

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

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

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

**APPEAL FROM THE WARD COUNTY DISTRICT COURT'S DECISION
DISMISSING APPELLANT'S COMPLAINT**

THE HONORABLE WILLIAM W. MCLEES PRESIDING

**Kim E. Brust (#03556)
Stephannie N. Stiel (#05918)
For Conmy Feste Ltd.
200 Wells Fargo Center
406 Main Avenue
P.O. Box 2686
Fargo, ND 58108-2686
Telephone (701) 293-9911**

**Attorneys for Plaintiffs and Appellants
Charles Leet and Janet Leet**

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ARGUMENT AND AUTHORITY

I. Allowing the City to assert the recreational immunity defense will prejudice Charles.

The district court concluded that the recreational immunity defense could be raised for the first time in a summary judgment motion in the absence of prejudice to Charles. In coming to this conclusion, the court does not rely on North Dakota Rule of Civil Procedure 15(a). The City has made no motion to amend the pleadings. The issue before this Court is not whether the district court abused its discretion in granting an amendment to the pleadings, but whether, under Rule 8(c) of the North Dakota Rules of Civil Procedure, the recreational immunity defense can be raised for the first time in a motion for summary judgment.

North Dakota case law provides that failure to plead an affirmative defense generally waives that defense. See Hansen v. First Am. Bank & Trust, 452 N.W.2d 770, 771 (N.D. 1990); Fetch v. Quam, 530 N.W.2d 337, 337 (N.D. 1995). The City argues that the district court in effect construed the summary judgment motion as a motion to amend the complaint. This contention is inconsistent with North Dakota case law on the subject. Affirmative defenses must either be put in the answer or a motion to amend and not merely raised in other responses such as a summary judgment motion. See Northwestern Fed. Sav. & Loan Assoc. of Fargo v. Biby, 418 N.W.2d 786, 787 (N.D. 1988).

In rationalizing its decision to allow the City to assert its affirmative defense, the district court adopted the position taken in Coop. Fin. Assoc. v. Garst, 917 F.Supp. 1356 (N.D. Iowa 1996). In Garst, the court held that assertion of affirmative defenses will be

allowed for the first time in response to a motion for summary judgment when there is no prejudice or surprise to the non-moving party. Id. at 1385-86. The North Dakota Supreme Court has not specifically adopted the Eighth Circuit rationale. The Court has stated, however, that Rule 8(c), must be read in conjunction with Rule 15(b), which provides that leave to amend pleadings is to be freely given when justice so requires. See Hansen, 452 N.W.2d at 771-72. If this court were to decide to adopt the Eighth Circuit rationale or to allow the summary judgment motion to be construed as a motion to amend, it must consider whether doing so would prejudice Charles.

The City argues that Charles cannot now claim that he has been prejudiced where he did not allege prejudice below. The district court's memorandum also states that no prejudice was alleged by Charles. (App. 21). In response to the City's summary judgment motion, Charles argued that the City waived the recreational immunity defense and could not raise it for the first time in its summary judgment motion. See Plaintiffs' Reply Brief in Opposition to Defendant's Motion for Summary Judgment. (Docket at 38). In response to Charles' argument, the City contended that the Eighth Circuit rationale applied and that the defense could be raised in the absence of prejudice. See Defendant's Reply Brief to Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment. (Docket at 42). Charles' first opportunity to respond to this assertion was at oral argument. Charles did not have an opportunity to brief the issue. Charles contends that the issue of prejudice was addressed at oral argument. The reality is that the district court, when writing its decision seven months later, did not have the benefit of a transcript nor do we have the benefit of one today. Nonetheless, prejudice to

Charles is apparent from the record.

In Swanson v. Van Otterloo, 177 F.R.D. 645 (N.D. Iowa 1998) the court, relying on Eighth Circuit cases, explained that prejudice means reopening discovery or forcing a continuance of trial. Id. at 650. The court stated that “the burden is on the party who wishes to amend to provide a satisfactory explanation for the delay, and the court is free to conclude that ignorance of the law is an unsatisfactory excuse.” Id. at 649. In this case, the City has not explained its delay. Even though the trial was ultimately continued, discovery in this case had already been completed and questions had not been asked of witnesses concerning the recreational immunity defense.

The City goes as far as to say that it is Charles’ fault that he did not ask for more time to request discovery and did not request a continuance. The City cites Zulli v. Coregis Ins. Co., 910 So.2d 437 (La. Ct. App. 2005), in support of this position. This Fifth Circuit decision is in sharp contrast to the Eighth Circuit’s rationale regarding prejudice. See Swanson, 177 F.R.D. at 650 (stating that prejudice means having to reopen discovery or continue trial).

It is clear from the record as set forth in Charles’ initial brief that he has not had a full opportunity to address the recreational immunity defense and that he would be prejudiced if the Court were to allow the City to assert the defense at this time.

II. The plain language of the recreational use immunity statutes does not alleviate the City of its duty of care to Charles.

A. Charles’ subjective intent is important in determining whether he was entering or using the Minot Auditorium for a recreational purpose.

Even though the Salute to Seniors Event was not occurring until the next day, the

City argues that the plain language of the recreational use immunity statutes define a recreational user as any person who is preparing to further the purposes of a recreational event. It argues that Charles is included in this definition because he was present at the auditorium to set up a booth to educate others. Nowhere in the plain language of the recreational use immunity statutes does it state that a recreational purpose includes furthering that purpose.

The City cites Linville v. City of Janesville, 516 N.W.2d 427 (Wisc. 1994), in support of its position that Charles' presence at the auditorium preparing for the recreational event was a recreational purpose. In Linville, the court found that the plaintiff was participating in an activity that was intrinsically recreational. 516 N.W.2d at 431. The plaintiff was scouting a fishing area in preparation for a fishing trip. Id. Charles did not enter the auditorium to recreate or to participate in anything that could be considered an intrinsically recreational purpose. Charles came to the auditorium to set up a booth as part of his job. (App. 30 and 4-5).

The City argues that Charles' intentions for being on the premises are irrelevant. Although North Dakota has not specifically addressed this issue, other states that have enacted recreational immunity statutes have come to the conclusion that an entrants' subjective intent is relevant and material. See 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); Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 598 S.E.2d 471, 474 n.2 (Ga. 2004). Although the Herman case is factually distinguishable, its general discussion on the entrants' subjective intent is persuasive. Linville's discussion on subjective intent is

similarly persuasive. Both Arizona and Wisconsin enacted their recreational use immunity statutes with a purpose similar to that of North Dakota. North Dakota, Wisconsin and Arizona enacted these statutes 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. See Herman, 4 P.3d at 978; Linville, 516 N.W.2d at 730; 1965 N.D. Laws Ch. 337 § 1; Hovland v. City of Grand Forks, 1997 ND 95, ¶ 10, 563 N.W.2d 384.

In support of its position that the land owners' intent controls, the City relies on Howard v. United States, 181 F.3d 1064 (9th Cir., 1999) and Gaeta v. Seattle City Light, 774 P.2d 1255 (Wash. Ct. App. 1989).

The Hawaii Supreme Court has failed to uphold the Howard court's interpretation of its recreational immunity statutes. See Crichfield v. Grand Wailea Co., 6 P.3d 349, 359 (Haw. 2000). The Hawaii Supreme Court found that subjective intent was material and relevant. Id. The City argues that the facts of Crichfield are distinguishable because there was an issue as to whether the plaintiffs were present for a recreational purpose or the commercial purpose of buying lunch. The City argues that it was not conducting any commercial enterprises at the Salute to Seniors Event and that Charles and others were invited to present and attend and could not have been present to patronize the auditorium for commercial non-recreational purposes. Because Charles has not been able to do any discovery regarding the commercial enterprises that may or may not have been conducted at the Salute to Seniors Event, he is unable to respond to those arguments. Charles was also precluded from discovering facts regarding any possible commercial purpose or

intent for the City to allow use of the auditorium.

The facts in Howard are also distinguishable from this case. In Howard, the plaintiff was sailing. Sailing is intrinsically recreational in nature and is specifically contemplated in the Hawaii recreational use immunity statutes. Furthermore, the plaintiff in Howard was not required to take the sailing class as part of her employment. Howard, 181 F.3d at 1072.

The City also relies on Gaeta to support its position that the land owners' intent is controlling. 774 P.2d at 1258. A more recent Washington Court of Appeals decision declined to follow this rationale. See Nielsen v. Port of Bellingham, 27 P.3d 1242 (Wash. Ct. App. 2001). The Nielsen court determined that the statement made in Gaeta must be read in the context of the facts of that case, where the plaintiff was on a cross-country scenic motorcycle tour and the roadway he was traveling on was built for recreational use. Nielsen, 27 P.3d at 1245.

The City's argument that it makes more sense to follow the land owners' intent is without merit. North Dakota case law supports the position that the statutes protect the land owners when others use the property for **their personal enjoyment**. See Olson v. Bismarck Parks and Recreation, 2002 ND 61, ¶ 14, 642 N.W.2d 864.

B. A land users' expectation is a legitimate basis for excluding an improved commercial facility from the definition of land.

The City argues that there is no basis for excluding the auditorium from the definition of land under the recreational use immunity statutes. The City argues that other jurisdictions have declined to exclude indoor or urban facilities from the protection of

recreational immunity statutes. None of the cases cited by the City stand for the proposition that the reasonable expectations of a recreational user should not be taken into consideration. Furthermore, the cases do not involve injuries that occurred inside an improved commercial facility. See Palmer v. United States, 945 F.2d 1134 (9th Cir. 1991) (involving a slip and fall accident at a swimming pool); Seich v. Town of Canton, 686 N.E.2d 981 (Mass. 1997) (involving a slip and fall accident outside of a gymnasium); and Wilson v. Kansas State Univ., 44 P.3d 454 (Kan. 2002) (involving a dispute regarding whether public restrooms adjacent to a football field were encompassed by the recreational use immunity statutes). The reasonable expectations of the recreational user are important in interpreting the recreational use immunity statutes. See Monteville v. Terrebonne Parish Consol. Gov't., 567 So.2d 1097, 1104 n.1 (La. 1990); Walsh v. City of Philadelphia, 585 A.2d 445, 450 (Pa. 1991). Furthermore, denying the City immunity would not frustrate the purposes of the recreational immunity statutes because the City already has a duty to maintain the building.

C. Whether there was a charge asked in return for an invitation to enter the Minot Auditorium is a question of fact and is inappropriate for summary judgment.

The plain language of the recreational use immunity statutes does not resolve the question of whether there was a charge to gain access to the Minot Auditorium. It is Charles' position that there was a charge asked in return to enter the auditorium. He basis his argument on the fact that entrants were required to purchase tickets. The City asks this Court to reject this argument on the basis of the decision in Howard v. United States, 181 F.3d 1064 (9th Cir. 1999). The Howard court relied on several inapposite cases in

determining that an actual fee must be charged by the land owner for entry onto the land. See Viess v. Sea Enter. Corp., 634 F.Supp. 226, 226 (D. Haw. 1986); Budde v. United States, 797 F.Supp. 731, 733 (N.D. Iowa 1991); Jones v. United States, 693 F.2d 1299, 1300 (9th Cir. 1982). In these cases, the public was not charged a fee to enter onto the land or to use the land and the plaintiffs could use the land free of charge. The Howard court cites numerous other cases where the public was not charged to enter the land. See Howard, 181 F.3d at 1066-70. These cases are clearly distinguishable.

The City further argues that N.D.C.C. § 53-08-05(2) requires that the owner of land charge the person for entry onto the land. It argues that because the City did not charge anyone, it owes no duty of care. It is clear from the facts of this case that a ticket had to be purchased in return to go upon the land. These facts fit squarely within the definition of “charge” provided for in N.D.C.C. § 53-08-01(1). Whether a fee was charged is a question of fact and appropriate for summary judgment. This is supported by a case also relied upon by the defendants. See Johnson v. Rapid City Softball Assoc., 514 N.W.2d 693, 696 (S.D. 1994).

CONCLUSION

The district court erred in allowing the City to assert the recreational immunity defense. Discovery has already been completed and the City has not provided a satisfactory defense for its delay. The district court also erred in granting the City’s summary judgment motion. The City does not fall within the protection of North Dakota’s recreational use immunity statutes. Charles was at the auditorium setting up a booth for his employer and was not at the auditorium for his personal enjoyment.

Furthermore, the auditorium does not fall within the definition of land and a question of fact exists as to whether there was charge to enter the land. Therefore, the City owed a duty to Charles, and the district court erred in dismissing his case.

Dated this 27th day of March, 2006.

/s/ Kim E. Brust

Kim E. Brust

/s/ Stephannie N. Stiel

Stephannie N. Stiel

For CONMY FESTE LTD.

200 Wells Fargo Center

406 Main Avenue

P.O. Box 2686

Fargo, ND 58108-2686

Telephone: (701) 293-9911

North Dakota ID No.: 03556

ATTORNEYS FOR PLAINTIFFS

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Charles Leet and Janet Leet,)	
)	Supreme Court No.: 20060011
Plaintiffs and Appellants,)	Dist. Ct. No.: 04-C-0653
)	
v.)	AFFIDAVIT OF SERVICE
)	BY EMAIL
City of Minot,)	TRANSMISSION
)	
Defendant and Appellee.)	
STATE OF NORTH DAKOTA)	
)ss	
COUNTY OF CASS)	

Stephannie N. Stiel, attorney for appellants, being first duly sworn on oath, deposes and states that on the 27th day of March, 2006, she served via email transmission a true and correct copy of the following document filed in the above-entitled action:

1. Reply Brief of Appellants Charles Leet and Janet Leet; and
2. Affidavit of Service by Email Transmission

That said documents were emailed to:

William E. Bergman at webergman@minotlaw.com

To the best of affiant's knowledge, information, and belief, such email address as given above was the actual email address of the party intended to be served.

/s/**Stephannie N. Stiel**
Stephannie N. Stiel

Subscribed and sworn to before me this 27th day of March, 2006.

/s/**Jessica A. Ivesdal**
Jessica A. Ivesdal, Notary Public
State of North Dakota