

ORIGINAL

Supreme Court Number 20080056  
District Court Number 07-C-00866

20080056

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Reuben Larson,  
Plaintiff/Appellant,

MAR 26 2008

vs.

STATE OF NORTH DAKOTA

Gail Hagerty, Zachery Pelham,  
and Wayne Stenehjem,

Defendants/Appellees.

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APPEAL FROM JUDGMENT GRANTING MOTION TO DISMISS  
DISTRICT COURT OF BURLEIGH COUNTY

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BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

Reuben Larson sued eight prison employees, the tortfeasors, plus the Governor and the State for trespass for taking his property, for committing an intentional tort. This is the "Wiedmeier" case. See ¶1 of the Complaint, App.2 (Appendix page 2, paragraph 1 of the Complaint). This was in Burleigh County District Court, civil file number 06-C-02441. That Court's holding effectuated that the statute, N.D.C.C. 32-12.2, makes the State liable for State employee's intended and premeditated torts as well as their negligence or unintended acts, conduct, omissions or accidents. See ¶13 of the Complaint, App.6-7.

In reaction, Larson filed his complaint in this case which is the subject of this appeal. See a copy of the Complaint, App.2.

Larson did not file a claim with the OMB before filing this action. (OMB - Office of Management and Budget.)

Defendants filed a Motion To Dismiss on May 3, 2007, claiming lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. R.A.9-10 (Register of Action Number 9-10).

Larson filed his Answer Brief To Defendants' Motion To Dismiss on October 8, 2007. R.A.28.

Larson then filed his Motion To Require The Attorney General To Prove His Authority to represent the Defendants on October 9, 2007. R.A.31.

In response to Larson's Answer Brief, Defendants filed

their Reply Brief on October 16, 2007. R.A.33.

The District Court filed his Memorandum Opinion And Order Approving The Motion To Dismiss Complaint (Opinion) on December 11, 2007. R.A.34; App.11.

On December 20, 2007, Judgment was filed dismissing the action. R.A.37; App.27.

On February 22, 2008, Larson filed his Notice of Appeal. R.A.40; App.28.

No hearing or oral argument was had. There is no transcript.

#### STATEMENT OF THE FACTS

The Complaint at ¶1, 2 and 15, App.2, stated a claim upon which relief can be granted for taking Larson's property, for taking Larson's right, privilege or benefit of access to the District Court to sue for his claim and to obtain his remedy, to obtain compensation. This fact or cause of action is not in dispute. - (See Rule 28(a)(4), NDRAppP.)

Defendants' Motion To Dismiss, R.A.10, raised five claims, five affirmative defenses, none of which go to the merits of the cause of action for trespass:

1. That the District Court lacked subject matter jurisdiction;

2. That the Complaint is an impermissible collateral attack on a prior court order;

3. That the claim against Judge Hagerty is barred by absolute judicial immunity;

4. That the claim against Wayne Stenehjem and Zachery

Pelham, Attorney General and Assistant Attorney General, is barred by discretionary immunity, and, if not, it fails to state a claim against them; and

5. That State law, §32-12.2, prohibits one from suing the individual defendants, but one must always instead sue the State, the People.

Defendants' five defenses are completely and wholly based on statutory reading, court cases, and their definition of scope of employment.

In response, Larson filed his Answer Brief, R.A.28, which showed why Defendants' five affirmative defenses are unfounded in the statutes, case law, and the definition of scope of employment. Larson showed that they mis-read and incompletely read the statutes and court cases so as to come to the conclusion they wanted, and with respect to judicial immunity, that the court cases they relied on do not properly or completely cite the original cases creating judicial immunity.

In reaction, Defendants filed their Reply Brief, R.A.33, raising totally new 'arguments' or reasons in an attempt to demur to Larson's Answer Brief, not disputing or denying the issues or rules of law, but demurring to them, admitting they are correct, but trying to give a reason to justify their unfounded positions.

The District Court made his ruling based on or copied from this Reply Brief. With respect to the issues shown by Larson, Defendants' Reply Brief and the District Courts'

Opinion do not disagree with or contradict the points of law, but instead ignore the law or try to 'get around' the law by reading a statute out of context, etc.

#### STANDARD OF REVIEW

Whether a court misinterprets or misapplies a statute is a question of law fully reviewable on appeal. De Mers v. DeMers, 2006 ND 142, ¶7, 717 N.W.2d 545, 550; State ex rel. Workforce Safety, and Insurance v. Altru Health Systems, 2007 ND 38, ¶15, 729 N.W.2d 113, 117. It will be likewise with respect to court cases. Where there are no facts in dispute, subject matter jurisdiction is a question of law and is reviewed de novo. Harshberger v. Harshberger, 2006 ND 245, ¶16, 724 N.W.2d 148, 154. On appeal from a dismissal under Rule 12(b), NDR CivP, the complaint is construed in the light most favorable to the plaintiff, taking as true the well pleaded allegations in the complaint. Saefke v. Stenehjem, 2003 ND 202, ¶11, 673 N.W.2d 41, 44-45. A motion to dismiss admits the material facts alleged in the complaint. Newman v. Hjelle, 133 N.W.2d 549, 555 (N.D. 1965). If a plaintiff pleads a sufficient level of culpability to avoid the grant of immunity to a state employee, summary dismissal is not appropriate. Perry Center, Inc., v. Heitkamp, 1998 ND 78, ¶34, 576 N.W.2d 505, 513-514.

#### ARGUMENT

Page 2 of the District Court's Opinion, App.12, says that Stenehjem, in his official capacity, determined that

the "Wiedmeier" defendants acted within the scope of their employment, saying this in the context that his determination is the governing fact or is the law of the case, and that Judge Hagerty enforced the determination, which implicated N.D.C.C 32-12.2-04 and thereby dismissed the "Wiedmeier" complaint for failure to first make a claim with the OMB. This preliminary comment by the Court sets the stage for part of his Opinion.

However, N.D.C.C. 32-12.2-01(6) and 32-12.2-03(6) says that the defendant's conduct for which he is being sued governs as to whether he did or did not act within the scope of his employment, and Stenehjem's determination does not determine this, but is governed or judged by it.

**1. §32-12.2-04 DOES NOT LIMIT OR REGULATE A DISTRICT COURT'S SUBJECT MATTER JURISDICTION.**

At pages 4-5 of the Opinion, App.14-15, the Court acknowledges that §32-12.2-04 does not have words in it which say that a claim against a State employee must be dismissed if the 180 day notice to OMB is not met, that is, that §32-12.2-04 does not have words in it which makes it a subject matter jurisdictional predicate statute, does not have words which limits a court's subject matter jurisdiction.

The Opinion instead quotes a phrase from §32-12.2-04(1): "shall present to the director of the office of management and budget within one hundred eighty days."

The Opinion then declares this phrase must mean it is for limiting jurisdiction. The Opinion also cited court cases which likewise declared §-04(1) to be a predicate statute, or that it must have been intended to be such, or that it implicates it and therefore it must be such.

And at the top of page 6 of the Opinion, App.16, the District Court concludes that it is this rationale, that is, that it is a rationale as opposed to words in the statute, which makes §32-12.2-04(1) a subject matter jurisdictional predicate statute.

The Opinion thereby states its own insufficiency.

¶3-4 of the Complaint, App.3-4, shows what §32-12.2-04 is for. It regulates the OMB's ability to make an out-of-court settlement offer, and it offers to pay for attorney fees. Defendants and the Opinion do not contest this.

Factually, §32-12.2-04 is not a subject matter jurisdictional predicate statute. There are no words in it which say it. A rationale is not a statute, is not words which say it.

As a question of fact, the issue ends here.

The Opinion is insufficient. But, going beyond this:

As a question of law, the Opinion legislated by adding words to §32-12.2-04 to make it in to a subject matter jurisdictional predicate statute. This violates the Separation of Powers Rule, that a court can not legislate, can not write or make a statute, can not declare a statute to say it says something it does not say. Larson pleaded that

they legislated in ¶10 of his Complaint, App.4-5. Defendants and the Opinion do not deny this.

Going one step further with respect to Article VI, §8 of the North Dakota Constitution:

When the N.D. Constitution was first adopted, the courts were created by the People, were constitutional courts, were not delegated to the Legislature to create, define, regulate and control, except for municipal courts.

County courts were created by the People. Section 110 and 111 of the original Constitution said county courts shall have original jurisdiction, concurrent with district courts in all civil actions of \$1,000 or less if the county voters give it an increased jurisdiction; and plus county courts were given a specified 'in rem' jurisdiction plus "such other probate jurisdiction as may be conferred by law", thereby allowing the legislature to give a county court extra probate jurisdiction beyond that conferred in the constitution. Sections 110 and 111 were repealed by the voters in 1976. See page 331-332 of Volume 13A of the North Dakota Century Code.

Justices of the Peace courts were created by the People. Section 112 of the original Constitution provided that justices of the peace shall have jurisdiction concurrent with district courts in all civil actions when the amount in controversy does not exceed \$200, but shall have no jurisdiction over real estate matters; and the legislature shall have power to abolish the office of justice of the

peace and confer that jurisdiction upon county courts, or elsewhere. This Section was repealed in 1976. See page 333-334 of Volume 13A of the N.D.C.C.

Police magistrates for cities, towns and villages were created and provided for by the People. Section 113 of the original Constitution provided that police magistrates shall be ex officio justices of the peace of the county, which means they have jurisdiction concurrent with district courts and justices of the peace of all civil actions of \$200 or less. This Section was repealed in 1976. See page 334 of Volume 13A of the N.D.C.C.

District courts were created and provided for by the People. Section 103 of the original Constitution stated, quoting: "The district courts shall have original jurisdiction, except as otherwise provided in this Constitution, of all causes both at law and equity, ..." This Section was not repealed, but was amended in 1976. See page 329 of Volume 13A of the N.D.C.C.

Thus here district courts have original jurisdiction of all causes at law (and equity). But it is not exclusive because other courts also have original jurisdiction of certain causes of action at law as provided for in the Constitution, where the amount sued for is \$1,000 or \$200 and less, as noted above with respect to county courts, justice of the peace courts, and police magistrate courts.

That is, district courts have original jurisdiction of all causes at law, except that other courts, as provided

for in the Constitution, may also share and have concurrent jurisdiction of certain causes along with the district courts. The phrase "except as otherwise provided in this Constitution" does not mean that the original jurisdiction or subject matter jurisdiction is regulated by other sections of the Constitution.

Section 85 of the original Constitution stated that the judicial power shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts as may be created by law for cities, towns and villages. This Section 85 was said to give power to the legislature to create additional courts for cities, towns and villages. McDermont v. Dinnie, 6 N.D. 278, 69 N.W. 294, 296 (1896). This Section was amended in 1976. See page 325 of Volume 13A of the N.D.C.C.

In 1976, Section 85 was amended to read that the judicial power is vested in the supreme court, district courts, and such other courts as may be provided by law, thereby saying that district courts are still constitutional courts, are still not created and regulated by the Legislature, but the other courts are now created and regulated by the Legislature. Article VI, §1, of the N.D. Constitution, page 210 of Volume 13A.

In 1976, Section 103 was amended to read: "The district court shall have original jurisdiction of all causes, except as otherwise provided by law, ..." Article VI, §8, of the N.D. Constitution, page 224 of Volume 13A.

Thus here district courts have original jurisdiction or subject matter jurisdiction of all causes, but it is not exclusive because other courts as provided for by the Legislature may also have original jurisdiction of certain causes of action along with district courts.

That is, district courts have subject matter jurisdiction of all causes, except that other courts, as provided by the Legislature, may also share and have concurrent jurisdiction of certain causes along with the district courts. The phrase "except as otherwise provided by law," does not mean that the subject matter jurisdiction of district courts can be regulated or limited by the Legislature. This was pleaded in ¶2 of the Complaint, App.2.

Since the lower courts are now created, defined and regulated by the Legislature, the words in Section 103, now Article VI, §8, change from "provided in this Constitution" to "provided by law" to reflect that the lower courts are no longer created by the Constitution, but are now created by the Legislature.

N.D.C.C. 27-05-06 affirms that district courts are courts of general subject matter jurisdiction of all causes of action at law (and equity). It does not say that the subject matter jurisdiction can be regulated or taken away by some other statute. §27-05-06 specifically states that "The district courts of this state have the general jurisdiction conferred upon the courts by the constitution, ...". District courts are created and regulated by the

People, by the Constitution, not by the Legislature.

The discussion of this in the cases cited by Defendants on page 2 of their Reply Brief, R.A.33, and page 3 of the Opinion, App.13, only look inward at the section itself to put the words in context. They do not look at the whole of the Constitution to understand the context.

But this is a political question. That is, it is only the People who can say what it means if there is a dispute over its meaning. A court, at the most, can only declare that its meaning is uncertain, and the People must then declare what it means or amend §8. The political question doctrine precludes a court from interfering with those issues committed or reserved for resolution to the People. Cf. Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 230, 106 S.Ct. 2860, 2866 (1986). This was discussed on pages 78-79 of Larson's Answer Brief, R.A.28. Plus, of course, it violates the Separation of Powers Doctrine for a court to legislate, in this case the power to legislate belongs to the People to do the legislating. Second, it exceeds a court's judicial power, for a court has power to only apply the law to the facts, it can not create or write law. In this case, a court can not create a benefit or right for the Defendants. Third, a court only has subject matter jurisdiction over causes of action. It can not create the cause of action for a party by giving the party a right. It is a non-justiciable issue. The court lacks subject matter jurisdiction.

With respect to Article I, §9 of the N.D. Constitution:

§9 relates only to suits in equity. §9 does not give the Legislature power to regulate actions at law. "Lessons in Constitutional Interpretation: Sovereign Immunity in Pennsylvania", by Jerome S. Sloan, 82 Dickinson Law REV. 209 (1978), as cited in Bulman v. Hulstrand Constr. Co., Inc., 521 N.W.2d 632, 637 note 5 (N.D. 1994), which case suggested that if the question were specifically presented, the Court would declare that §9 relates only to regulating suits in equity. The dissenting opinion at page 642, *Id.*, also suggested this or inferred it.

It must be noted that §9 and Article VI, §8 and N.D.C.C. 27-05-06 conflict. That is, no benefit can be awarded Defendants until this conflict is fixed by the People and the Legislature. §9 gives a power to regulate suits, but §8 makes no provision for the Legislature to put §9 in to effect. Note that in the Pennsylvania constitution, their district courts, court of common pleas, were given only a limited equity jurisdiction, subject to regulation by their legislature. Whereas in North Dakota, the district courts are given a general, unregulated jurisdiction in equity. That is, §8, (and also §27-05-06) impedes and bars the use and effectiveness of §9. This is shown and discussed in Larson's Answer Brief, page 77-78, R.A.28, and is not disputed by the Opinion nor by Defendants. Also, ¶11 of the Complaint, App.6, pled that §9 relates only to suits in equity. Defendants and the Opinion do

not deny this, thereby making this issue of fact the truth.

Larson refers to 'issues of law' which he pled in his Complaint and which Defendants did not deny. Due to the nature of this case, these 'issues of law' are facts because they are the facts which give Larson a cause of action. Defendants' failure to deny, as a matter of law, for purposes of their motion to dismiss, makes these facts (of law) conclusive against them.

Factually, §32-12.2-04 is not a subject matter jurisdictional predicate statute. And legally and constitutionally, it is not and could not be such.

At pages 6-7, App.16-17, the Opinion says that §32-12.2 also applies to intentional torts, citing court cases where §32-12.2 was allowed to be applied to or was assumed to apply to intentional torts. These cases did not or do not appear to have addressed this issue of applicability. It was not claimed by either party in these cases that the Tort Claims Act and the former sovereign immunity applied only to claims founded and phrased in terms of negligence. Nor did they argue that by definition of law, committing an intentional tort can not be a job duty. These cases make no case law on this question.

Page 7 of the Opinion, App.17, the last paragraph says that because Stenehjem determined the Defendants acted within the scope of their employment, that thus it is irrelevant that the torts are intentional torts, and that therefore §32-12.2 applies to intentional torts.

However, the statute does not make Stenehjem's determination the law of the case.

§32-12.2-01(6) and 32-12.2-03(6) makes the conduct of the defendant determinative of whether they acted within the scope of their employment. Stenehjem's determination does not prove his determination!

By definition of law, committing an intentional tort can never be a job duty for one to do.

The District Court has subject matter jurisdiction of Larson's complaint or cause of action.

## 2. THIS IS NOT AN IMPERMISSIBLE COLLATERAL ATTACK.

At pages 11-12, App.21-22, the Opinion says this is an impermissible collateral attack because Hagerty's judgment is not void because she had subject matter jurisdiction to hear and determine the case, because district courts are courts of general subject matter jurisdiction, they are not of a limited or regulated subject matter jurisdiction.

It is correct, Hagerty's court did have subject matter jurisdiction.

But her judgment is void because she was without jurisdiction to render the judgment rendered. She lacked jurisdiction to enter the judgment she entered. Gruebele v. Gruebele, 338 N.W.2d 805, 810 (N.D. 1983).

The jurisdiction of a court is more than just whether the court had subject matter and personal jurisdiction.

In addition to jurisdiction of the subject matter and of the person, it is also necessary to the validity of a judgment that the court should have jurisdiction to render the judgment rendered, and where the court does not have such jurisdiction, the judgment is void. 50 C.J.S. Judgment, §18(d); Schillerstrom v. Schillerstrom, 32 N.W.2d 106, 122 (N.D. 1948); Taylor v. Oulie, 55 N.D. 253, 258, 212 N.W. 831, 932 (1927); Scott v. Reed, 820 P.2d 445, 447 (Okla. 1991); Waltman v. Austin, 142 N.W.2d 517, 521 (N.D. 1966); State v. Beaverstad, 12 N.D. 527, 532, 97 N.W. 548, 549 (1903); Ex Parte Solberg, 52 N.D. 518, 525, 203 N.W. 898, 901 (1925); Davidson v. Nygaard, 48 N.W.2d 578, 580 (N.D. 1941); Cooper v. Reynolds, 77 U.S. 308, 316, 19 L.Ed. 931, 932 (1870); Matter of Gober, 100 F.3d 1195, 1202 (5th Cir. 1996); Matter of Camp, 59 F.3d 548, 551 (5th Cir. 1995).

A judgment is void if the court lacked jurisdiction to render the judgment rendered. It is also void if the court lacked subject matter jurisdiction.

It must be noted that for purposes of this issue of collateral attack, Defendants, at page 11 of their Reply Brief, R.A.33, and the Opinion at page 12, App.22, say that Hagerty did have subject matter jurisdiction because district courts are courts of general jurisdiction. But for purposes of their first claim, Defendants, at page 3-6 of their motion to dismiss, R.A.9, and page 1-2 of their Reply Brief, R.A.33, and the Opinion at page 3-7,

App.13-17, say that Hagerty's district court did not have subject matter jurisdiction because district courts are not of a general subject matter jurisdiction, but are of a limited, regulated jurisdiction. They want it both ways.

**3. JUDGES HAVE IMMUNITY ONLY IF THEY ACTED IN GOOD FAITH, ONLY IF THEY ACTED WITH JUDICIAL INTEGRITY.**

The Opinion, at pages 8-9, App.18-19, says Judge Hagerty has judicial immunity.

The issue, or one issue in this case is that in the "Wiedmeier" case, (and also in this case), the law and statute plainly says that §32-12.2 has application if the state employee acted within the scope of his employment. See ¶3-9 of the Complaint, App.2.

However, Judge Hagerty ruled that §32-12.2 applies merely because the State employee is a State employee, deliberately, knowingly, intentionally, specifically and pointedly and fraudulently ignoring the law. She acted with malice. She lacks judicial immunity.

At the top of page 8, App.18, the Opinion said, quoting and paraphrasing, that: "It is of the highest importance to justice that a judge shall be free to act upon her own convictions, without fear of personal consequence when she does." This is the reason given for having judicial immunity.

That is, we want judges to be free to rule as they

please, regardless of the law. We want to condone it.  
So, we will give them immunity when they do.

However, judges have only judicial power. Due process of the law; and Article VI, §1, N.D. Constitution.

A judge's only authority is to rule according to the rule of law. They have no power, no right to rule according to what they want. Quoting: "Judicial power is never exercised for the purpose of giving effect to <sup>the</sup> teh will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." Osborn v. Bank, 22 U.S. 738, 866, 6 L.Ed. 204 (1824). Quoting: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the laws, and can will nothing." Osborn v. Bank, id. Judicial discretion "does not mean a wild self-willfulness, which may prompt to any and every act." Black's Law Dictionary, Fourth Edition, defining discretion, citing Faber v. Bruner, 13 Mo. 543.

The Opinion says that the reason for judicial immunity is so that judges can be free to rule based on their own convictions, their own will. This violates and is contrary to the law that judges can exercise only a judicial power, can decide only according to the law and the will of the law. Due process of law; Article VI, §1, N.D. Constitution.

Judicial immunity is based upon or authorizes or allows or condones a judge to rule based upon her own convictions,

her own will, to do what she wants, and thus is unconstitutional.

And, as already discussed on pages 51-54 of Larson's Answer Brief, R.A.28, reason 3, 5 and 6, it is contrary to due process of law because it deprives one of his property, of his ability and right to obtain compensation for the wrong done him, and because a right can not arise from a wrong, that is, a judge can not obtain or have a right which arose from her wrongdoing.

For due process to exist, Larson's property can not be taken from him or condemned unless he has done a wrong for which he owes compensation or he owes a debt. For there to be due process of law, one's liability and responsibility must exist and be adjudged before his person or property is condemned. For there to be due process of law, before one's property can be taken, there must be an actor, a plaintiff, a reus, a defendant, a judex, a judge, and there must be regular allegations, opportunity to answer, and a trial. Chrysler Corp. v. Appeal Bd. of Michigan Unemployment Compensation Commission, 3 N.W.2d 302, 304 (Mich. 1942); Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 290, 15 L.Ed. 372 (1855).

That is, one's property can not be taken or condemned unless he is estopped from complaining that it is taken due to his own conduct, not due to the wrong of another, of a judge.

Judicial immunity is contrary to due process of law

because it takes a citizen's property, not due to his own wrongdoing, but due to the wrongdoing of a judge, due to the wrongdoing of the person from whom he is seeking compensation because that person, the judge, did him wrong.

Second, for an alleged public purpose, immunity condemns one's ability and right to sue and to obtain compensation for the injury done him, without giving him just compensation for the taking of the right. This violates due process of law, for private property shall not be taken for public use without just compensation.

On page 8 of the Opinion, App.18, the Court said judge Hagerty made a specific finding of fact that the "Wiedmeier" defendants acted within the scope of their employment in compliance with North Dakota law and in compliance with Stenehjem's opinion that they acted within the scope of their employment.

But the Opinion pointed to no place in the "Wiedmeier" record where this finding of fact was actually made. It was not claimed to have been done by the Defendants in this case.

¶9 of the Complaint, App.2, pled that judge Hagerty dismissed Larson's complaint solely because the defendants were State employees. Defendants did not deny this.

This finding of fact by the District Court is without foundation in the record.

Second, whether or not the employee acted within the scope of his employment is determined by the facts, by

the employee's conduct for which he is being sued. It is not determined by the Attorney General's opinion or determination, nor by case law or anything it may say or infer, because it is the statute which governs. §32-12.2-01(6) and §32-12.2-03(6).

Defendants had to take and quote §32-12.2-03(6) incompletely, ignoring the whole of the statute, in order to conclude that the Attorney General's determination determines that the employee acted within the scope of his job. The Opinion's ruling is plainly contrary to the law, to the statute.

On page 9 of his Opinion, App.19, the District Court qualifies his ruling that Hagerty has immunity because she did not act "in the clear absence of jurisdiction".

First, §32-12.2-01(1) and §32-12.2-03(6), plainly and specifically makes the fact of whether the employee acted within the scope of his employment the governing fact or criteria, not the Attorney General's opinion or determination or duty. Hagerty clearly ruled wrongly. (Of course, factually, she never made a finding of fact that they did act within the scope of their employment.)

Second, the phrase "in the clear absence of jurisdiction" as quoted from the "Riemers" case on page 8 of the Opinion, App.18, refers to subject matter jurisdiction, not to the jurisdiction to render the decision rendered, not to exceeding jurisdiction.

At common law, or, more accurately, the case law which

established judicial immunity, judicial immunity applies only if a judge acted in good faith, but if she acted in bad faith, with malice or oppression, she has no judicial immunity. Floyd v. Barker, 12 Co.Rep. 23, 77 Eng.Rep. 1305, 1307 (1607); Bradley v. Fisher, 80 U.S. 335, 20 L.Ed. 646 (1871); Randall v. Brigham, 74 U.S. 523, 19 L.Ed. 285 (1868). Larson showed this on pages 33-57 of his Answer Brief, R.A.28, focusing on pages 40-46. This fact is not disputed nor denied by Defendants nor by the Opinion.

All the case law subsequent to the above, saying that a judge has immunity even if she acted with malice says it without giving reasoning or explanation, or it only quotes parts of the Bradley v. Fisher, id., case so as to be able to conclude it. Larson pointed his out on pages 39-40 and 55 of his Answer Brief, R.A.28. The Opinion and Defendants do not dispute or deny this.

¶3, 4, 7-14 and 20 of the Complaint, App.2, pled that Hagerty knowingly ruled wrongly and thus acted with malice. As an issue of fact, she does not have judicial immunity. Defendants nor the Opinion deny the Complaint. On a motion to dismiss, the complaint is presumed true and to work in favor of the plaintiff.

On pages 9-11 of the Opinion, App.19-21, the Court says that Larson has not sufficiently shown that judicial immunity is unconstitutional.

It must be noted that the Opinion does not say or claim that judicial immunity is constitutional and give

a reason why it is or could be or should be considered to be constitutional. It does not even cite a specific authority for a court or the Legislature to give immunity, that is, by what authority they can do it. Of course, this is because there is no authority under due process of law nor in the Constitution of North Dakota.

The Opinion, at page 10, App.20, does admit and recognize that a statute is unconstitutional when the Legislature had no power to act in the particular matter, or that the power was exercised in an arbitrary, unreasonable or discriminatory manner, and the method adopted has no reasonable relation to attaining the desired result.

At the top of page 8, App.18, the Opinion says that the particular matter or desired result is the proper administration of justice; and to attain this the judge must be free to rule as she pleases, as she wills, and so immunity is given so as to allow, authorize, condone or not discourage this, citing the case of "Riemers v. State".

However, the proper administration of justice is attained when the judge rules according to the rule of law and the will of the law, not as she pleases or wills, not based on her own convictions. The proper administration of justice is attained and encouraged when lawless ruling is discouraged, not encouraged, condoned or authorized or allowed by removing fear of being held accountable for her lawlessness.

The Legislature has acted in an arbitrary and unreasonable

manner. And allowing or authorizing or condoning or not discouraging a judge to rule as she wills, giving immunity, has no reasonable relation to attaining the proper administration of justice. In fact, it does just the opposite. It encourages, condones, allows or authorizes injustice. It removes the judge's respect for the law, for her job function because it removes her fear of being held accountable for when she acts willfully or intentionally.

The statute, §32-12.2-02(3)(d), is unconstitutional, contrary to due process of law.

Granted, trying to attain a proper administration of justice is for the public benefit. But taking a person's property or remedy for the public benefit without just compensation is contrary to due process of law. One's property can be taken only if he is estopped by his own conduct from complaining that it is being taken, that is, if he did a wrong or owes a debt. One's property can not be taken because another did a wrong.

Just nakedly taking property to give to the public or for the public benefit is theft and robbery. A robber steals for his benefit or for the benefit of the person to whom he gives the stolen property. To say it is legal to take a person's property because it is taken for the benefit of another person, the State or Public, defies common sense, for all thefts are done for the benefit of the thief or for the person for whom the thief steals the property. Playing Robin Hood does not make it legal.

Of course, it must be noted that were the State to enact a statute to give compensation for a judge's tort, it would be illegal because no contract or provision can be made wherein a person or the State will indemnify or hold harmless a tort-feasor. N.D.C.C. 9-08-02; Ohio Cas. Ins. Co. v. Clark, 1998 ND 153, ¶17, 583 N.W.2d 377, 381. This is a reason why §32-12.2 does not and can not apply to an intentional tort. If it did, it would be unconstitutional, outside the power of the State to do. It would be taking money from the People to 'give' to the tort-feasor to hold him harmless. Although the money would be given directly to the victim, its effect is to give it to the tort-feasor to pay off the victim.

Defendants and the Opinion assume that §32-12.2-02(3)(d) applies to district court judges and all judges.

§32-12.2 was enacted in response to the abrogation of Sovereign immunity, that is, State immunity. Before, the state employee could be sued for torts as well as negligence, but the State could not be sued or held accountable for the negligence of the employee. Spielman v. State, 91 N.W.2d 627, 631 (N.D. 1958). Now, under §32-12.2, the State can be sued and held accountable for the negligence of the employee.

Before, judges had judicial immunity and employees had quasi-judicial immunity, this independent of Sovereign immunity. The abrogation of Sovereign immunity had and has no effect on judicial or quasi-judicial immunity.

The only rational reason for putting immunity, §-02(3)(d), in to the statute would be to say that the State still shall not be liable even though the employee has immunity, because the employee has immunity independent of Sovereign immunity or its abrogation. Article I, §9 of the N.D. Constitution does not give the Legislature power to give an employee an immunity because §9 only gives the Legislature power to regulate actions against the State, not an employee, and because §9 gives no power to regulate actions at law. Hence, §32-12.2 is illegal wherein it gives a benefit or immunity to an employee.

Page 10 of the Opinion, App.20, says that Article I, §9 does not guarantee a remedy for every injury, and that the Legislature can limit the remedies available for redress of an injury.

Larson is suing pursuant to the common law. He has a cause of action for trespass.

§9 reads that every man for any injury shall have remedy by due process of law. §9 does guarantee a remedy for every injury according to due process of law, that is, such as was obtainable at common law.

Reading §9 in its totality, so as to avoid §9 from contradicting itself and so that it makes sense, §9 does guarantee for every injury a remedy at law. Understanding the second sentence of §9 to mean only suits in equity, then there is no conflict between the first and second sentences of §9.

The second sentence is not an exception to the first sentence with respect to obtaining a remedy for an injury. The word injury means that the wrong has already occurred and thus can be redressed by an action at law. Injury means a legal injury, not one based on equitable rights or equitable wrongs, nor 'wrongs' created by statute, such as, for example, what is labeled as "unfair trade practices", selling goods below cost. The Opinion, at page 10, App.20, referred to this to say the Legislature has the right to limit a remedy, citing the case of "Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.". There is no need to resort to equity to obtain redress for an injury, a legal injury. In fact, one can not have a remedy in equity when one has a remedy at law. Thus there is no detracting in the second sentence of §9 from one's right to obtain redress for an injury at law, as guaranteed in the first sentence.

And factually, the second sentence of §9 does not apply and could not apply in this case because Larson is not suing the State. Nor could the State be liable under the common law for this action because Larson is not trying to sue the State. §32-12.2 does not apply and could not apply for this reason.

And §32-12.2 is or would be unconstitutional if it did make the State liable in this case as the Legislature has no authority to enact a statute which would make the State liable in this case. The Legislature can only enact laws which put the Constitution in to effect. Article

IV, §13, N.D. Constitution. The Legislature has no power to make the State liable where an employer would not be liable at law. If the Defendants feel aggrieved, that the State should be liable, they can bring the State in as a party under Rules 13(h), 14, 17 or 19, NDRCivP if the law allows it.

**4. STENEHJEM AND PELHAM DO NOT HAVE DISCRETIONARY IMMUNITY.**

Pages 57-69 of Larson's Answer Brief, R.A.28, showed that discretionary immunity for filing a motion and making argument does not apply, this on the merits. Defendants and the Opinion do not deny this.

Plus, Larson gave an extra reason why Stenehjem and Pelham (hereafter Stenehjem) lack discretionary immunity:

On page 67 of his Answer Brief, R.A.28, Larson showed that Stenehjem lacked subject matter jurisdiction to represent the "Wiedmeier" defendants under §32-12.2-03(6) because they did not act within the scope of their employment, and thus Stenehjem can not lay claim to discretionary immunity.

It must be observed that this subject matter jurisdiction point only demurs to the claim of discretionary immunity. The merits Larson addressed in addition, as noted above.

Page 12-13 of Defendants' Reply Brief, R.A.33, picked up on this one point of demurrer and made it their 'defense'.

They took the point of lack of subject matter jurisdiction and converted it in to saying that Larson said that discretionary immunity does not apply because they did not have discretion

to represent the "Wiedemier" defendants, using the word discretion to substitute for the term subject matter jurisdiction.

However, subject matter jurisdiction and discretion do not mean the same thing.

Subject matter jurisdiction means the authority, the right of the Attorney General to engage in certain conduct, in this case to represent employees when they are sued. Discretion means the power to make a decision. Black's Law Dictionary, Eighth Edition, defining discretion.

Analogizing to a court to explain: Discretion, judicial discretion or judicial power, which comes under Article VI, §1 of the N.D. Constitution, is not the same as subject matter jurisdiction, which comes under Article VI, §8 of the N.D. Constitution. A judge must have both powers or rights, discretion and subject matter jurisdiction. A judge must have the discretion, the duty to determine if she has subject matter jurisdiction of a case. She must have the discretion, the power or duty to determine or decide if the situation meets the criteria for her to have subject matter jurisdiction. Cf. Bradley v. Fisher, id., page 351-352; Ranking v. Howard, 633 F.2d 844, 849 (9th Cir. 1980); Granito v. Tiska, 181 F.Supp.2d 106, 113 (N.D.N.Y. 2001). The duty to determine, discretion, is not the same as subject matter jurisdiction. In fact, having discretion, having the duty to determine is a requisite necessity for a judge to have so that she can determine if she has subject matter jurisdiction.

The Attorney General must have the discretion, the duty to determine if he can represent an employee, to decide if the case fits the criteria to allow him to represent, to determine if he does have subject matter jurisdiction.

In this case, the criteria for the Attorney General to have subject matter jurisdiction to represent an employee is if the employee acted within the scope of his employment.

The Opinion at pages 12-13, App.22-23, adopted Defendants' Reply Brief and ruled that Stenehjem had discretionary immunity, that he had subject matter jurisdiction to represent the employees.

The Opinion says that Stenehjem can represent because §32-12.2-03(6) gives the Attorney General the duty of determining (whether the employee acted within the scope of his employment). That is, they say the Attorney General has subject matter jurisdiction because he has the duty to determine (if he has subject matter jurisdiction)!

The Opinion misconstrues the meaning of terms and words.

There are three more false points within the Opinion, Page 12-13, App.22-23:

The Opinion said Larson did not provide any evidence that the "Wiedmeier" defendants acted outside the scope of their employment.

¶1 of the Complaint, App.2, pled that the "Wiedmeier" defendants acted outside the scope of their employment.

As a rule of law, Larson did present evidence. This is a motion to dismiss. The facts and claims in the complaint

are construed to be true and are to be construed to work in favor of the plaintiff. Defendants did not deny ¶1.

Second, Larson is not required to prove anything. As pointed out on page 1-2 of Larson's Answer Brief, R.A.28, Defendants, the movant for the motion to dismiss, bear the burden to prove their affirmative defense, that §32-

And, of course, they bear the burden to prove discretionary immunity. 12.2 applies to this case. Anderson v. State, 692 N.W.2d 360, 364 (Iowa 2005); Hyatt v. Anoka Police, 700 N.W.2d 502, 505 (Minn.App. 2005).

At page 13, App.23, the Opinion says that Larson merely gave a historical recitation of discretionary immunity law. But this showed that Stenehjem did not have discretionary immunity because the Court's adjudication would not be substituting his judgment for that of the Defendants' judgment, that the Separation of Powers Principle would not be violated in deciding that Defendants acted wrongly; because this was an action for trespass, an action for absolute liability; and their decision was not made in good faith. Plus, Larson did cite the other rules and court cases and reasons on the merits showing why Stenehjem had no discretionary immunity for filing the motion to dismiss and making argument. Their discretion was not unbounded, without standards, but was bounded by and must conform to rule of law.

Third: On page 12, footnote 4 of Defendants' Reply Brief, R.A.33, Defendants say that Larson bears the burden of proof to prove by clear and convincing evidence that the employee was acting outside the scope of his employment. They quote the third sentence of the first three sentences of §32-12.2-03(3) in order to say this, but leave out one

word of the sentence, which word changes its meaning.

§32-12.2-03(3), the first three sentences, reads in total: "(1) A state employee may not be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment. (2) A state employee may be personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment. (3) The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was acting outside the scope of the employee's employment." Larson underlined the portion of the third sentence which Defendants' footnote 4 cited and quoted. They left out the word "such", which word qualifies and changes the meaning of their argument. Larson added the numbers (1), (2) and (3) to make it easy to identify the first, second and third sentences.

The Opinion, page 12-13, App.22-23, picked up on this and ruled that Larson is the challenging party and that he bears the burden to prove by clear and convincing evidence, and also escalates it in to having to prove beyond a reasonable doubt, that the defendants acted outside the scope of their employment, citing §32-12.2-03(3), but, strictly speaking, not citing it, but only saying "see §32-12.2-03(3)". Using the word "see" in this context tells the reader that this subsection does not actually

and pointedly say what the Court is saying.

This third sentence of §03(3) does not apply to this particular cause of action for intentional tort, trespass. §-03(3) applies if the injury is proximately caused by negligence, etc. The second sentence of §-03(3). The term "when the injury is proximately caused by the negligence, wrongful act or omission" all relate to actions founded in negligence or wrong acts which may not be considered strictly negligent. Hatahley v. U.S., 351 U.S. 173, 181, 76 S.Ct. 745, 751-752 (1956).

Second, the Tort Claims Act does not cover causes of action framed in terms of absolute liability, such as for trespass. Dalehite v. U.S., 346 U.S. 15, 44-45, 73 S.Ct. 956, 972-973 (1953); Knutson v. City of Fargo, 2006 ND 97, ¶5, 14-18, 714 N.W.2d 44, 46-47 and 49-50; Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488,<sup>492</sup> 493, 123 S.Ct. 1683, 1686, 1687 (2003). This is because sovereign immunity protected only from negligence claims. Intentional torts or torts framed in terms of absolute liability, such as is trespass, were suable, sovereign immunity did not protect the state. Hence, when sovereign immunity was 'waived' or abrogated, the Tort Claims Act, the statutes only applied to claims framed in terms of negligence. Note that the language of §32-12.2 uses language applicable only to claims framed in negligence. Larson pointed this out on page 8 of his Motion to require the attorney general to prove his authority to appear, R.A.31, and also on pages

7-11 and also 58-62 and 68 of Larson's Answer Brief, R.A.28.

Third, this third sentence applies to a negligence action only if the plaintiff wants the employee, not the State, to be liable for the employee's negligence, that is, if the plaintiff does not want to dip in to the deep pockets of the State. That is, the plaintiff could, under this second and third sentence make the State liable for the negligence even though the State, the employer, would not be liable at common law, this simply by choosing to not claim or to not try to prove the employee acted outside the scope of his employment, this even though the plaintiff knew the employee acted outside the scope of his employment when he committed his negligence! This second and third sentence makes, or appears to make it such that the State could not dismiss itself from liability even if the State wanted to and by due process of law had the right to. These two sentences are contrary to due process as they make the State liable even when the State would not be liable. And they are unconstitutional as they impose a burden of proof for damages which plaintiffs in other civil actions are not subject to, this contrary to due process of law and the equal protection of the law.

The Opinion, and Defendants, do not tell the truth about the statute, §-03(3), to say Larson bears an elevated burden of proof he is not required to bear.

Also, of course, for those situations where their claim would apply, (assuming no challenge to the

constitutionality of the two sentences), the burden would arise at the time of trial, not at the pleading stage and on a motion to dismiss.

Stenehjem lacked subject matter jurisdiction to represent the "Wiedmeier" defendants. He can not lay claim to or receive the benefit of discretionary immunity because he was not acting as an Executive Officer, he was 'ultra vires'. And, on the merits, Stenehjem did not have discretionary immunity for filing a motion to dismiss and making argument.

**5. LARSON CAN SUE THE DEFENDANTS. HE IS NOT REQUIRED TO SUE THE STATE.**

At pages 83-88 of his Answer Brief, R.A.28, Larson showed that §32-12.2-03(1) does not prohibit him from suing the Defendants, and does not mandate that he sue the State.

This is an action for trespass, for absolute liability. The statute would apply only if Larson sued for negligence, wrongful act or omission, and if the employee acted within the scope of his employment.

Defendants say they acted within the scope of their employment because they committed their tort while acting within the course of their employment. Factually, their claim is unfounded that §32-12.2-03(1) applies.

If Defendants do feel aggrieved, that is, if they feel the State should be liable, not them, or should share liability with them, they have the due process option under

Rules 13(h), 14(a), or 17 and 19(a), NDR CivP, to bring the State in as a party to make it liable.

Defendants Reply Brief, R.A.33, made no contest of this, they did not address this. They made no attempt to sustain or continue their fifth defense.

The Opinion, App.11, likewise did not rule on their fifth claim.

Whether their claim that the Attorney General's duty to determine under §32-12.2-03(6), his power of discretion, is the law of the case and that thus they acted within the scope of their employment regardless of the facts and truth, was meant to apply to this fifth defense, Larson does not know because they did not say. But, as discussed above, the Attorney General's duty and determination, his power of discretion, is not the law of the case.

Larson can sue the Defendants. He is not mandated to sue the State. Their fifth defense must be annulled, voided, declared wrong or inapplicable or unconstitutional.

**6. HAVING THE OFFICE OF ATTORNEY GENERAL REPRESENT STATE EMPLOYEES CONFLICTS WITH HIS FUNCTION TO REPRESENT THE BEST INTERESTS OF THE PEOPLE.**

Larson filed a motion to require the Attorney General to produce and prove his authority to represent himself, Pelham and Hagerty in this action. R.A.31.

Larson showed in this motion that representing the employees conflicted with Stenehjem's common law primary

and first duty to represent the best interests of the People, of the State. Larson also discussed this on pages 88-94 of his Answer Brief, R.A.28. And that thus the Attorney General's representation of the Defendants violated the Separation of Powers and Balance of Powers Principles, and thus N.D.C.C. 32-12.2-03(6) and 54-12-01.3 are unconstitutional.

The Attorney General did not respond to this motion. But the Opinion, at pages 13-14, App.23-24, did rule on this issue of Separation of Powers.

The Opinion says that under §32-12.2-03(6), the Attorney General has the authority to defend state employees because §-03(6) gives him or mandates upon him the duty to defend if the employee acted within the scope of his employment.

But with reference to Hagerty and §54-12.01.3, the Opinion says the Attorney General has a duty to defend a judge simply because she is a judge. The Opinion quoted only the first phrase of §54-12-01.3. The Opinion ignored the last part of the sentence which says only if the judge was performing an official duty.

On page 14 of the Opinion, App.24, the Court made the denial that Larson did not show proof that the statutes violated the Separation of Powers Rule.

However, Larson showed that the Office of Attorney General's primary and only common law duty is to represent the State, the People's best interests.

The best interest of the People is to see that they

are not made to pay for nor made subject to the possibility of being made to pay for torts committed by the People's employees where the common law would not make any employer liable. Refer to the case of Farmer's Ins. Exchange v. Nagle, 190 N.W.2d 758 (N.D. 1971), where the Attorney General intervened in an auto accident law suit to try to keep the Unsatisfied Judgment Fund from having to be made liable. Nor should the People be made to bear the expense of defending an employee when due process of law would not require it of any employer or insurance company. Refer to the case of Ohio Cas. Ins. Co. v. Clark, 1998 ND 153, 583 N.W.2d 377 where an insurance company filed a proceeding in court to keep from having to pay out a claim and to not have to pay the cost to represent and defend their insured, Clark, in a law suit against him.

But in this case, the Attorney General is siding with the Defendants to absolve them from liability and to impose it on the State, even though Larson is not suing the State and the State is not liable under the common law. The Attorney General is claiming that the statute, §32-12.2, mandates that the State be liable.

The Attorney General's position is to advocate this, rather than representing the People and saying that the statute does not say this or it is unconstitutional if it did say this, imposing liability on the State which due process of law would not impose upon any employer.

§32-12.2 makes the State liable only if the employee

acted within the scope of his employment. Larson pleaded that Defendants acted 'coram non judice' and ultra vires'. ¶17 and 18 of the Complaint, App.7-8. And the facts pled in the Complaint show that Defendants' conduct was outside the scope of their employment.

When a complaint pleads facts or alleges that the defendant acted outside the scope of his employment, §32-12.2 does not apply or act as a bar to the cause of action. McCann v. State of Michigan, Department of Mental Health, 247 N.W.2d 521, 525 (Mich. 1976) (The facts pleaded in the complaint determine whether the specific tortious activity alleged is within the protection of the immunity rule or the statute; and where the facts pled show that the case does not come within the terms of the statute, the statute will not act as a bar to the action, and the cause of action should not be dismissed.); Vogel v. Braun, 2001 ND 29, ¶7, 622 N.W.2d 216, 218 (Where the complaint makes an allegation that the employee acted outside the scope of his employment, then §32-12.2 does not apply.); Kautzman v. McDonald, 2001 ND 20, ¶7 & 8, 621 N.W.2d 871, 874 (The complaint did not allege the law enforcement officers acted outside the scope of their employment.).

Factually, this case presents a conflict of interest between the People's interests and Defendants' interests. And any and all lawsuits against an employee have the potential and risk of presenting a conflict between the employee's interests and the People's interests.

Contrary to the denial in the Opinion, page 14, App.24, the facts of this case show that the statutes, §32-12.2-03(6) and §54-12-01.3 violate the Separation of Powers and Balance of Powers Principles intra-Branch, within the Executive Branch. There is a conflict of interest between what Defendants want, and what is in the best interest of the People, of the State.

Page 14 of the Opinion, App.24, calls district court judges state employees.

This is an assumption. No facts or reasons are given to show that a district court judge is an employee, much less whose employee if she is an employee.

(If they are State employees, then why the need for §54-12-01.3. Before the abrogation of State Sovereign immunity, there was no 'special' statute defining how state employees were to be represented. They were represented either by the insurance company which insured them, or, if no insurance policy covered their activity, they were represented by whatever the method was at that time, either they obtained their own attorney or the State provided counsel. An example is the case of Spielman v. State, 91 N.W.2d 627 (N.D. 1958), wherein the State provided counsel for the employee, as well as the State, in that case.)

District court judges are not employees, much less are they State employees. Just because the State volunteered to pay their salaries does not make them an employee nor a State employee. Most employers probably would be happy

if somebody else volunteered to pay the salaries of their employees. The facts show there is a conflict of interest between Hagerty's interests and the Peoples interests. to not have to pay the cost to defend a person they are not required to defend, nor to be liable for their torts.

The Separation of Power Principle applies and makes the statutes unconstitutional.

Defendants raised two defenses, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. These are affirmative defenses. As such, they bear the burden to show that their claims apply to this action for trespass. These two defenses, and the five issues or defenses contained within them, are insufficient. All fail to show the facts and rules of law needed to sustain them.

Likewise, the Opinion is insufficient. It fails to show the facts and rules of law that the five issues or defenses apply and are valid. It is contrary to law.

#### CONCLUSION

Wherefore, Larson prays this Court to reverse and overturn the District Court's Opinion and Judgment and allow Larson to proceed forward with his action.

Dated this 24th day of March, 2008.

  
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