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IN THE SUPREME COURT OF NORTH DAKOTA

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Audra D. Woody,	)	<b>Supreme Court File No. 20150236</b>
	)	
	)	Pembina County Civil No.
Plaintiff and Appellant,	)	<b>34-2014-CV-00129</b>
	)	
v.	)	<b>APPELLANT'S BRIEF</b>
	)	
	)	
Pembina County Annual Fair and	)	
Exhibition Association,	)	
	)	
	)	
Defendant and Appellee.	)	

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**APPEAL FROM AN ORDER AND JUDGMENT OF DISMISSAL**  
**FROM PEMBINA COUNTY DISTRICT COURT, NORTHEAST**  
**JUDICIAL DISTRICT, NORTH DAKOTA. THE HONORABLE**  
**JUDGE JOHN T. McCLINTOCK Jr., PRESIDING.**

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## QUESTION PRESENTED

- I. Whether as a matter of law the Defendant is entitled to the protection of “Recreation Use Immunity” under the provisions of Chapter 53-08 of the North Dakota Century Code.

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## **JURISDICTION**

[¶ 1] The Plaintiff, Audra D. Woody, timely filed for appeal of a civil judgment arising out of the Pembina County District Court. North Dakota Supreme Court has jurisdiction over the appeal of this matter under N.D.C.C. §28-27-01 and §28-27-02 as this matter involves a district court issuing a judgment of dismissal finding the Defendant/Appellee was immune from liability pursuant to N.D.C.C. § 53-08.

## **STATEMENT OF THE ISSUES**

[¶ 2] Whether as a matter of law the Defendant is entitled to the protection of “Recreation Use Immunity” under the provisions of Chapter 53-08 of the North Dakota Century Code.

## **STATEMENT OF CASE**

### **I. NATURE OF THE CASE**

[¶ 3] This is an appeal of a judgment of dismissal of a civil complaint filed in the Northeast Judicial District, Pembina County.

### **II. PROCEDURAL HISTORY**

[¶ 4] A civil complaint was filed with the district court on October 8, 2014 alleging that the Defendant/Appellee (“Fair”) was negligent in causing serious bodily injury to the Plaintiff/Appellant (“Woody”) after she fell through rotten boards in the grandstands located on the fairgrounds during the annual fair in Hamilton, North Dakota where Woody was attending the fair and free fireworks display. (App. Appx. A-3).

[¶ 5] A stipulation of facts was filed on January 30, 2015. (App. Appx. A-18). On March 9, 2015, the Fair filed a summary judgment motion to dismiss based on N.D.C.C. §53-08. (App. Appx. A-1 Doc ID #20). Woody filed a response, an affidavit

and brief opposing the summary judgment motion on March 7, 2015. (App. Appx. A-1, Doc ID #25). The Fair filed a reply brief, affidavit and exhibits on March 17, 2015. (App. Appx. A-1, Doc ID #28).

[¶ 6] The district court held a hearing for oral argument on May 21, 2015. The transcript of that hearing was ordered and has been filed with the Court. (App. Appx. A-2). The district court entered a Memorandum Decision and Order granting Defendant's motion for summary judgment on July 23, 2015. (App. Appx. A-11). A notice of Entry of Order for judgment of dismissal and judgment of dismissal with prejudice was entered on July 29, 2015. (App. Appx. A-17). On August 17, 2015, a Notice of Appeal and Request for Transcript was filed with this Court. (App. Appx. A-26). On September 10, 2015 the Clerk filed a Certificate on Appeal.

### **STATEMENT OF FACTS**

[¶ 7] On July 4, 2013, Woody along with family members and friends attended the annual three day county fair held on the Pembina County fairgrounds in Hamilton, North Dakota with the intent of to go on rides at the Midway, eat fair food and view the fireworks display. (App. Appx. A-3).

[¶ 8] Prior to the fireworks display, Woody went to the grandstands within the fairgrounds to view the fireworks and while looking for a seat in the grandstands she stepped on a rotten wood board that broke resulting in her falling through the grandstands to the ground below. (App. Appx. A-3).

[¶ 9] Prior to Woody being injured, at 8:00 p.m. on July 4<sup>th</sup>, 2013, the Six Appeal vocal band preformed at the same grandstands requiring a \$10 entrance fee and ending about one hour prior to the fireworks display. (App. Appx. A-3).

[¶ 10] On the fairgrounds operated by the Fair were food vendors, carnival ride and game operators, amusements and commercial exhibits. (App. Appx. A-3).

## **LAW AND ARGUMENT**

### **Standard of Review**

[¶ 11] Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that reasonably can be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Kappenman v. Klipfel, 2009 ND 89, ¶ 7, 765 N.W.2d 716; Leet v. City of Minot, 2006 ND 191, ¶ 12, 721 N.W.2d 398. Whether the district court properly granted summary judgment is a question of law that we review de novo on the record. Kappenman, at ¶ 7; Leet, at ¶ 12. Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶7, 781 N.W.2d 200.

### **I.**

#### **THERE IS A CHARGE TO THE PUBLIC FOR ACCESS TO THE FAIRGROUNDS**

[¶ 12] N.D.C.C. § 53-08-02, “Duty of care of owner”.

1. 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, regardless of the location and nature of the recreational purposes and whether the entry or use by others is for their own recreational purposes or is directly derived from the recreational purposes of other persons, or to give any warning of a dangerous

condition, use, structure, or activity on such premises to persons entering for such purposes.

2. This section does not apply to:

a. A person that enters land to provide goods or services at the request of, and at the direction or under the control of, an owner; or

b. An owner engaged in a for-profit business venture that directly or indirectly invites members of the public onto the premises for commercial purposes or during normal periods of commercial activity in which members of the public are invited.

[¶ 13] The underlying purpose of Chapter 53-08 is the furtherance of the public policy of opening land and water areas to recreational uses. 1965 N.D. Laws ch. 337, preamble. It accomplishes this purpose by immunizing landowners from premises liability when the landowners have insufficient incentives to outweigh tort liability and justify opening their land for recreational use. The history of the Statute is such that it was clearly intended to open up lands to recreational use where the landowner lacks a business incentive to do so.

[¶ 14] The Court's position on interpretation of North Dakota legislation is as follows,

Our primary objective in the interpretation of a statute is to ascertain the intent of the legislature. We look first to the language of the statute. If the language of a statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit. If a statute's language is ambiguous or of doubtful meaning, we may consider extrinsic aids, including legislative history, along with the language of the statute, to ascertain legislative intent.

A statute is ambiguous if it is susceptible to meanings that are different, but rational." This Court "presume[s] the Legislature did not intend an absurd or ludicrous result or unjust consequences," and "construe[s] statutes in a practical manner and give[s] consideration to the context of the statutes and the purposes for which they were enacted.

Harter v. North Dakota Department of Transportation, 2005 ND 70, ¶ 7, 694 N.W.2d



677) (*quoting* Phipps v. North Dakota Dep’t of Transp., 2002 ND 112, ¶7, 646 N.W.2d 704. The recreational use immunity statute is subject to interpretation and is a question of law, fully reviewable on appeal. Kappenman, 2009 ND 89, ¶ 21, 765 N.W.2d 716; Leet, 2006 ND 191, ¶ 13, 721 N.W.2d 398. Our primary objective in interpreting a statute is to ascertain the intent of the legislation. Kappenman, at ¶ 21; Leet, at ¶ 13. Words in a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07.” Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶14, 781 N.W.2d 200.

[¶ 15] There are two issues raised by N.D.C.C. §53-08-02. First, whether section 53-08-02(2)(a) applies when the Pembina County Fair Association (Fair) indirectly charges a person for entry onto the fairgrounds and second, is whether the Fair is an owner engaged in a for-profit business venture that directly or indirectly invites members of the public onto the fairgrounds for commercial purposes or during normal periods of commercial activity.

[¶ 16] The fundamental legal analysis centers on whether a County Fair is entitled to “recreational use immunity” under N.D.C.C. §53-08 as it pertains to maintaining fairgrounds during, in this case, the three-day county fair.

[¶ 17] Applying the law the facts in this case, the purpose of having a free fireworks display held on the fairgrounds on the night of July 4<sup>th</sup>, 2013 was to encourage the public to attend the fair. The Fair argues that the free fireworks display held during a three day fair event on its fairgrounds was for recreational purposes. The Plaintiff argues that the free fireworks display was for commercial purposes. A recreational purpose was

not the motivational factor behind the Fair inviting the public into the grandstands for a free fireworks display but rather the means to encourage the public to come to the fair and spend money. This is a genuine issue of material fact for a jury to decide at trial.

[¶ 18] Further, the Fair argues Woody was not “charged” for admission to the fairgrounds, therefore, it is entitled to protection against liability under the recreational immunity statute in Chapter 53-08. The Fair allowed the public free admission to the fairgrounds and the fireworks display but collected payments from third parties and directly from the public for attendance to concerts and horse races during the three-day fair.

[¶ 19] The purpose of the 2011 amendment to Chapter 53-08 was to clarify and return control over the issue of the duty of care back to the landowner rather than focusing on the subjective reasons why a person has entered the land.

[¶ 20] N.D.C.C. § 53-03-05(4) creates a mandatory duty of care upon the Fair to aid the policing of the fairgrounds when there is carnival present with a criminal penalty for violations. There was a carnival present. There remain questions about compliance with § 53-03 and policing of the fairgrounds and grandstands.

[¶ 21] The Fair claims there was no charge to Woody by the Fair to enter the fairgrounds according to the definition of “charge” which “means the amount of money asked in return for an invitation to enter or go upon the land. ‘Charge’ does not include vehicle, parking, shelter, or other similar fees required by any public entity.” N.D.C.C. § 53-08-01(1). Additionally, §53-08-05(2)(a)

...does not limit in any way any liability that otherwise exists for: . . .

2. Injury suffered in any case in which the owner of land:

- a. Charges the person for entry onto the land other than the amount, if any, paid to the owner of the land by the state; and . . .

[¶ 22] The Stipulation of Facts number 12 states that statutory exceptions in §53-08-05 does not apply. This is an inadvertent error. It should have read “§53-08-05(1) which relates to willful and malicious failure to guard or warn against a dangerous condition. The exception in §53-08-05(2) does apply to this case. Any reference that there was no “charge” in the Stipulation of Facts does not apply because there was an indirect charge for the public to enter the fairgrounds. (App. Appx. A-23, ¶¶ 2,3,4).

[¶ 23] According to the Fair’s advertisement in the local newspaper, the Fair charged \$10 per person to attend the vocal band Six Appeal with a “Free Fireworks Display following the performance”. (App. Appx. A-27). A narrow interpretation of the meaning of “charge” in §53-08-01(1) grants the Fair immunity against Woody’s claims but hypothetically if she had attended the concert immediately proceeding the fireworks and paid the \$10 entrance fee, the Fair would not have been entitled to the same protections. This would result in an absurd and unjust consequence.

[¶ 24] The North Dakota Supreme Court has addressed the issue of free admission in the Schmidt case as follows:

On remand, the trial court again granted the landowner summary judgment, ruling the recreational use statute provided the landowner immunity. Atlanta Comm., 598 S.E.2d at 473. The Georgia Supreme Court again reversed the trial court and remanded, stating the purpose for which the public was permitted on the property involves the examination and weighing of evidence in those instances in which there exist both commercial and recreational aspects for the use of the property, and if there is conflicting evidence regarding the purpose, the trier of fact must resolve the conflict. Id. at 473-74. The court explained that even if there is no dispute about the activities on the land, the nature and extent of the mixed uses of the land may raise factual issues about the owner's purpose for directly or indirectly inviting or permitting a person to use the land without charge. Id. at 474. The court explained the issue for resolution by

the trier of fact was whether the owner directly or indirectly invited or permitted any person to use the property for recreational purposes in light of any evidence the owner's purpose in allowing the public to be on the land free of charge was to derive, directly or indirectly, a pecuniary gain from business interests on the land. Id. The court said summary judgment for that issue was appropriate only when reasonable minds could not differ as to the conclusion. Id. The court recognized the inquiry was intensively fact driven and also elaborated on the type of evidence necessary to resolve a mixed use case where the land's commercial and recreational aspect were closely intertwined. Id. at 474-76. The court explained relevant considerations include whether the owner makes the property available to the public free of charge during regular business hours or at other times and whether the owner's financial arrangements with commercial interests that are both on and off the land indicate the property was made available for recreational or commercial purposes.

Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶21-23, 781 N.W.2d 200.

[¶ 25] The dissent in the Schmidt cited a case which is similar to this case as follows: “In Thompson v. St. Mary's Immaculate Conception Church, 1998 WL 13936 (Conn. Super. Ct.), the Superior Court of Connecticut denied a motion for summary judgment and found the defendant church would not be granted immunity from liability. In that case, the plaintiff attended a fund-raising fair hosted by the church, fell down, and was injured. The district court declined to grant the church recreational use immunity, because although the concerts were free, the fair also included games, rides, and amusements, which were not.” Id. at ¶40.

[¶ 26] In the Thompson case, the court found as follows:

On the basis of this record, it does not appear that 52-557f, et seq., should be interpreted so as to give this defendant immunity from liability. What the record indicates here is that a church ran a festival for the public which consisted of several games of chance, rides and amusements and in conjunction with that or ancillary to it held music concerts. The concerts were free but people had to pay fees or charges to use the other just mentioned recreational activities of which there were several. Fees or charges for use of these activities do not appear or at least were not shown to have anything to do with or to be limited just to reimbursing the church for the clean up and set up costs of running the festival. If they were, that

would present a different question. Nor is this a situation where, at least on this record, the court can say the games, rides, snack booths, et cetera, were just ancillary to the use of the property for the free concerts. For all the record indicates, *the concerts may have been ancillary to a purpose of having as many people as possible use and pay for the other recreational activities.*

Thompson v. St. Mary's Immaculate Conception Church, 1998 WL 13936 (Conn. Super. Ct.) (emphasis added)

[¶ 27] There are two ways to read the Statute's reference to charging for an invitation to come upon land. The first interpretation is that the Statute applies in all cases in which a recreational user does not personally exchange money to enter land. This interpretation would force courts throughout the state to reach absurd results in many premises liability cases as stated above.

[¶ 28] The second interpretation is that the Statute does not grant immunity in those cases where the landowner has invited the public to go upon the land for a commercial purpose. It grants equal justice to those on equal footing. "Statutes are construed as a whole and are harmonized to give meaning to related provisions" N.D.C.C. § 1-02-07.

[¶ 29] The exclusion of "the amount, if any, paid to the owner of the land by the state," N.D.C.C. § 53-08-05(2)(a), contemplates that the phrase "charges the person for entry onto the land" includes charges paid by third parties, including third parties who do not pay for the public's invitation onto the land but rather pay an amount that enables the landowner to invite the public. If amounts paid by third parties to enable a landowner to invite others onto land for recreational purposes do not constitute a charge under the Statute, then the language that excludes amounts paid by the state has no meaning. Whenever possible, "the entire statute must be given meaning because the law neither

does nor requires idle acts." Ridl v. EP Operating Ltd. Partnership, 553 N.W.2d 784, 787 (N.D. 1996) (*quoting* State ex rel. Kusler v. Sinner, 491 N.W.2d 382, 385 (N.D. 1992)).

[¶ 30] Giving meaning to the entirety of Chapter 53-08, N.D.C.C. requires that charges paid by third parties other than the state to enable a landowner to open his land for recreational purposes are sufficient to deny immunity under that Chapter.

[¶ 31] In this case it is the significant funds received by the Fair from third parties and from their own sponsored events which is sufficient to defeat the claim for recreational immunity under Chapter 53-08. "The 2013 Pembina County Annual Fair and Exhibition was held on the Fair property located in Hamilton, North Dakota and in addition to the free firework display, included food vendors, camping, games, rides, amusements and commercial exhibits, non-commercial exhibits, 4H, livestock and other exhibits that were maintained and operated by independent third parties and/or businesses . . . The only activities operated by the Fair where a charge is obtained from the general public to enter are for band performances and horse races, which consists of approximately \$11, 700 . . .". (App. Appx. A-18, ¶¶ 9,14).

[¶ 32] The Fair opened the fairgrounds to the public for a commercial purpose to encourage the public to spend money on goods and services offered at the fair by other business entities and by itself such as concerts, horse races and demolition derby.

[¶ 33] The Fair would not have opened up its land to the public if not for the payments it received from third parties, from the concert, from the horse races and from the demolition derby. A reasonable jury would be permitted to infer from the evidence that the Fair received a charge in exchange for inviting the Plaintiff onto the fairgrounds where the fireworks display was held. This is an unresolved question of fact.

[¶ 34] The Fair is a public entity operating public lands but there is an indirect charge to the public for the activities of the Fair as mentioned above. The Fair therefore should not receive the immunity provided to owners of recreational land by Chapter 53-08.

## **II.**

### **THE FAIR ENGAGED IN A FOR PROFIT BUSINESS VENTURE**

[¶ 35] Chapter § 53-08-02(2)(b) provides for an exception to recreational immunity and states as follows:

- b. An owner engaged in a for-profit business venture that directly or indirectly invites members of the public onto the premises for commercial purposes or during normal periods of commercial activity in which members of the public are invited.

[¶ 36] Commercial purpose is defined under Chapter § 53-08-01(2) as follows:

"Commercial purpose" means a deliberative decision of an owner to invite or permit the use of the owner's property for normal business transactions, including the buying and selling of goods and services. The term includes any decision of an owner to invite members of the public onto the premises for recreational purposes as a means of encouraging business transactions or directly improving the owner's commercial activities other than through good will. "Commercial purpose" does not include the operation of public lands by a public entity except any direct activity for which there is a charge for goods or services.

[¶ 37] Since the 2011 amendments to Chapter 53-08, the intentions of Woody for attending the 2013 Pembina County Fair are not controlling in deciding whether the recreational immunity is applicable to this case. The focus is on the purpose of the Fair for inviting the public to attend the three-day fair and the free fireworks.

[¶ 38] The Fair was engaged in a for-profit business venture by charging money for horse races, concerts, demolition derby and collecting camping fees and the Fair was

engaged with for-profit business ventures with food vendors, commercial exhibitors, the carnival and others. The more people going to the three day fair and spending money the more profitable the businesses. The Fair has a full time paid employees, an office, advertising expenses and insurance expenses with a sole single purpose of having a three-day fair. The Fair wants to separate the free fireworks from the other activities involved at the fair. At best, this would involve a mix of recreational and commercial purposes.

[¶ 39] The North Dakota Supreme Court has addressed the issue of cases involving a mix of recreation and commercial purposes in the Schmidt case:

A common thread under our case law interpreting the recreational use immunity statutes is that the intent of both the owner and the user are relevant to the analysis and that the location and nature of the injured person's conduct when the injury occurs are also relevant...Our caselaw effectively recognizes more than one purpose may be involved with the use of land. See Kappenman, at ¶ 28; Leet, at ¶¶ 19-20. Other jurisdictions have acknowledged that cases involving claims of recreational use immunity involve fact-driven inquiries in which nonrecreational uses or purposes may be mixed with recreational uses or purposes. See Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 598 S.E.2d 471, 473-76 (Ga. 2004). . .

On remand, the trial court again granted the landowner summary judgment, ruling the recreational use statute provided the landowner immunity. Atlanta Comm., 598 S.E.2d at 473. The Georgia Supreme Court again reversed the trial court and remanded, stating the purpose for which the public was permitted on the property involves the examination and weighing of evidence in those instances in which there exist both commercial and recreational aspects for the use of the property, and if there is conflicting evidence regarding the purpose, the trier of fact must resolve the conflict. Id. at 473-74. The court explained that even if there is no dispute about the activities on the land, the nature and extent of the mixed uses of the land may raise factual issues about the owner's purpose for directly or indirectly inviting or permitting a person to use the land without charge. Id. at 474. *The court explained the issue for resolution by the trier of fact was whether the owner directly or indirectly invited or permitted any person to use the property for recreational purposes in light of any evidence the owner's purpose in allowing the public to be on the land free of charge was to derive, directly or indirectly, a pecuniary gain from business interests on the land.* Id. The court said summary judgment



for that issue was appropriate only when reasonable minds could not differ as to the conclusion. Id. The court recognized the inquiry was intensively fact driven and also elaborated on the type of evidence necessary to resolve a mixed use case where the land's commercial and recreational aspect were closely intertwined. Id. at 474-76. The court explained relevant considerations include whether the owner makes the property available to the public free of charge during regular business hours or at other times and whether the owner's financial arrangements with commercial interests that are both on and off the land indicate the property was made available for recreational or commercial purposes. Id.

Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶19 and ¶21, 781 N.W.2<sup>nd</sup> 200 (*emphasis added*).

[¶ 40] People attending the fair, no matter their subjective reasons for doing so, furthered the Fair's business in exactly the same way that a shopper entering a department store furthers that store's business, even if the shopper enters with the intention of walking the aisles to educate himself about prices. The Fair had a business incentive to permit people onto its property. The Fair's principal business purpose is renting commercial space to food vendors and providers of games, rides, amusements and commercial exhibits. They attract the public to those businesses, and attract the public to attend the horse races, the concerts, the demolition derby and the camp grounds by advertising and offering free admission to the fairgrounds and free admission to the fireworks display. As they advertised, there was a "Free Gate" and free band concerts connected with paid for events – "\$20 & \$25 wrist bands for carnival rides, \$10 & \$5 admission the Horse Racing, \$10 & \$5 to the demolition derby and \$10 to the Six Appeal vocal band." – (App. Appx. A-27).

[¶ 41] The purpose of Chapter 53-08 is not, in any way, furthered by its application to the Fair, the public policy underlying it is not present, and the activities involved are not within its contemplation. During the three days of operation, the Fair

would undeniably keep its property open to the public and offer a fireworks display without direct admission charge regardless of the possibility of premises liability. For example, it would be a different story had the three day fair been held in August and the Fair opened its grounds to the public for the sole purpose of having a free fireworks display on July 4<sup>th</sup>, 2013 for goodwill reason. But that is not the case here, the free fireworks display was held during the normal business operating hours of the three day fair.

### III.

**THE 2011 AMENDMENT TO CHAPTER 53-08 WAS TO GET THE COURTS TO FOCUS ON THE OWNER INTENT AND DID NOT ABROGATE OR OVERTURN *LEET* OR *SCHMIDT*.**

[¶ 42] Tag Anderson, Director of Risk Management at the Office of Management assisted the members of the Senate Judiciary Committee amending Chapter 53-08 and testified as follows:

The State of North Dakota, like many states, has enacted laws designed to encourage landowners to open land for recreational purposes. These laws are codified in Chapter 53-08 of the North Dakota Century Code. These provisions are commonly referred to as the “recreational immunity statutes” although the term “recreational immunity” is not used in any of the statutory language. These statutory provisions define the duty of a landowner has to those whose presence on the land is the result of the landowner’s decision to directly or indirectly permit the property to be used for recreational purposes. (App. Appx. A-71).

[¶ 43] In Leet v. City of Minot, 2008 ND 91, the Court strayed from focusing on the decision of the landowner to allow property to be used for recreational purposes and whether the person was on the property as a result of that decision and instead focused on

the entrant's purposes for being on the land, something the landowner ordinarily would have no knowledge or control. Justice Crothers in his dissent in the *Leet* decision expressed it perhaps best:

The majority's result is obtained by dramatically changing focus to each user's purpose for being present on the property and away from the owner's act of opening the property for recreational use. This shift strips the owner of any ability to control liability and hands that control to each user—or in this case—a user's employee. I do not believe this is the result directed by plain words of the recreational use immunity statutes. I do not believe this result is supported by a fair assessment of the Legislature's express and implied intent. To the contrary, the majority's analysis and conclusion thwart, rather than carry out, the Legislature's goal by reducing, rather than maintaining or expanding, land available for recreational use.

(App. Appx. A-71).

[¶ 44] The changes in this proposed legislation are designed to return the control over duty of care owed back to the landowner as expressed by Justice Crothers, thereby furthering the policy of encouraging landowners to allow property to be used for recreational purposes. In addition, by focusing on the landowner's act of allowing property to be used for recreational purposes and asking solely whether an entrant is on property because of that decision, the application of recreational statutes becomes more certain in litigation. As the recreational use statutes apply equally to public and private landowners, the State has a strong interest in bringing clarity to the duty of care it owes as a landowner when it permits property to be used for recreational purposes.” (App. Appx. A-72).

[¶ 45] Leet and Schmidt are still good law. According to the “minutes” on the “Explanation or reasons for introduction of bill/resolution” the Senate Judiciary committee discussed as follows:

Representative Klemin explains the amendments that the House made to the bill. He describes the Leet case which was a Supreme Court case and this bill was originally intended to reverse that Supreme Court case. He said in their view the language was a little too broad. The committee discusses different scenarios that could arise to see if this would be applicable. Rep. Klemin says the Supreme Court says you have to go through a balancing test. Their goal was not to have to go through this balancing test. They discuss being able to go into a mall for walking purposes before it opens. Rep. Klemin says that would be for commercial purpose and this is why the definition for commercial purpose is in the bill. Senator Olafson questions those that are invited onto the land and should there be a distinction whether the person is being paid by the owner. Rep. Klemin says as he reads it, it doesn't make a difference whether he is paid or not. He goes onto (to) say this does not apply to a person who enters land to provide goods and services for compensation at the request of an owner. Rep. Guggisberg asks if it should read requests or invites. Rep. Klemin says it may be more of a direction and control issue rather than whether they are being compensated. Senator Olafson says he feels it is more of a relevant issue than the compensation. The committee discusses it would be better to add under the direction and control of the owner. . . .

#### Discussion

Senator Nething asks about the responsibility of a mall owner with recreational walkers. He is concerned that this liability would shut down the mall walkers and asks Rep. Klemin how he would envision that with this bill. Rep. Klemin says the mall expects that the walkers will shop after the store open. *He thinks that the way it is written now actually tightens it up for the way the Supreme Court decision was. He thinks it won't effect anything.* Rep. Guggisberg points out in Section two under exemptions that is has to be during normal periods of commercial activity so he doesn't think they would be covered. Rep. Klemin said commercial purpose was defined so it should be okay. Rep. Kretschmar asks if this will cover if you invite someone to your place to do repair work. Senator Olafson said it would not apply because this is recreational immunity. *Id.* at Bates Nos. 37 and 38. (*emphasis added*)

(App. Appx. A-71, 72).

[¶ 46] The Legislative History indicates that the two Supreme Court cases (Leet and Schmidt) were discussed and were attached at the end of the Legislative History. Rep. Onstad stated that “The law cases that are brought forth, everybody kind of agreed that they were probably the right determination”. (App. Appx. A-55).

#### IV.

#### THE DUTY OF CARE STANDARD FOR THE FAIR IS ENHANCED BY N.D.C.C.

#### CHAPTER 53-03.

[¶ 47] Chapter 53-03 Carnivals, addresses the duty of fair boards as follows:

**53-03-05. Authority of governing body and fair board.**

If a governing body or fair board determines that an application for a permit should be granted, it shall: . . .

4. Aid in policing the carnival grounds and in otherwise compensating the municipality or association interested in such amount as may be determined; N.D.C.C. §53-03-05 (emphasis added)

[¶ 48] The legislation of Chapter 53-03-05 created a specific duty on fair boards to insure the premises are safe. Fair boards must protect the public from being victims of crime but they also must aid in policing the fairgrounds and keeping them clean and safe from dangerous conditions.

[¶ 49] The defendant may argue that §53-03-05(4) is only applicable to the “carnival grounds” and not the grandstands but that would mean that the Fair has a higher duty of care in one area of the fairgrounds and basically no duty of care to the public in another area separated by a few feet. The free fireworks display was part of the three-day fair.

[¶ 50] If a person walking on the grounds of the Fair during the three-day fair, steps into a hole and breaks an ankle, then the Fair is not be entitled to claim recreational immunity either under the Schmidt case or under Chapter 53-03. In this case, the Fair is not entitled to claim recreational immunity because the grandstands are on the fairgrounds and recreational immunity is not applicable under the Schmidt case or under Chapter 53-03.

[¶ 51] Denying Woody the opportunity to pursue a recovery for her personal injuries, which will only be successful in the first place if she is able to prove the culpability of the Fair in causing them, frustrates the ends of justice while serving no valid purpose, whether stated by the legislature or otherwise.

### **CONCLUSION**

[¶ 52] The Appellant requests a reversal of the judgment of dismissal and for the case to be remanded to the District court for trial.

/S/ Clint D. Morgenstern(ND #06656)

*for*

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  ) SS  
COUNTY OF GRAND FORKS     )

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RE:   Audra D. Woody vs. Pembina County Annual Fair and Exhibition Association  
      Supreme Court No. **20150236**  
      Pembina County Court File No.: **34-2014-CV-00129**

The undersigned, being of legal age, being first duly sworn deposes and says that on  
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Arnette A. Carmean

Subscribed and sworn to before me  
this 30<sup>th</sup> day of October, 2015.

[Signature]  
Notary Public

CLINT MORGENSTERN  
Notary Public  
State of North Dakota  
My Commission Expires May 21, 2016