if such a failure constituted causal negligence. If, however, the District either attached or covered the pads, it discharged its ministerial duty and enjoys immunity for any negligence its employees may have committed in electing between the alternatives or in accomplishing one of them.

¶26 What the District could not do, however, was to take neither action—attachment or covering of the pads—given that Rule 7.3 absolutely and imperatively prescribes that one of the specific measures be taken. With respect to taking one of the two alternative actions specified in Rule 7.3, we deem the present facts to be governed by the analysis in ***Bicknese v. Sutula***, 2003 WI 31, 260 Wis. 2d 713, 660 N.W.2d 289, where the supreme court held that a University of Wisconsin (UW) official was under a ministerial duty to follow "the specific directives under chapter seven of the UW Faculty Policies and Procedures." ***Id***., ¶32. Assuming as we do that the requirements of Rule 7.3 are imposed on the District "by law," we conclude the rule creates a ministerial duty to take one of two steps to prevent or reduce gaps between high jump landing pads, leaving the District no discretion to simply do neither.

¶27 The question thus becomes whether the record on summary judgment shows any dispute regarding whether the high jump landing area pads at the time of Fata's injury were either (1) covered by a common cover, or (2) attached to each other.[9] The District concedes for purposes of summary judgment

[9] Fata asserts in her reply brief that there "seems to be some confusion about whether or not the school district was subject to a WIAA rule governing high jump landing areas," and she includes in a supplemental appendix a copy of an excerpt from the "WIAA 2001 Spring Edition of Season Regulations." The excerpt contains the following directive under the heading "15. Rules Governing Competition": "The official rules for all interscholastic competition are contained in the (a) current edition of TRACK & FIELD AND CROSS COUNTRY RULES BOOK, CASE BOOK, AND OFFICIALS MANUAL and (b) related publications and interpretations of the National Federation…." The excerpt from the 2001 WIAA rules does not appear to be a part of the summary judgment record.

(continued)

that whether the pads were covered by a common cover on the day in question is disputed on the present record. It maintains, however, that there is no dispute that the landing area pads were in fact attached or secured to one another at the time Fata was injured. We disagree and conclude that whether the landing pads were attached to one another at the time of Fata's injury is also disputed on the present record.

¶28 The assistant track coach testified that "[w]e connect the foam blocks with belts that are connected to them that are pulled together, and then we put a strap around the entire system to hold. The cover is primarily to help cushion the fall." In response to the District counsel's questions, he also said that the pads are "hooked together," describing how, and he verified that "there is a rope or cord around the entire circumference" and that "the cover [is] left on all the time." Significantly, in the deposition excerpts that appear in the record, the assistant coach was *not* asked specifically whether the pads were hooked together, circumscribed and covered on the day of Fata's injury, even though this coach witnessed her aborted jump and gave his account of it in his deposition.

¶29 Similarly, the head track coach testified at deposition that he did not recall if he was the person who put the cover on the pads that day, but it was his

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We see no "confusion" in either the record or the appellate briefing regarding the District's obligation to abide by the quoted National Federation Rule 7.3 governing high jump landing areas, a point essentially conceded by the District. We note, however, that WIAA regulation 15, quoted in the preceding paragraph, seems to impose the National Federation rules on member schools for only "interscholastic competition," not necessarily for team practices. If this is indeed the case, and if National Federation Rule 7.3 was not otherwise "imposed by law" on the District's coaches for purposes of track team practices, it could be argued that the composition of the high jump landing area during practices was a matter completely within the discretion of District employees. We do not address such an argument, however, because (1) the District does not make the argument in this appeal, (2) the District did not raise the issue in the circuit court, and (3) the argument relies on matters outside the present record.

"assumption" that the cover was on because "[t]he cover was put on when the pit was set up and left on all the time." The coach also said that it was his "policy" to "make sure that the pits were as close to regulation as we possibly could at all times, and that would be following state regulations." The coach also agreed that it was important "to make sure that there are no cracks between the three sections of the high jump pit" and that the District did so "by making sure that the straps are properly applied." As with the assistant coach, however, the head coach was not specifically asked in the deposition excerpt contained in the record whether the straps were in place on the day Fata was injured.

¶30 The District asserts in its brief that "[i]t is undisputed that the school district complied with rule 7[.3] by securing the landing pit mats together," and it cites the foregoing deposition testimony in support, asserting that the "testimony of the two coaches on this issue was unequivocal." The District acknowledges that its witnesses did not specifically recall putting the cover on the mats on the day of Fata's accident, but it asserts that "[n]either track coach expressed any uncertainty over the fact that the mats were secured together on the day of Sara Fata's accident."

¶31 We reject the District's characterization that its coaches unequivocally verified the status of the pad bindings at the time of Fata's injury. Both men described the District's general practice and method of securing the pads together, but neither was asked and neither testified that the pads were secured in the fashion they described on the day of Fata's injury. We nonetheless conclude that the coaches' testimony would support a reasonable inference that the landing area on the day of Fata's injury complied with the District's general practice and methods of attaching the landing pads.

¶32 That inference is disputed, however, by Fata's averments in her affidavit submitted in opposition to summary judgment. She avers that the landing pads were not attached or bound together when she injured her knee, and further that they were not covered by a common cover at that time. Fata has thus submitted evidence that places in dispute whether the District complied with either of the alternatives set forth in Rule 7.3 on the day in question.

¶33 Because the record on summary judgment presents a dispute of historical fact regarding whether the District complied with either of the alternatives set forth in Rule 7.3 for preventing gaps between high jump landing area pads, and because the District had a ministerial duty to comply with one or the other of the requirements, we cannot say as a matter of law that the District is immune from suit on the present record. As we have discussed, if the District either attached or covered the pads, Fata's claims must be dismissed because the choice of which alternative to employ and specifically how to accomplish it are not set forth in Rule 7.3. Those matters are thus left to the discretion of District employees, the exercise of which cannot render the District liable to Fata pursuant to the provisions of WIS. STAT. § 893.80(4). Whether the District took one of the required steps cannot be determined on the present record, however, and we remand for further proceedings on Fata's claim.

CONCLUSION

¶34 For the reasons discussed above, we reverse the judgment of the circuit court and remand to the circuit court for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.