

**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

<b>Charles Leet and Janet Leet,</b>	)	
	)	<b>Supreme Court No.: 20060011</b>
<b>Plaintiffs and Appellants,</b>	)	<b>Dist. Ct. No.: 04-C-0653</b>
	)	
<b>v.</b>	)	
	)	
<b>City of Minot,</b>	)	
	)	
<b>Defendant and Appellee.</b>	)	

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**BRIEF OF APPELLANTS  
CHARLES LEET AND JANET LEET**

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**APPEAL FROM  
THE WARD COUNTY DISTRICT COURT'S DECISION  
DISMISSING APPELLANT'S COMPLAINT  
  
THE HONORABLE WILLIAM W. MCLEES PRESIDING**

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## **STATEMENT OF ISSUES**

1. Whether the district court erred in allowing the affirmative defense of recreational immunity to be asserted for the first time in a summary judgment motion.

2. Whether the district court erred in granting summary judgment and finding that the recreational use immunity statutes of the North Dakota Century Code were applicable.

## **STATEMENT OF THE CASE**

Charles Leet (“Charles”) and Janet Leet (“Janet”) appeal the Ward County District Court’s decision dismissing their Complaint against the City of Minot (“City”), for injuries Charles sustained while working for Experience Works and setting up for the Salute to Seniors Event at the Minot Auditorium in an employment capacity. (App. 30 and 4-5).

Charles and Janet commenced this action on August 8, 2003, alleging that the City was negligent in causing injuries and damages sustained by Charles when a curtain divider fell and a pipe struck him on the head while he was at the Minot Auditorium owned, operated and maintained by the City. (App. 4-5).

The City submitted its Answer denying that Charles’ injuries were a result of its actions. Defendants also asserted that the injuries resulted from Charles’ actions or omissions. (App. 7-8). The City did not assert a recreational immunity defense. (App. 7-8).

The City ultimately moved for summary judgment arguing that it was entitled to judgment as a matter of law under the recreational use immunity statutes set forth in N.D.C.C. Ch. 53-08. (App. 11 and 12). See also Brief in Support of Motion for Summary Judgment (Docket at 22). In response to the City’s Motion, Charles argued that the recreational use immunity statutes were not applicable to the facts of the case and that the recreational immunity defense had not been properly pled. See Plaintiff’s Reply Brief in Opposition to Defendant’s Motion for Summary Judgment (Docket at 38).

The Motion for Summary Judgment was heard by the court on Monday, March 21, 2005. (App. 18-27). On October 28, 2005, the district court notified the parties that it would be granting the summary judgment motion. (App. 17). On November 11, 2005, the district court issued its Memorandum and Order granting summary judgment to the City stating that it was immune from suit pursuant to Chapter 53-08 of the N.D.C.C. (App. 18-27). On December 21, 2005, the judgment was entered dismissing Charles' Complaint against the City. (App. 28).

In its Motion for Summary Judgment, the City argued that the recreational use immunity statutes bar Charles' claim. The City argued that no questions of fact existed regarding whether there was a charge to enter the premises, whether the Salute to Seniors Event was a recreational event, or whether Charles was there for a recreational purpose. See (Docket at 22). In Charles' response to the City's Motion, he argued that recreational immunity is an affirmative defense that cannot be raised for the first time in a summary judgment motion. Charles further argued that the recreational use immunity statutes were not applicable to alleviate the City of its duty of care to Charles because he was not a recreational user of the Minot Auditorium, there was a charge to enter the auditorium and the Salute to Seniors Event held at the Minot Auditorium, a commercial building, was not a recreational purpose contemplated by the recreational use immunity statutes. See (Docket at 38).

The district court concluded that the City was not precluded from asserting recreational immunity as an affirmative defense for the first time in a summary judgment motion. The court found that the Salute to Seniors Event was a recreational event, that

there was no charge for the event, and that Charles was there to further a recreational purpose. The court concluded that the City owed no duty of care to Charles and granted the summary judgment motion. (App. 18-27). This appeal is submitted on the basis of the district court's decision granting the City's motion for summary judgment. (App. 30).

### **STATEMENT OF FACTS**

On May 6, 2002, Charles was injured at the Minot Auditorium when a curtain divider system fell and a pipe struck him on the head. Leet deposition, pp. 36, 55-61, 64-66, 93, and 95. (App. 32 and 37-41), and (App. 4-5 and 7-8). Charles came to the auditorium to set up a booth for his employer, Experience Works, which was participating in the Salute to Seniors Event as a vendor. Leet deposition, pp. 39-40 and 53. (App. 33 and 37). The event was to take place the following day. Leet deposition, p. 46. (App. 35). The purpose of having a booth at the Salute to Seniors Event was to promote the services of Experience Works. Leet deposition, pp. 39-40. (App. 33). Experience Works' main purpose was to find training and employment for people age 55 and older by putting them in community service positions while paying their wages in order to get them training. Leet deposition, p. 33. (App. 32). Charles was Experience Works' field operations coordinator. Leet deposition, p. 31. (App. 31). Charles received workers' compensation benefits for his injuries. Leet deposition, p. 36. (App. 32).

The City owns, operates and maintains the Minot Auditorium. (App. 7-8). The City's employees set up the curtain divider system. Johnson deposition, p. 10. (App. 42.)

The Salute to Seniors is an event that the Minot Senior Coalition holds annually, The event offers "educational information as well as entertainment and information from

area businesses and organizations that have booths.” Zahn Deposition, p. 7. (App. 43).

## ARGUMENT AND AUTHORITY

### **I. The City was precluded from asserting the recreational immunity defense for the first time in its summary judgment motion.**

The district court concluded that an affirmative defense such as recreational use immunity can be raised for the first time in a motion for summary judgment if there is not prejudice to the opposing party. It further concluded that Charles would not be prejudiced by the motion.

Interpretation of the rules of procedure is a question of law for a court to decide. See In re Disciplinary Action Against McKechnie, 2003 ND 22, ¶ 15, 656 N.W.2d 661 (finding the interpretation of rules of professional conduct, like interpretation of statutes, is a question of law for the court to decide). “Questions of law are fully reviewable, de novo, on appeal.” See Rudd v. Frandson, 2005 ND 174, ¶ 6, 704 N.W.2d 852.

Recreational immunity is an affirmative defense, to be plead by the defendant. This defense cannot be raised in a motion for summary judgment unless the complaint supplied the basis for the defense. See N.D.R.Civ.P. 8(c); N.D.R.Civ.P. 12(b); DiMella v. Gray Lines of Boston, Inc., 836 F.2d 718, 720 (1st Cir. 1988) and Dawson v. United States, 68 F.3d 886 (5th Cir. 1995).

Rule 8(c) of the North Dakota Rules of Civil Procedure provides in relevant part:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative

defense.

N.D.R.Civ.P. 8(c). (emphasis added).

Rule 12(b) of the North Dakota Rules of Civil Procedure provides in relevant part:

**Every defense**, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, must be asserted in the responsive pleading thereto...

N.D.R.Civ.P. 12(b) (emphasis added).

In DiMella, the court found that recreational immunity was an affirmative defense to be “pleaded by defendant” and stated that the defendant could not raise the defense by a motion to dismiss unless the complaint itself supplied the basis. DiMella, 836 F.2d at 720.

In Dawson, the court found that a summary judgment motion was filed in bad faith, based in part on the government’s failure to plead recreational immunity as an affirmative defense. Dawson, 68 F.3d at 892 n.8.

In this case, the City has failed to affirmatively plead recreational immunity as required by the North Dakota Rules of Civil Procedure. Although rule 15(a), allows for amendment of pleadings, such an amendment should not be allowed in this case. See N.D.R.Civ.P. 15(a); Hollonbeck v. Torrey, 171 F.R.D. 244 (E.D.Ark. 1997).

In Hollenbeck, the court stated that it would not permit amendment of pleadings, in a negligence case, to allow the defendant to assert a defense provided by the state recreational use immunity statute. Id. In that case, the court considered that the statute had been on the books for over 30 years, the defendant had not included the affirmative defense in his answer or sought to amend until more than a year after filing the answer

and more than five months after the deadline for filing all motions. Id. at 245. The court also considered that additional discovery would be required to resolve questions as to whether the statute was applicable. Id. The court stated that “[t]hough Rule 15 of the Rules provides that leave to amend ‘shall be freely given when justice so requires’, the Court nevertheless believes that in seeking leave at this stage of the proceedings, the defendant has simply waited too long.” Id. The court further stated that “this is why the Court has deadlines and spells them out to the litigants well in advance. Bringing up new arguments, theories, claims, defenses, etc. late in the game risks putting the other parties at a disadvantage.” Id. at 246. The court found that granting the motion to amend would put the plaintiff at a disadvantage. Id.

Amending pleadings late in the game creates a disadvantage and causes prejudice. Charles’ action was commenced on August 8, 2003. (App. 3). Charles’ deposition was taken on November 25, 2003. (Docket at 64). Keith Whites’ deposition was also taken on November 25, 2003. (Docket at 68). The depositions of Charlotte Zahn, Linda Brown, Frank Misuraca, and Beverly Westman were taken on May 11, 2004. (Docket at 70-73). A Scheduling Conference was held on July 26, 2004, and the Court’s Order for Trial was issued on July 27, 2004. (App. 6 and 9). The trial was scheduled as a backup trial for March 28 through April 1, 2005. (App. 9). On December 23, 2004, Judge McLee’s sent a letter to the parties establishing that the deadline for disclosure of the names of expert witnesses would be January 21, 2005. (App. 10). The Motion for Summary Judgment was not brought until February 10, 2005. (App. 11).

The district court found that there was no prejudice in this case that would

preclude the City from asserting its defense. It is Charles' position that the City should be barred from asserting the recreational immunity defense for the first time in a motion for summary judgment made less than two months before trial. The North Dakota recreational immunity statutes have been on the books for over 30 years, the City did not include the affirmative defense in its answer or bring the summary judgment motion until more than a year and one-half after this action was brought. Furthermore, all depositions in this case have been conducted and Charles was precluded from asking questions that would have determined whether the statute properly applied in this case. For example, at the time of the depositions, it did not seem important to inquire about charges for those entering the Minot Auditorium for the Salute to Seniors Event. This is evidenced by the fact that the City had to obtain an affidavit from Keith White, whose deposition was taken on November 23, 2003. (App. 14). Charles was precluded from finding whether the City indirectly received any charges or obtained other economic benefits from the Salute to Seniors Event. See Hollonbeck, 171 F.R.D. at 245-46; and DiMella, 836 F.2d at 720. The City's delay in bringing this motion put Charles at a disadvantage and allowing the City to amend its pleadings at this stage would be prejudicial.

**II. The recreational use immunity statutes are inapplicable in this case and do not alleviate the City's duty of care to Charles.**

North Dakota Century Code § 53-08-02 provides:

Subject to the provisions of section 53-08-05, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

N.D.C.C. § 53-08-02.

North Dakota Century Code § 53-08-03 provides:

Subject to the provisions of section 53-08-05, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

1. Extend any assurance that the premises are safe for any purpose;
2. Confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed; or
3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

N.D.C.C. § 53-08-03.

In interpreting the statute, the district court concluded that the Salute to Seniors Event was a recreational purpose, that Charles was using the auditorium to further that purpose and that the City permitted him to use the auditorium without charge. As such, the district court granted the City's motion for summary judgment finding it was immune from suit pursuant to Chapter 53-08 of the North Dakota Century Code.

**A. Standard of Review**

Summary judgment is a procedural device used to promptly dispose of an action without trial if there is no dispute about material facts or the reasonable inferences to be drawn from undisputed facts, or if the only issues left to be resolved are questions of law.

Zuger v. State, 2004 ND 16, ¶ 7, 673 N.W.2d 615.

Motions for summary judgment are governed by Rule 56 of the North Dakota

Rules of Civil Procedure, which provides in part:

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.D.R.Civ.P. 56(c).

Summary judgment is appropriately granted when a party fails to show that any facts are in dispute on an essential element of a claim for which they have the burden of proving at trial. Jaste v. Gailfus, 2004 ND 94, ¶ 10, 679 N.W.2d 257. Even undisputed facts do not justify a finding of summary judgment if reasonable persons could draw different inferences from those facts. Helbling v. Helbling, 267 N.W.2d 559, 561 (N.D. 1978).

In considering a motion for summary judgment, the trial court must view the evidence in the light most favorable to the party opposing the motion and that party shall receive the benefit of all reasonable inferences that can be drawn from the evidence. Iglehart v. Iglehart, 2003 ND 154, ¶ 9, 670 N.W.2d 343.

“A de novo standard of review is used to determine whether a district court erred in granting summary judgment.” See Ziegler v. Dahl, 2005 ND 10, ¶ 11, 691 N.W.2d 271; see also Koehler v. County of Grand Forks, 2003 ND 44, ¶ 10, 658 N.W.2d 741 (stating that the decision to grant summary judgment will be reviewed on the entire record).

“In construing statutes, it is the Court’s duty to ascertain the Legislature’s intent. Rydberg v. Rydberg, 2004 ND 73, ¶ 10, 678 N.W.2d 534. Words in a statute are to be

understood in their ordinary sense. N.D.C.C. § 1-02-02. Words must be given their plain, ordinary, and commonly understood meaning. N.D.C.C. § 1-02-03. See also Rydberg, at ¶ 10. Statutes are to be construed as a whole and harmonized to give meaning to related provisions. Rydberg, at ¶ 10. Although courts may resort to extrinsic aids to interpret an ambiguous statute, if the language is clear and unambiguous, the legislative intent is presumed clear from the face of the statute. N.D.C.C. §§ 1-02-05, 1-02-39; Gratch Co., Ltd. v. Wold Engineering, P.C., 2003 ND 200, ¶ 10, 672 N.W.2d 672. Statutes will be interpreted to avoid absurd and ludicrous results. Mead v. North Dakota Dept. of Trans., 1998 ND App 2, ¶ 10, 581 N.W.2d 145; Keepseagle v. Backes, 454 N.W.2d 312, 315 (N.D. 1990).

**B. The district court erred in concluding that Charles was using the Minot Auditorium for a recreational purpose.**

For the purposes of the recreational use immunity statutes “recreational purposes” “includes any activity engaged in for the purpose of exercise, relaxation, pleasure, or education.” N.D.C.C. § 53-08-01. The recreational use immunity statutes protect landowners when others use their property without charge for their personal enjoyment. Olson v. Bismarck Parks and Recreation, 2002 ND 61, ¶ 14, 642 N.W.2d 864.

It is undisputed that Charles was at the Minot Auditorium on May 6, 2002, in an employment capacity. At the time of the injury, Charles was employed by Experience Works. Leet deposition, p. 38. (App. 33). Charles was at the Minot Auditorium on his employer’s behalf in an employment capacity to set up a booth for an event in which his employer was involved. Leet deposition, pp. 39-40. (App. 33). The fact that Charles

received Workers' Compensation benefits for his injuries further evidences that he was at the auditorium in an employment capacity. Leet deposition, p. 36. (App. 32). Charles was not at the Minot Auditorium for exercise, relaxation, pleasure or educational purposes and he was not at the auditorium for his personal enjoyment. Furthermore, the Salute to Seniors Event, which the City contends is a recreational purpose, was not taking place until May 7, 2002, which was the following day. Leet deposition, p. 46 (App. 35).

In concluding that Charles was on the land for recreational purposes, the district court stated that it is the land owner's intent which controls whether the recreational use immunity statutes apply, and not Charles' subjective intent for entering the auditorium. It concluded that the fact that Charles was at the auditorium in an employment capacity on behalf of one of the vendors does not preclude a finding that he was a recreational user of the premises. The district court places much reliance on a Ninth Circuit decision entitled Howard v. United States, 181 F.3d 1064 (9th Cir. 1999). The decision in Howard, however, has been rejected by the Supreme Court of Hawaii interpreting the same statute. See Crichfield v. Grand Wailea Co., 6 P.3d 349, 359 (Haw. 2000). The court in Crichfield was unwilling to hold as the Ninth Circuit did in Howard, that the subjective intent prompting a person to enter or use another's land is immaterial to the question of whether a duty is owed to keep the premises safe. Id.

Other jurisdictions have found that the user's subjective assessment and subjective intent are important when there is an issue of whether the user entered onto the property for recreational purposes. See Atlanta Committee for the Olympic Games, Inc. v. Hawthorne, 598 S.E.2d 471, 474 n.2 (Ga. 2004); Herman v. City of Tucson, 4 P.3d 973

(Ariz. Ct. App. 2000); Linville v. City of Janesville, 516 N.W.2d 427, 431 (Wisc. 1994).

The court in Herman, dealt with an issue similar to the issue before this court. In Herman, a local radio station was sponsoring a fund-raising music festival in a band shell area of a park which the City owned and maintained. Herman, 4 P.3d at 975. Herman worked for one of the vendors. Id. Herman went to the park that day for the sole purpose of working. Id. She was injured when she stepped in a gopher hole and fell. Id. The Arizona recreational use immunity statutes define recreational purposes differently than the North Dakota statutes. Id. at 975. The Arizona statutes limit recreational purposes to hunting, fishing, trapping, camping, hiking, riding, exercising, swimming or engaging in similar pursuits. Id. The court in Herman determined that the music festival was not a recreational purpose. The court, nonetheless, discussed whether Herman would be considered a recreational user being present solely to work. Id. at 976.

The City in Herman had argued that the statute did not require a person to be engaged in recreational pursuits in order to be covered by the definition. Rather it argued that it was the owner's intent and not the subjective intentions of the person entering the land that was determinative. Herman, 4 P.3d at 976. The court disagreed noting that other courts addressing this issue have routinely focused on the entrant's activities, not just on the nature and scope of the landowner's permission in determining whether an entrant was a recreational user. Id. at 979. Although the court recognized that the entrant's subjective intent should not be a controlling factor, the court also stated that it could not say that the legislature clearly intended to render irrelevant the entrants' purposes for coming onto the land, even though the legislature obviously intended the

statute to limit public land owners' liability to recreational users. Id. at 978. The court based this on the fact that the stated purpose of the act was to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability towards persons entering thereon for such purposes. Id. The Arizona statutes like the North Dakota statutes were enacted in 1965 with a similar purpose. Id.; S.L. 1965, ch. 337, § 1; Hovland v. City of Grand Forks, 1997 ND 95, ¶ 10, 563 N.W.2d 384. Although the ultimate holding in Herman was that the festival itself was not a recreational use, the court found that any concerns by the City that they would lose their immunity based on subjective intent were not present in that case because it was undisputed that Herman was at the park solely to work. Herman, at 979.

Wisconsin also has similar recreational immunity statutes. The purpose behind those statutes are also similar to the purpose behind the North Dakota statutes, to encourage property owners to open their lands for recreational activities by removing a property user's potential cause of action against a property owner's alleged negligence. See Linville v. City of Janesville, 516 N.W.2d 427, 730 (Wis. 1997).

In Linville, the court found that a test which is consistent with the purpose of the statute is one which considers the purpose and nature of the activity in addition to the user's intent.

In Linville, the court stated:

The test requires examination of all aspects of the activities. The intrinsic nature, purpose and consequence of the activity are relevant. While the injured person's subjective assessment of the activity is relevant, it is not controlling. Thus, whether the injured person intended to recreate is not dispositive, but why he was on the property is pertinent.

Linville, 516 N.W.2d at 430.

The Linville court found that scoping out a fishing site was a recreational purpose because fishing is intrinsically a recreational activity and people fish for relaxation and enjoyment. Linville, 516 N.W.2d at 431. The North Dakota recreational use immunity statutes also classify people differently based on the location and nature of the injured party's conduct. See Olson v. Bismarck Parks and Recreation, 2002 ND 61, ¶ 14, 642 N.W.2d 864.

In Dawson v. United States, 68 F.3d 886 (5th Cir. 1995), the government brought a summary judgment motion on the bases of the Texas recreational immunity statutes. In Dawson, a prison inmate was injured while chasing a ball. The government argued that the field where Dawson was injured was used for recreational purposes by both prisoners and other groups. Dawson, 68 F.3d at 889. In commenting on this motion, the court stated that "if the defendant had conducted the slightest amount of research, the defendant would have known that it had nothing to do with this lawsuit. If the defendant had used an ounce of logic, the defendant would have known that it had nothing to do with this lawsuit and that [Dawson] was there as inmate of the prison system. He didn't come on those premises for recreational purposes. He wouldn't have been there at all, if he hadn't been an inmate in the prison." Id. at n.8.

An entrants' actual activities on the premises and his or her reasons for being there are relevant factors in determining whether the recreational use statute applies. Charles was at the Minot Auditorium setting up a booth for his employer. He was there solely to work. Charles was not even present at the Salute to Seniors Event, which was to

take place the next day. Charles' activity of working cannot be equated with scoping out fishing locations. Mr. Leet entered the building to work. Working is not a recreational activity and is objectively non-recreational. The district court, nonetheless, concluded that Charles was a recreational user of the premises because he was there to further the recreational purpose of the event. This reads language into the statute that simply does not exist.

Had the legislature intended to grant qualified immunity to public land owners for injury claims by any non-fee paying entrant regardless of the entrant's purpose, intent and activity it could have so stated. Instead, the legislature specifically stated that no duty of care was owed to persons entering for a recreational purpose. N.D.C.C. § 53-08-02.

In Olson v. Bismarck Parks and Recreation, 642 N.W.2d 864, 871 (N.D. 2002), the Court stated that “[w]inter sledding is a recreational use in the clearest sense of the term.” As winter sledding is clearly a recreational use, it is Charles' position that entering an auditorium for the purposes of setting up a booth in an employment capacity is **clearly not** a recreational use in the clearest sense of the term. Charles was not using the auditorium for exercise, relaxation, pleasure, education or personal enjoyment and, therefore, the recreational use immunity statutes are inapplicable to this case.

**C. The district court erred in concluding that the Salute to Seniors Event at the Minot Auditorium was a recreational purpose contemplated by the recreational use immunity statutes.**

Charles asserts that the legislature did not contemplate indoor activities in a completely improved facility such as a commercial building when enacting the recreational immunity statutes. The district court, however, concluded that the Salute to

Seniors Event was a recreational event contemplated by the statute.

The purpose of the statutes was to encourage landowners to make available to the public, land and water areas and other property for recreational purposes by limiting their liability toward users. S.L. 1965, ch. 337, § 1; Hovland v. City of Grand Forks, 1997 ND 95, ¶ 10, 563 N.W.2d 384. The rationale behind the statute was that the cost of monitoring and maintaining the land for safe public use would be a great burden and landowners may not otherwise open up their land. The statutory language is clear that an owner of land owes no duty to those entering the land for a recreational purpose. See N.D.C.C. § 53-08-02. Land is defined to include “all public and private land, roads, water, watercourses and ways and buildings, structures and machinery or equipment thereon.” N.D.C.C. § 53-08-01(2). The statute defines recreational purposes as “any activity engaged in for the purpose of exercise, relaxation, pleasure or education.” N.D.C.C. § 53-08-01(4).

This Court has not addressed whether the definition of land encompasses a commercial building. Whether or not land must be rural in character to be encompassed by the statute was, however, addressed in a dissenting opinion. See Hovland v. City of Grand Forks, 1997 ND 95, 563 N.W.2d 384. (VandeWalle C.J. dissenting).<sup>1</sup> The Hovland case involved a bike path. Id. The dissent in Hovland discussed whether a bike path fit within the definition of land. The dissent stated that although the bike path was in a somewhat more urban setting versus a rural setting, “[w]e do not split such a fine hair.” The dissent stated that there is nothing in Chapter 53-08 which specifies the immunity

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<sup>1</sup>Justice Sandstrom joined in signing the dissent in Hovland.

granted should only apply to rural, open areas. The dissent further stated that, “[t]o hold that a bike path, a course clearly designed for recreation, should not be included under the statute’s definition of land contradicts the purpose of the act.” See Hovland, at ¶¶ 27 and 29. The majority opinion was not decided based on whether the bike path constituted land and this interpretation of land is not precedent. Nonetheless, a bike path is clearly distinguishable from an improved commercial facility.

In this case, we are dealing with a commercial facility that has been designed with improvements that require regular maintenance to be safely used and enjoyed. The obligation to maintain the building already exists to nonrecreational and commercial users of the building and to those who work in the building. There is no additional cost of monitoring and maintaining the land for safe public use by recreational users. Owners of improved commercial facilities such as the Minot Auditorium should have a duty to maintain the facilities. Walsh v. City of Philadelphia, 585 A.2d 445, 450 (Pa. 1991) (finding a duty to maintain improvements to recreational facilities). Unlike the great outdoors, when people enter a commercial facility, there is an expectation that the building will be properly maintained and inspected. This expectation is enhanced when the building is in an urbanized and developed area. Monteville v. Terrebonne Parish Consolidated Government, 567 So.2d 1097, 1104 n.1 (La. 1990). Because a fee was paid to gain access to the premises in this case, those entering the auditorium may have an even greater expectation that the premises will be safe. See Monteville, 567 So.2d at 1104 n.1; Leet deposition, p. 51. (App. 36). To allow the definition of land to include completely improved buildings would be to disregard the reasonable expectation of users

of these facilities. See Walsh, at 450; Monteville, at 1104 n.1 (finding that protection of the reasonable expectations of a recreational user is an additional factor to consider).

The district court also erred in concluding that the Salute to Seniors Event falls within the definition of a recreational purpose. In 1995, the legislature amended the definition of “recreational purpose” to its current form. Prior to the 1995 amendment the statute provided in part that visiting, viewing or enjoying historical, archaeological, geological, scenic or scientific sites, were recreational uses of land. The Legislature amended the definition because it was concerned that “by listing specific recreational activities there is a risk that the courts may use the interpretation that if an activity is not listed, then it must not be a recreational activity for purposes of this chapter.” See Testimony of Robert Olheiser on Senate Bill No. 2127, February 22, 1995. (App. 15). Prior to the 1995 amendments the statute also listed boating, camping, picnicking, hiking, pleasure driving, and animal riding. The Legislature considered these things to be activities for the purpose of exercise, relaxation, pleasure or education. Id. It is clear from the prior list of activities given by the legislature for recreational activities that it did not contemplate for an event such as the Salute to Seniors Event to be considered a recreational activity. This is further supported by the fact that nowhere in the legislative history of this bill does the legislature discuss or contemplate indoor activities in a commercial building.

**D. A question exists as to whether there was a charge to use the property for a recreational purpose.**

If this Court decides that Charles was at the Minot Auditorium for a recreational

purpose and that the Salute to Seniors Event is a recreational event, it must be determined whether a fee was charged. For the purposes of the recreational use statute “charge” means the amount of money asked in return for an invitation to enter or go upon the land. N.D.C.C. § 53-08-01(1). The district court stated that even though Charles’ employer and others had to pay a fee to the Senior Coalition, it is undisputed that the City did not charge anyone a fee to enter the auditorium for the Salute to Seniors Event. A fee was, however, charged to gain access to the premises. The statute does not require that the fee be paid to the Minot Auditorium.

During Charles’ deposition he testified as follows:

Q. Did people have to pay admission?

A. No. They just went through a desk where they got all the materials and signed up and all that. It was all prepaid admission, so there was no money exchange at the table.

Q. You didn’t need to get a ticket to get in?

A. Oh, yeah.

Q. Oh, you did need a ticket. And you got the ticket through one of the agencies or the coalition?

A. You’d have had to buy it through the coalition at South.

Q. So the Senior Coalition actually sold tickets actually sold tickets to this?

A. Yeah.

Leet Deposition, p. 51. (App. 36).

This testimony shows that entrants to the auditorium were required to purchase a ticket in order to gain access to the auditorium. The district court again relies on Howard

v. United States, 181 F.3d 1064 (9th. Cir. 1999), to support its position that when a person pays a fee to another entity, they are not charged an admission, price or fee in return for permission to enter or go upon the recreational facility. See Howard, at 1068. The cases cited in Howard to support its position are clearly distinguishable. They focus on whether a charge to use equipment or other facilities on the land constitutes a charge to enter the land for a recreational purpose. They did not involve any fee for entry onto the land itself. Id. at 1068-69. In this case, there was a charge to enter or go upon the land. Because there was a charge to enter or go upon the land, the recreational use immunity statutes are inapplicable.

### **CONCLUSION**

The district court's decision granting summary judgment to the City should be reversed. The district court erred in concluding that the City was not precluded from asserting a recreational immunity defense for the first time in its summary judgment motion. Furthermore, the district court erred in determining that the Salute to Seniors Event was a recreational event, that there was no charge for the event, and that Charles was there to further a recreational purpose. Charles was injured at the Minot Auditorium while there in an employment capacity. The Salute to Seniors Event was not going on at the time and was not scheduled until the following day. Nonetheless, the Salute to Seniors Event at the Minot Auditorium was not a recreational purpose contemplated under the recreational immunity statutes. Furthermore, a question of fact exists as to whether there was a charge to enter the Minot Auditorium. On the basis of the facts of this case, the City owed a duty to Charles, and the district court erred in determining that

the recreational use immunity statutes were applicable to this case.

\_\_\_\_\_ Dated this 16<sup>th</sup> day of February, 2006.

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