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STATE OF NORTH DAKOTA

SUPREME COURT OF THE STATE OF NORTH DAKOTA

M.M., a minor child, and Thomas Moore,

Plaintiffs and
Appellants,

vs.

Fargo Public School District No. 1,
and Eugenie Hart,

Defendants and
Appellees.

Sup. Ct. No.: 20090121
Cass Co. No.: 07-C-01528

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT ENTERED ON FEBRUARY 3RD, 2009
CASE NO.: 09-7-C-1528-1
COUNTY OF CASS
EAST CENTRAL JUDICIAL DISTRICT
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STATEMENT OF THE ISSUES

1. Did the trial court err by holding that a recreational use statute has eliminated the duty of schools and teachers to use reasonable care for the safety of a student in school?

2. Is it a violation of equal protection of the laws to apply a recreational use statute so broadly as to create different liability for the same acts of negligent supervision causing injury to a student, depending merely upon whether the injury occurred on or off of school property?

3. Was it error for the trial court to split a single claim of gross negligence for encouraging and permitting students to practice for a dangerous classroom stunt, by dismissing "part" of the claim to preclude evidence of the teacher's actions that encouraged the students to contemplate and rehearse for a dangerous stunt performance, and restricting proof to whether the teacher knew of and failed to stop the rehearsal?

4. Was it error to fail to instruct the jury on each of the alternate grounds for liability provided by the statute?

5. Was it error to fail to instruct the jury on the heightened legal duty of a teacher toward a child entrusted to her care?

STATEMENT OF THE CASE

[¶ 1] This is a personal injury action brought on behalf of plaintiffs M.M. and his father Thomas Moore for injuries sustained by M.M. as a minor child on May 6, 2004, and for the substantial medical expenses incurred by Thomas. The action pled a claim of negligence liability against Fargo Public School District No. 1 (also referred to herein as "Fargo School District" or "Fargo Public Schools") for the actions of its employee, Eugenia Hart, as a history teacher acting in the course and scope of her employment regarding a class project. The action also pled a claim of personal liability against Hart, alleging her acts and omissions rose to the level of fault required by statute to create personal liability for actions taken in the course and scope of her employment. (Appellants' Appendix, pp. 12-15) (hereinafter, the "Appellants' Appendix" will be cited as "A.A.")

[¶2] Shortly before trial, defendant Fargo Public Schools moved for summary judgment on the ground that the recreational use statute immunized the District from any and all liability for the teacher's conduct for any injury occurring on school property. Defendant Eugenie Hart moved for summary judgment on the ground that there was no genuine issue of material fact as to whether Hart's actions rose to the level of gross negligence, willful misconduct, recklessness or wanton misconduct, as required by the statute to impose personal liability on Hart. At the conclusion of the motion hearing the court informed counsel of his intention to grant the dismissal of Fargo Public Schools and to grant a partial dismissal of the claim against Hart, but

denying the motion to dismiss Hart insofar as it related to whether Hart failed to stop the rehearsal.

[¶3] The trial proceeded on a part of the claim against Hart, under the heightened negligence requirements for imposing personal liability, and with evidence restricted to whether Hart knew of the rehearsal, and not to her role in previously approving such a bicycle stunt and sharing the idea with the students. The jury returned a verdict finding insufficient evidence to prove gross negligence, recklessness, willful misconduct or wanton misconduct by Hart. The court later issued its written decision on the summary judgment motions and directed entry of judgment of dismissal of the defendants. This is an appeal from the judgment for defendants.

STATEMENT OF FACTS

[¶4] Prior to May 6, 2004, 15 year old M.M. had been an exemplary student, well behaved, an academic success, and an Eagle Scout. (Tr. 150, 468, 550, 587, 737) Neither he, nor his classmate J.B., were students who had posed discipline problems before. (Tr. 150, 273, 587) On May 6, 2004, M.M. and his classmate J.B. were in the Discovery Middle School auditorium alone to attempt a bicycle stunt in which, after moving chairs on the stage set for an evening band concert, they rode their bikes off the edge of the proscenium stage to land three and a half feet below on the audience floor. (Tr. 241-242, 244-245, 266; A.A. 29) Neither boy wore a helmet. (Tr. 244) J.B. successfully completed his attempt; M.M. did not. M.M. sustained a very severe

head injury that has rendered him unable to recall the day or the events leading up to it. (Tr. 245, 298-299)

[¶5] As the teachers and principals who were called to M.M.'s aid soon learned, the attempt had been a practice run, or a rehearsal, for a planned performance in a history class project scheduled to occur the next day, known as "60s Day". (Tr. 85-86, 724) The history teacher in charge of the project, defendant Hart, was not present at the time of the rehearsal. (Tr. 630-31) She had, however, seen M.M. outside the auditorium minutes before and admits she discussed M.M.'s plan to perform the stunt with his classmate J.B.. (Tr. 628-629, 649, 217) She had also discussed the matter with the boys previously. (Tr. 218, 221, 654; A.A. 76) Hart testified she did *not* discuss his plans for an imminent rehearsal, but this claim was contradicted by what she told three parents after the injury that she did know of it. (Tr. 628-629, 498, 562, 392-3) Since M.M. had a traumatic brain injury he was not able to testify to what was said between him and Ms. Hart just before the accident. (Tr. 245, 298-299) J.B. did not recall if he separately told Ms. Hart of the rehearsal, but if not, then M.M. would have been the only source of the knowledge she once admitted to having. (Tr. 233-234, 278).

[¶6] In preparing students for 60s day participation, defendant Hart had shown the boys and other students a video tape of past examples, including a similar stunt performed in the class two years earlier by a boy that both J.B. and M.M. knew. (Tr. 153, 223, 225, 725; A.A. 71-72) The videotape, which was taken by another teacher and destroyed by the school after this incident, depicted the prior boy performing the stunt in front of defendant Hart and other teachers. (Tr. 191, 224, 652-653, 724) The

boy testified he received Mrs. Hart's approval the day of his performance and he rehearsed it in the auditorium over the lunch hour. (Tr. 186-187, 189, 197) Hart acknowledges approving him to do the stunt, knowing the boy did not wear a helmet. (Tr. 48-49, 52-53; A.A.70) She testified that she did not require that he have his stunt on an agenda or list of approved skits that were prepared the day before. (Tr. 197) The teacher video showed the boy perform the stunt, without a helmet, to student drum rolls in which he twice "faked" a jump while a student announcer narrated to help build audience suspense. (Tr. 189-191, 198) The boy broke a part of his bike, but was not hurt, and then held it up for the audience to see. (Tr. 191-192)

[¶7] Defendant Hart later testified that the earlier stunt "mortified" her because the boy could have injured himself, but she watched the performance without intervening during the "fakes" and never said anything to the boy to suggest her regret or disapproval. (Tr. 191, 200-201,652-653). Hart later gave the boy a personal copy of the video, which he shared with his younger friend J.B. outside the classroom. (Tr. 200, 223, 250, 653) No school administrator had ever been made aware of the prior stunt or the video tape by Hart or the other teachers, nor had the administrators been asked by Hart to give approval of such a stunt. (Tr. 67, 88-90, 93, 703) All administrators testified that school policy required a teacher to get prior administrative approval and parent consent for such activities. (Tr. 68-69) The administrator in charge of auditorium use indicated that if she had ever been asked for approval of this type of activity, she would not have approved it. (Tr. 63, 89) Student J.B. testified that while he expected Hart would approve him performing the stunt based on this history, he did not believe administrators would approve and so he

hoped to avoid their detection when he brought his bike in for a rehearsal. (Tr. 239-240) In contrast to this, moments before the accident another teacher saw M.M. trying to get in the auditorium area with his bike and stated that M.M. greeted him and did not act as though he had anything to hide. (Tr. 738-740)

[¶8] Defendant Hart was not present during the injury because she left M.M. outside the auditorium to go to pick up her car from a local repair shop. (Tr. 628-630) When Hart arrived at the car repair shop, twenty to thirty minutes after talking with M.M., a message from another teacher was waiting to inform her of M.M.'s injury and the hospital where she could find him. (Tr. 631) Hart went immediately to the hospital. (Tr. 631) At the hospital she had separate conversations with each of M.M.'s parents (Tr. 495-498, 561-562) Among other things, telling them what a fine student M.M. was and that she was responsible for the injury because she knew the boys were planning to rehearse this stunt and that she should have stopped them, but didn't. (Tr. 498-499, 562, 632) She seemed so upset that M.M.'s mother even felt concerned about her and felt like comforting her while she waited to learn of her son's fate in the emergency room. (Tr. 562) The next morning Hart spoke to J.B.'s mother, Adair, and made nearly the same statements, acknowledging her knowledge of the boys' rehearsal activity and her sense of responsibility for not stopping it. (Tr. 392-393) Hart did not talk to the principal about the incident until the day after the accident when she encountered him in the hallway. (Tr. 659) Since her conversations with the parents, defendant Hart has denied knowledge of the rehearsals and disputes making her statements to the parents. (Tr. 632, 636)

[¶9] The “60s Day” event was designed by teacher Hart to cap off a study of the history of the “60s”. (Tr. 683) Students were encouraged to perform for a production in the auditorium that ideally would have some connection to the decade of the 1960s and demonstrate some aspect of that history. (Tr. 66) If students chose not to perform, they could fill another role such as lighting, or helping with the production. (Tr. 585) While an actual performance was not required, doing so would earn points as part of the grading for History. (A.A. 28) No one could articulate an educational value or relationship to the 60s for this particular stunt. (Tr. 67, 188) Hart described it as just entertainment with no connection to the 1960s. (A.A. 69) Its origin seemed to be that not enough skits were scheduled to fill the time, and so further performances were welcomed as filler. (Tr. 188, 196)

ARGUMENT

I.

[¶10] THE TRIAL COURT ERRED IN HOLDING FARGO PUBLIC SCHOOL DISTRICT NO. 1 WAS IMMUNE FROM LIABILITY FOR TEACHER NEGLIGENCE OR GROSS NEGLIGENCE IN FAILING TO PROPERLY SUPERVISE M.M.

[¶11] A. The Recreational Use Statute Limits Landowner Liability For Negligent Control Of Its Recreational Land, But Does Not Relieve A School Or Teacher Of The Legal Duty To Operate The School Safely For Its Students.

[¶12] The liability of a North Dakota school district is set forth by law as follows:

> Each political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee’s employment or office under circumstances where the employee would

> be personally liable . . **or** injury caused from some condition or use of tangible property, real or personal, under circumstances where the political subdivision, if a private person, would be liable to the claimant.

N.D.Cent.Code § 32-12.1-03(1) (emphasis added). This statute explicitly provides for liability of two different kinds: employee negligence in the course of employment, and harm caused by the condition or use of its property. It sets forth the general rule that a political subdivision is subject to the same types of liability as a private citizen. Whether that liability is vicarious for actions of an employee who breaches any of a number of recognized duties of care, or whether the liability is premised upon the entity's ownership of property and the condition or use of the premises, this statute provides the clear intention of the legislature that political subdivisions should be liable as a private person would be. (Related provisions do, however, impose a per person damage cap that private citizens do not enjoy).

[¶13] This general rule of liability, expressly applied to two distinct categories of liability, is modified by another statute that partially abrogates one of those categories: landowner liability. The recreational use statute negates a duty of care for a landowner regarding the condition and use of land that has a recreational purpose. This statute provides that "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition [or] use … to persons entering for such purposes". N.D.Cent.Code § 53-08-02. This statute serves to modify the common law liability of premises owners, which imposes a duty of care based upon an owner's control of the land. *See, eg*. *Stanley v. Turtle Mountain Gas & Oil*, 567 N.W. 2d 345, 348-9 (N.D. 1997) (discussing the centrality of control of property to the imposition of a

duty of care on the landowner under North Dakota premises liability law). The application of the recreational use statute, which has been subject to constitutional challenge in the past due to its impingement on the "important substantive right to recover for personal injuries", has been upheld when it is applied to "advance the important legislative goal of opening property to the public for recreational use in a manner that closely corresponds to the achievement of that goal." *Olson v. Bismarck Parks & Recreation Dept*., 642 N.W. 2d 864, 871 (N.D. 2002) (applied to a sliding accident on a golf course hill).

[¶14] While this statute does narrow one category of a school's common law duties, those of a landowner of recreational lands by exempting such lands from the duty of care, the statute does not speak to the other common law duties of the school through its employees. Those other legal duties remain intact, since it is presumed that a statute does not change the common law beyond what it explicitly declares in express terms or unmistakable implication. *Reeves & Co. v. Russell*, 148 N.W. 654 (N.D. 1914); see also *Green v. Gustafson*, 482 N.W. 2d 842, 847 (N.D. 1992).

[¶15] The common law duty to safeguard students is well established in North Dakota, as well as other states. *See, eg., Besette v. Enderlin School District*, 310 N.W.2d 759, 763 (N.D. 1981) ("Schools are under a duty to insure the safety of their students during playground activities . . . The school owes to its children to exercise such care of them as a parent of ordinary prudence would observe in a comparable circumstance . . ."); *Godar v. Edwards*, 588 N.W.2d 701, 708 (Iowa 1999) ("The law charges school districts with the care and control of children and requires the school district to exercise the same standard of care toward children that a parent of

ordinary prudence would observe in comparable circumstances."); *Johnson By and Through Johnson v. School Dist. Of Millard*, 573 N.W. 2d 116,119 (Neb. 1998) (explaining that "The proper standard of care regarding negligent supervision is whether the defendant acted as a reasonably prudent person would in a similar circumstance."); *Larry v. Commercial Union Ins. Co*., 277 N.W. 2d 821, 826 (Wis. 1979)("a teacher in a school has a common-law duty to use reasonable care in the supervision of those pupils in his charge.") Since the recreational use statute contains no express or implied repeal of any duty of a school or teacher that is independent of its duties as a landowner, the trial court has erred by dismissing the Fargo School District on the basis of the recreational use statute.

[¶16] In this case the liability of the Fargo School District is premised upon the duty of the school and teacher to provide for the safety of its students, not upon a duty of a land owner. See *Besette v. Enderlin School District No. 22*, 310 N.W.2d 759, 763 (N.D. 1981). This court has previously drawn a careful distinction between "premises liability" for unsafe conditions of property that is based on ownership and control of property, and the duty to provide a safe environment that arises from the relationship of the parties to one another in the circumstance at hand. *See Azure v. Belcourt Public School District*, 681 N.W. 2d 816, 820 (N.D. 2004) (holding "this is not a premises liability action . . . Here, the essential prerequisite is to establish a relationship through supervisory and operational controls that gives rise to the School District's duty to protect Agnes Azure for injury in the Middle School lunchroom" and distinguishing *Doan v. City of Bismarck*, 632 N.W.2d 815 (N.D. 2001) as a

premises liability case in which the owner's control of the premises was a disputed fact issue).

[¶17] The recreational use statute, which expressly applies to landowner liability, does not abrogate such other legal duties. Indeed, the statute specifically provides that it is not intended to abrogate liability for actions of non-owners who enter upon or use the land of another for a recreational purpose. It expressly provides: "Nothing herein limits in any way the obligation of a person entering upon or using the land of another for recreational purposes to exercise due care in that person's use of such land and that person's activities thereon." N.D.Cent.Code § 53-08-06.

[¶18] It is noteworthy that this language does *not* simply perpetuate a person's duty to exercise due care only *for their own safety*, but rather speaks more generally to the duty of care for use or activity upon the land by any person entering upon the land of another. In so doing, the statute declines to limit the non-owner's legal obligation of care, either for one's self or others. A statute is to be construed to give effect to all of its parts and not to render one part of the statute useless. *State v. Mees*, 272 N.W.2d 61 (N.D. 1978). This section of the statute, explicitly providing that the recreational use statute does not limit "in any way" the duties of care of those who enter or use the land of another, must be given effect. Every provision used in a statute is to be given meaning and effect. *Garner Public School v. Golden Valley County Committee,* 334 N.W. 2d 665 (N.D. 1983). Therefore, whatever legal obligations applied to defendant Hart as a non-owner continued entirely unaffected by this statute. She remained bound to observe her common law duties of care relative to her own acts and omissions.

[¶19] Hart's acts of negligence and breach of duty were numerous and included, by way of example, her prior approval of this type of an obviously dangerous stunt without following school policy, her violation of school policy again by failing to forbid a stunt known from prior experience to be dangerous or to stop the student's consideration and preparation of the stunt, her failing to make even the slightest attempt to comply with school policy requiring prior administrative approval and parent consent, and her total failure to include requirements for use of safety equipment that she personally used or to require any demonstration of skill to safely perform the activity, all of which was also required by school policy. The school's liability for these actions is clearly premised upon the actions of Mrs. Hart as a teacher, and the duty of care owed by her and the school to insure the safety of its students, just as a parent of ordinary prudence would do in a comparable circumstance. *See Besette v. Enderlin School District No. 22*, 310 N.W.2d 759, 763 (N.D. 1981).

[¶20] M.M. was a 15 year old student whose school attendance was compelled by law and whose study of history under Ms. Hart was a required curriculum. It is in this context that the defendants owed its duty of care. "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Azure v. Belcourt Public School Dist.*, 681 N.W.2d 816 (N.D. 2004). Hart was the teacher in charge of this part of the classroom curriculum, and her acts and omissions related to her management of the curriculum on behalf of the school, not as one assigned to monitor and warn about uses of the auditorium. She was no landowner and she

exercised no control of the auditorium. The access and use of the auditorium was controlled by the school administration, and particularly, Peggy Stibbe. (T. 63; A.A. 75)

[¶21] Plaintiffs' claim of school liability was not dependent upon a claim that the auditorium was in a dangerous and defective unsafe condition or required a warning or guard, nor did this tragedy occur as a result of the use of the auditorium for the purpose for which it was designed. Compare *Fastow v. Burleigh County Water Resource District*, 415 N.W.2d 505 (N.D. 1987) (in dictum leading to a holding that insurance coverage made the recreational use statute inapplicable, the court refers to allegations that pool owner's employees failed to warn, guard, maintain, and provide first aid protection to a swimmer injured by diving in the swimming pool, as a claim of negligence that "relates to the condition of the property");and *Wirth v. Ehly*, 287 N.W. 2d 140, 147 (Wis. 1980) (recreational use statute eliminates duty for state employees to warn trail users of a cable strung across a trail on state owned recreational land.)

[¶22] The fact that the school's liability was unrelated to its landowner status is easily illustrated. If the location of the stunt was in another facility not owned or controlled by the school, but the facts of the teacher's knowledge and actions had otherwise been the same, then Fargo Public School would still have clearly faced an issue of their vicarious liability for the teacher's actions. If this had been an inappropriate chemistry experiment, such as ignition of explosive materials that had been announced as planned for students to "perform" in the class room and the student's homework assignment was to practice outside the school with the

knowledge and assent of the chemistry teacher, there would be little doubt that the issue of responsibility for such a foolhardy stunt would not be foreclosed by the recreational use statute. The fortuity of the location and ownership of the rehearsal site has little or nothing to do with the underlying issues of fault of the teacher in disregarding her obligations and school policy designed to assure her student's safety.

[¶23] The trial court's decision to apply recreational land immunity fails to distinguish negligent supervision of students from liability for control of premises, a distinction readily made in other jurisdictions when determining the scope of immunity laws pertaining to landowner liability. *See Lightfoot v. School Administrative Dist. No. 35*, 816 A.2d 63, 66-7 (Me. 2003) (student injured while running a team drill in the hallway of the school did not raise questions of unsafe condition or management of building premises, but rather of the supervision of students and the manner in which they were allowed to run through the school); *Wilson v. Norristown Area School District*, 783 A.2d 871 (Pa. Commw. Ct. 2001) (coach requiring relay drill in school leading to student falling on a school staircase); *Oehler v. Diocese of Buffalo*, 277 A.D.2d 967 (N.Y. 2000) (student injured when pushed through a glass door by a student raised issues of failure to supervise students rather than safe condition of premises); *University Preparatory School v. Huitt*, 941 S.W.2d 177 (Tex. Ct. App. 1996) (student injured in fall from balcony into pool raised issues of negligent supervision rather than premises liability); *Farber v. Pennsbury School District*, 571 A.2d 546 (Pa. Cmwlth. 1990) (student fall during school sponsored foot race); *Mooney v. North Penn School District*, 493 A.2d 795,

(Pa. Cmwlth. 1985) (blindfolded student being led through school building falls on steps during simulated Iranian hostage crisis).

[¶24] The trial court's misapplication of the recreational use statute served to destroy the very common law liability of political subdivisions that the legislature meant to preserve and limit under N. D. Cent. Code §§ 32-12.1-03 and 04. Statutes are to be interpreted in harmony and to avoid conflict. *Public Service Com'n v. Minnesota Grain Inc*., 756 N.W.2d 763, 766 (N.D. 2008); *Ohnstad Twichell P.C. v. Treitline*, 574 N.W. 2d 194, 197 (N.D. 1998). This goal is accomplished merely by limiting application of the recreational use statute to landowner liabilities for recreational use of their lands. To abrogate all other duties simply goes too far and ignores the recreational use statute's own provision that it not be construed to limit the duties of care that apply to non-owners who go upon such lands.

[¶25] The trial court's ruling has the effect of completely relieving the schools, who have custody of our children under mandatory attendance laws, from exercising any care for their safety while on school property. This is an absurd result, and such results are to be avoided in interpreting statutes. *Raboin v. North Dakota Workers Compensation Bureau,* 571 N.W. 2d 833 (N.D.1997). Surely the legislature did not intend to mandate citizens to provide custody of their children to a political subdivision and then, in the indirect and oblique guise of "recreational immunity", eliminate the legal responsibility of that same entity to act with the care of a reasonably prudent parent toward the safety of those children.

[¶26] B. The Recreational Use Statute Does Not Apply Because The Rehearsal For A Class Project, Of No Apparent Educational Value, Is Not "Recreational".

[¶27] Even assuming that any liability of any use of a school property could be said to fall within the school's liability as a landowner, this rehearsal of a classroom assignment did not represent a "recreational purpose" as required by the statute. Only uses of property that are for "recreational purposes" come within the meaning of the statute. N.D.Cent.Code § 53-08-01. Words in a statute are to be given their ordinary meaning. N.D. Cent. Code § 1-02-02. The term "recreational" or "recreate" refers to activities designed to "restore or refresh physically or mentally", to "create anew". *Random House College Dictionary*, 1st Ed. Rev. (1980), p.1104. While the statute provides that "recreational" uses "includes" those that are for "exercise, relaxation, pleasure or education", these words are obviously not synonyms and so may not be understood in abstract isolation from the plain meaning of "recreational purposes". The term "education" must still be read and understood in light of the meaning of "recreation".

[¶28] This Court has held previously that injury to an auditorium user who was in the auditorium preparing to set up a booth for an exhibition the next day that, among other things, provided educational information and entertainment, was not a use for a recreational purpose. *Leet v. City of Minot,* 721 N.W.2d 398, 406 (N.D. 2006). In so deciding, the court reviewed the history of this statute and stated that current language, adopted in a 1995 amendment, by using the term "includes" to describe "recreational purposes" was to be viewed as a term of enlargement of the meaning, the court specifically noted that "we cannot conclude it encompasses all

activities". *Leet v. City of Minot,* 721 N.W.2d 398, 406 (N.D. 2006). This Court noted that the statute was adopted for the purpose of "opening property to the public for recreational use in a manner that closely corresponds to the achievement of that goal." *Id.*

[¶29] Since, as *Leet* notes, this statute does not encompass "all activities" that "recreational purposes" specifically "includes", it follows that not all activity related to "education", no matter how tenuously, has a "recreational purpose". It is not appropriate to assume, as the trial court appears to have done, that everything occurring within a school must therefore be considered automatically "educational". In this case, none of the educators could describe any educational value to the "bike stunt". The prior performer of the stunt indicated the activity was devised as a kind of filler, since there were not enough legitimate skits to fill the hour. There are many examples in the law where courts have scrutinized classroom activities and concluded that, despite their offering in a classroom, they were not "educational". [1] That is certainly true here as well.

[¶30] If the legislature had meant to immunize all activity within the confines of a school property as a "recreational use of land", an action that no doubt would make North Dakota law unique in this country, surely it would have done so clearly, simply and directly. To reach such a conclusion so obliquely by applying the term

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[1] *See, eg., Dawson v. East Side Union High School Dist.*, 28 Cal.App.4th 998,1038 (1994) (Public school students may not be compelled to watch classroom video advertising since it lacks educational value); *Hope v. Charlotte-Mecklenburg Bd. Of Educ.*, 430 S.E.2d 472,473 (N.C.App. 1993) (doll making project in class had no educational value); *Roberts v. Rapides Parish School Bd.*, 617 So.2d 187,190 (La.App. 1993)(showing movie in classroom with no relation to curriculum had no educational value).

"education" in its broadest possible meaning, and without reference to the context of "recreation", simply leads to an absurd result and far exceeds the legitimate purpose of this statute.

[¶31] Recreational use statutes of one type or another may be found in nearly every state. *See* Robin C. Miller, Annotation, *Effect of Statute Limiting Landowner's Liability for Personal Injury Recreational User,* 47 A.L.R. 4th 262 (1986). A few states have provisions that are similar to North Dakota's current version. For example, Maryland law provides: "an owner of land owes no duty of care to keep the premises safe for entry or use by others for any recreational or educational purpose . . ." MD Code, Natural Resources, § 5-1103. Similarly, Wis. Stat. § 895.52 provides: "no owner . . . owes to any person who enters the owner's property to engage in a recreational activity: (1) A duty to keep the property safe for recreational activities . . .". Wis. Stat. §895.52(g) defines "Recreational Activity" to include "educational activity".

[¶32] Despite the similar reference to educational activity in both of these state's statutes, neither Maryland nor Wisconsin treats anything at all occurring on school grounds as a "recreational" activity. In *Auman v. School District of Stanley-Boyd*, 635 N.W.2d 762 (Wis. 2001), the Wisconsin Supreme Court rejected application of the recreational use statute to a claim by a student who was injured while sliding on a snow pile on the school playground during mandatory recess. The court noted that "educational activity" within the context of the recreational use immunity statute "refers to participation in an outdoor learning experience voluntarily entered into by the individual". *Id.* at 768. In Maryland, the statute itself goes on to

specify a variety of particular types of educational outings of a recreational nature. *See* MD Code Ann., Nat. Res. § 5-1101(c). Both states are examples of how the use of the term "education", in defining recreational use for immunity purposes, does not mean to include, in the words of the *Leet* decision, "all activities" that are related to education.

[¶33] The same common sense conclusion must be reached about North Dakota's statute. Before 1995 the act defined "Recreational Purpose" by trying to specify particular recreational uses, some of which had an educational component, and provided that "recreation purposes":

> includes, but is not limited to any one or any combination of the following: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure diving, nature study, water skiing, winter sports, and *visiting, viewing, or enjoying historical, archeological, geological,scenic, or scientific sites* . . .

See 1995 N.D. Sess. Laws, ch.162, §7. As cited in *Leet v. City of Minot*, 721 N.W.2d 398,405 (N.D. 2006) (emphasis added). The Court noted that by amending the statute, the Legislature meant to broaden the language "to cover all recreational activities" and not just those listed. *Id*. This history shows, however, that the nature of education activities included were those involved (much like Maryland's statute) in educational outings of a recreational type. In other words, a recreational purpose includes *recreational* education. Clearly the rehearsal of a performance for participation in classroom assignment in history class (even though lacking real educational value) is not the type of activity meant or needed to be encouraged through creation of legal immunity.

[¶34] In the *Leet* decision, this court noted that while the auditorium involved may have been designed for a recreational use, the use being made of it by the

plaintiff was one of employment and therefore the use was for employment purposes, not recreational purposes. *Leet*, 721 N.W.2d at 406. To put it another way, the injured person was working. This conclusion comports with the plain meaning of recreation. "Recreation" is something one does as a kind of antidote to the rigors and challenges of work and education. Recreation is meant, as the dictionary suggests, to restore or refresh oneself, to create oneself anew. Similarly, in this case, the boys were in the auditorium to perfect their planned stunt by rehearsing it. While not being paid to be there by an employer, as students, their "work" included the "homework' of preparation for the class activity. While the educational value of this particular assignment was elusive, even if there had been a "60s" connection, they received no instruction as part of this rehearsal. This was no recreational education.

[¶35] The trial court's decision seems to be that any activity connected with school may be characterized as "education" and is therefore immune under this statute as "recreation". This approach would mean that even actual educational activity, such as sitting at a desk taking an exam, would be "recreation". While plaintiffs' counsel admits to being a long way off from formal education, vivid memories of test taking suggests that is hardly an experience anyone would consider to be "recreation". If the legislature had really meant such a sweeping imposition of immunity for schools, surely it would have done so more plainly and directly. Although it seems doubtful that any legislature would adopt such a purpose, surely it would not seek to do so by acting so opaquely in the guise of a statute protecting "recreational" uses of land. The trial court's dismissal of Fargo Public Schools was erroneous and should be overturned.

[¶36] C. The Trial Court's Application Of Recreational Use Immunity Violated M.M.'s Equal Protection Rights

[¶37] The federal constitutional right to equal protection is provided in Amend. XIV, § 1, U.S. Const., which states, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." North Dakota's state guarantee of equal protection is found in Article I, §§ 21 and 22, N.D. Const.:

> Section 21. No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.
>
> Section 22. All laws of a general nature shall have a uniform operation.

[¶38] The equal protection clauses above do not entirely prohibit legislative classifications or require identical treatment of different groups of people. *State v. Leppert,* 656 N.W.2d 718 (N.D. 2003). Rather, equal protection prohibits the government from treating individuals differently who are alike in all relevant aspects. *Hamich, Inc. v. State ex rel. Clayburgh,* 564 N.W.2d 640, 647 (N.D. 1997). If the legislature does classify a group of individuals, the classification is subject to one of three different levels of judicial scrutiny depending on the right infringed by the challenged classification:

> We apply strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose. When an important substantive right is involved, we apply an intermediate standard of review which requires a close correspondence between statutory classification and legislative goals. When no suspect class, fundamental right, or important substantive right is involved, we apply a

> rational basis standard and sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose.

Leppert at 722 (citing *Gange v. Clerk of Burleigh County Dist. Court,* 429 N.W.2d 429, 433 (N.D.1988)).

[¶39] This court has previously determined that the right to recover for personal injuries is an important substantive right to which intermediate scrutiny applies. *Hanson v. Williams County*, 389 N.W.2d 319, 325 (N.D. 1986). ("We are unwilling to view human life and safety as simply a matter of economics…[T]he right to recover for personal injuries is an important substantive right."). Fargo School District has the burden to justify such an application as closely advancing the legislative purpose for the challenged law under such an intermediate scrutiny standard is on the government. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1, at 645-46 (2002) (discussing the levels of scrutiny and their respective burdens of proof); *United States v. Virginia,* 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (explaining that under immediate scrutiny, "the burden of justification ... rests entirely on the state").

[¶40] In this case, the trial court violated M.M.'s right to equal protection by applying N.D.C.C. §§ 53-08-01 thru 06. (recreational use immunity) in a way that arbitrarily distinguished between the right to tort recovery for two otherwise alike groups of students; namely students injured because of teacher negligence *while on school property* and students injured because of teacher negligence *while away from school property*. *Hamich,* 564 N.W.2d at 647. Because the government cannot establish a close correspondence between this special classification and the legislative

goals behind the recreational use immunity statute, the trial court's application of recreational use immunity must be reversed. *Leppert,* 656 N.W.2d at 722; *Hanson,* 389 N.W.2d at 325; CHEMERINSKY at 645-46.

[¶41] The arbitrary and unfair nature of the trial court's classification in applying this statute is easily illustrated by an example of another way the classification would work. Consider two students and their respective rights to recovery for an injury resulting from teacher negligence. The first student is injured when hit by a school bus driven negligently by a school employee while the student is waiting on the curb in front of her house. There is little doubt that the student could recover for injuries from the school district under either a statutory or common law claim. N.D.C.C. § 32-12.1-03(1); *Besette,* 310 N.W.2d at 763. Next, consider a second child who is hit and injured by a school bus driven in the same manner by the same employee while the student is waiting for the bus in the school's parking lot. Under the trial court's classification the second student would be deprived of any chance for recovery.

[¶42] This Court has previously held that North Dakota's recreational use immunity statute is intended to "encourage landowners to make available to the public, land and water areas and other property for recreational purposes by limiting their liability toward users." *Olson v. Bismarck Parks and Recreation District*, 642 N.W.2d 864, 867; citing 1965 N.D. Sess. Laws ch. 337. This legislative intent has no apparent bearing on the trial court's application of recreational use immunity. The classification advanced by the trial court, separating the tort recovery rights of students injured at school from students injured away from school (each as a result of

teacher negligence), does not encourage opening lands for public recreational use through the limitation of liability.

[¶43] The trial court violated M.M.'s right to equal protection by applying recreational use immunity in a way that arbitrarily distinguished between the right to tort recovery for two otherwise alike groups of students; those injured because of teacher negligence while on school property and those students injured because of teacher negligence while away from school property. Because the government cannot establish a close correspondence between this special classification and the legislative goals behind the recreational use immunity statute, the trial court's application of recreational use immunity must be reversed.

II.

[¶44] THE TRIAL COURT ERRED IN GRANTING "PARTIAL SUMMARY JUDGMENT" BY DIVIDING A SINGLE CLAIM AGAINST DEFENDANT HART AND "DISMISSING" PART OF THAT CLAIM AND THEN EXCLUDING SUBSTANTIAL RELEVANT EVIDENCE

[¶45] As an employee of a political subdivision, defendant Hart may not be sued for simple negligence and claims of such negligence may only be brought against the employer, Fargo Public Schools, which is obligated to indemnify her negligence. N.D. Cent. Code § 32-12.1-04 (1) and (4). Hart is, however, personally liable for acts or omissions that "constitute reckless or grossly negligent conduct, or willful or wanton misconduct." *Id.* at (3). The plaintiffs' complaint alleged a single theory of liability by defendant Hart based upon her actions leading to the rehearsal injury. The complaint merely alleged that Hart, acting in the scope of her employment as a teacher, was personally liable under the statute for actions

suggesting that the bicycle stunt could be performed as part of a class project and that her unspecified acts and omissions subjected M.M. to a grossly unreasonable risk of danger leading to his injury during his attempted rehearsal.

[¶46] Hart moved for summary judgment, arguing that there was insufficient evidence to meet the statutory requirement of clear and convincing evidence of reckless or gross negligence or willful or wanton misconduct on her part. The court found the evidence of Hart 's knowledge of the rehearsal and failure to stop it to be sufficient to suggest a fact issue even under the heightened proof requirement of clear and convincing evidence. The court chose, however, to segment the evidence surrounding the planned *performance* (distinguishing this from a *rehearsal* for the performance) and analyzed it as a separate claim, ruling as a matter of law that the underlying evidence in dispute was of insufficient weight to be tried.

[¶47] The trial court, on its own initiative, chose to treat the claim as if it were two distinct claims and dismissed part of the claim in the guise of dismissing one of two. Ordinarily the plaintiff is entitled to present their own theory of the case as long as the law and evidence support it. *See Johanson v. Nash Finch Co*, 216 N.W.2d 271 (N.D. 1974) (discussing the right to a jury instruction conveying the theory). Moreover, pleadings are to be construed to do substantial justice so that any variation of the complaint and factual proof is ordinarily allowed. *Wachter Development L.L.C. v. Gomke*, 544 N.W.2d 127, 131 (N.D. 1996). *See also* N.D.R. Civ. P. 8(f). The court's artificial construction of the gross negligence claim as two different claims deprived the plaintiffs from presenting their theory of liability and misconstrued the pleadings.

[¶48] Based on its partial summary dismissal, the court did not allow much relevant evidence surrounding the origin of the idea to perform the stunt. Evidence excluded included the various conversations and actions by the teacher that gave the boys the notion to rehearse for a performance they believed would be allowed the next day[2]. Since a "rehearsal" is a practice in preparation for a performance, the segmentation of the claim was highly artificial. The excluded evidence had a direct bearing on the remaining issue that the court allowed the jury to consider under a "clear and convincing" evidence standard: whether the teacher really did know of the rehearsal plan and failed to stop it, as three witnesses testified she expressly admitted to. The trial court's determination that "part" of the claim be dismissed without a trial, and the resulting restriction of proof, was an error of law. The evidentiary rulings that followed from this erroneous legal ruling are therefore errors of law as well.

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[2] Examples of evidence excluded as a consequence of the court's partial summary judgment ruling: fellow house teacher Kolesar not allowed to testify using the helmetless stunt video as an example of 60's day skits not appropriate (Tr. 152); student Hajicek not allowed to testify Hart gave prior approval to his performance of the identical stunt (Tr. 171); student Hajicek not allowed to testify that he rehearsed the same stunt in the auditorium on the day of his performance (Tr. 197); student J.B. not allowed to testify to his prior conversation with Hart about doing the stunt or how close the discussion was to the event, or to contradict Hart's claim she said the stunt was "not a good idea", or that M.M. was involved in at least one of J.B.'s conversations with Hart (Tr. 218, 220, 221); J.B. could not testify that the video was shown in the history class by Ms. Hart as an example of what could be done as part of 60s day nor could he explain why he believed he would be allowed to perform the stunt (Tr. 222, 228, 280); Ms. Hart not allowed to testify about her discussions with M.M. before the day of the rehearsal and could not be questioned on her knowledge that this stunt performed without a helmet was dangerous (Tr. 650, 653) and teacher Nelson not allowed to testify about her perception of the danger of the stunt while she videotaped it. (Tr. 724)

[¶49] Summary judgment is a procedural device to eliminate claims for which there is no factual dispute and for which a party is entitled to judgment as a matter of law or if resolution of the facts would not alter the result in the case. *Schneider v. Schaaf*, 603 N.W.2d 689 (N.D. 1999). Summary judgment is considered rarely appropriate in a negligence action. *Arneson v. City of Fargo*, 303 N.W.2d 515, appeal after remand 331 N.W.2d 30 (N.D. 1981). Actions, including issues of negligence and state of mind, are not usually suited for summary disposition. *Pioneer Credit Co. v. Medalen,* 326 N.W.2d 717 (N.D. 1982). The decision to grant partial summary judgment is a question of law to be reviewed de novo based upon the entire record and granting the party opposed all favorable inferences of fact. *Barbie v. Minko Const., Inc*., 766 N.W.2d 458, 460-461 (N.D. 2009)

[¶50] The essence of this claim of *gross* negligence was not simply that a teacher knew that a student would do this particular dangerous thing and failed to stop it. In and of itself, although still shocking, such a claim is at least arguably a kind of ordinary negligence. The unique factors of this case, which transform this negligence to a kind that is much more egregious, include that it was the teacher, in a position of influence and authority over 15 year old boys who by their nature may be prone to welcome an adult sanctioned act of risk taking, who was directly responsible for the origin of this ill-fated plan, including that it could occur without administrative or parent consent.

[¶51] A central issue for the jury, which the trial court found powerful enough to rule posed a genuine issue even under the “clear and convincing” proof standard, was whether the defendant did indeed admit, not once but three times, to specific

knowledge of the rehearsal and that she had been in a position to stop it but failed to do so. This was the critical fact issue for the jury to evaluate and resolve. Yet the court, by granting a "partial summary judgment' and keeping out evidence of all of the teacher's actions leading to the boys plan to perform, for which they were rehearsing, created an inherently restricted and incomplete consideration of that issue. This prevented a fair trial of the matter.

[¶52] Consider the scenario from the perspective of an ordinary juror who was allowed to hear only a part of the story due to the court's ruling. How likely is it for an ordinary juror to believe that a popular and experienced teacher, who testified to a personal devotion to bicycle safety as an avid cyclist who "always" wears her helmet, and who denied knowledge or permission of the stunt, would ever have ignored such an obvious danger for a daredevil stunt of no educational merit? Most people who try to exercise ordinary care themselves, could not help but be skeptical of the alleged "confessions" testified to by the Moore parents and Mrs. Boening. One would hope that most would see such a lack of care as being outside the typical realm of mature human behavior and would therefore be reluctant to conclude a teacher would act so cavalierly.

[¶53] The same ordinary juror would likely think very differently about that question, however, upon learning all of the facts comprising the "partial summary judgment" ruling and which were largely kept out of evidence. The evidence included that Hart had approved this activity before sans helmet, administrative approval, and parent consent. This kind of evidence bears directly on the credibility of Hart's denials at trial.

[¶54] Hart's denials would also be evaluated differently if the jury knew that, after claiming to be "mortified" by watching the prior student do the stunt without a helmet and breaking his bike, she then gave that student a personal copy of the stunt video and also replayed the video for successive classes when giving examples of 60's day activities. By excluding such evidence, the jury was given the false impression that the boys apparently devised the stunt plan themselves and "snuck" into the auditorium to rehearse a stunt that they had no reasonable basis to expect to perform the next day. The evidence conveys an entirely different impression had the jury been allowed to hear evidence that the teacher had shown the video and had conversations with the boys in which she failed each time to say no when the boys proposed to repeat the stunt. This evidence goes directly to the question of the likely degree to which the teacher was aware of the planned rehearsal.

[¶55] This excluded evidence is probative for a jury asked to decide whether, consistent with her post accident admissions, this teacher did indeed discuss the rehearsal with M.M. within minutes of the fateful accident and then chose to walk away and not stop it. It was highly artificial to isolate facts surrounding the planned performance from facts dealing only with the rehearsal.

[¶56] The trial court erred by ruling "as a matter of law" that the evidence of the teacher's role in bringing about this rehearsal was not for the jury. The "partial summary judgment" should be reversed and the claim retried on remand with the negligence claim involving the school.

III.

[¶57] THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY OF THE DUTY OF CARE TOWARD CHILDREN, AND BY REQUIRING THE JURY FIND BOTH WILLFUL AND WANTON MISCONDUCT CONTRARY TO THE STATUTE

[¶58] A. The Instruction Requiring Both Willful and Wanton Misconduct

The plain language of the statute creating personal liability of the teacher requires proof of liability by proof of *either* "reckless or grossly negligent conduct, or willful or wanton misconduct". N.D. Cent. Code § 32-12.1-04 (3). This requirement is stated with the use of the disjunctive word "or" and the same term is repeated later in the paragraph when the statute provides the claim must be proven by clear and convincing evidence of actions within the scope of employment that are "in a reckless, grossly negligent, willful, or wanton manner". Id.

[¶59] Although plaintiffs' requested separate definitions of each of these four liability standards in accordance with the statute, the court combined "willful and wanton" in a single instruction that required the jury find "knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; an ability to avoid the resulting harm by ordinary care and diligence in the means at hand; and the omission of such care and diligence to avert threatened danger when to an ordinary person it must be apparent that the result **would likely prove disastrous** to another". (Emphasis added.) (A.A. 53-54) The court failed to give a separate instruction for willful misconduct from the standard jury instructions that would have defined willful misconduct as "intentionally failing to do that which should be done, knowing that injury to a person will probably result or recklessly disregarding the possibility that injury to a person may result". (A.A. 55)

[¶60] Plaintiff was entitled to have the jury instructed according to their theory of the case so long as the evidence and law warranted it. *Johanson v. Nash Finch Co*, 216 N.W.2d 271 (N.D. 1974). It is evident from the two instructions that the degree of likelihood of injury and the extent or magnitude of injury described are substantially different and that a jury could very well have been satisfied that there was proof under the "willful misconduct" definition of the standard instruction in contrast to finding that a "disastrous" consequence was "likely".

[¶61] B. Failure to Instruct on The Duty of Care to Children

[¶62] Plaintiffs also requested that the jury be instructed that a duty of care to a child is higher than the duty of care to an adult as provided by this court's decision in *Besette v. Enderlin School Dist. No. 22*, 310 N.W.2d 759 (N.D. 1981), in which the court approved an instruction providing:

> The duty of care owed a child is greater than that owed an adult against unreasonable risk of injury. The standard of care used in dealing with adults, however, is not considered adequate for those entrusted with the care of children. The degree of due care increases with the immaturity of the child.

310 N.W.2d at 763. (See A.A. 56-57)

[¶63] As with the requested instructions on the standard of liability, this instruction on the heightened duty of those who are entrusted with children was an important part of the plaintiffs' theory of the case and should have been given. Since the jury is called upon, by the heightened standard of proof, to only find liability of the teacher if there is a greater degree of fault than ordinary negligence, the jury's understanding of the duty of care is critical. The fact that the jury may have found a heightened duty appropriate, makes the likelihood of a finding of liability

significantly greater. This error was therefore inherently prejudicial and should be corrected on remand.

CONCLUSION

[¶64] The trial court erred in dismissing Fargo Public Schools under a premises liability statute designed only to end liability as a landowner for conditions of land used for recreational purposes. Plaintiffs claims, based upon the duty of the school and teacher to provide for student safety independent of any landowner obligations, should be reinstated for trial. If the court concludes that the recreational use statute was correctly interpreted to apply in such a manner as to end all liability for any injury that occurs on school property, then it is unconstitutionally applied and creates an impermissibly unequal class of students in school custody and control who are only protected by a duty of care when injury occurs off school property.

[¶65] The court also erred by granting a "partial summary judgment" to defendant Hart and excluding evidence of her role in previously approving a similar stunt and creating a motivation to practice an unsafe stunt and by erroneously instructing the jury about the teacher's duty of care and the alternative bases for finding liability.

[¶66] Plaintiffs' respectfully request the court to reverse the summary judgment orders and the judgment of dismissal based upon the jury trial and remand the case for a new trial against both defendants and without erroneous restriction of evidence or jury instructions.

Respectfully submitted,

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ADDENDUM

West's North Dakota Century Code Annotated Currentness
Title 32. Judicial Remedies
Chapter 32-12.1. Governmental Liability
§ 32-12.1-03. Liability of political subdivisions--Limitations

1. Each political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or office under circumstances where the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition or use of tangible property, real or personal, under circumstances where the political subdivision, if a private person, would be liable to the claimant. The enactment of a law, rule, regulation, or ordinance to protect any person's health, safety, property, or welfare does not create a duty of care on the part of the political subdivision, its employees, or its agents, if that duty would not otherwise exist.

2. The liability of political subdivisions under this chapter is limited to a total of two hundred fifty thousand dollars per person and five hundred thousand dollars for injury to three or more persons during any single occurrence regardless of the number of political subdivisions, or employees of such political subdivisions, which are involved in that occurrence. A political subdivision may not be held liable, or be ordered to indemnify an employee held liable, for punitive or exemplary damages.

3. A political subdivision or a political subdivision employee may not be held liable under this chapter for any of the following claims:

a. A claim based upon an act or omission of a political subdivision employee exercising due care in the execution of a valid or invalid statute or regulation.

b. The decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, charter, ordinance, order, regulation, resolution, or resolve.

c. The decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including the decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.

d. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.

e. Injury directly or indirectly caused by a person who is not employed by the political subdivision.

f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:

(1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.

(2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.

(3) Providing or failing to provide law enforcement services in the ordinary course of a political subdivision's law enforcement operations.

(4) Providing or failing to provide fire protection services in the ordinary course of a political subdivision's fire protection operations.

g. “Public duty” does not include action of the political subdivision or a political subdivision employee under circumstances in which a special relationship can be established between the political subdivision and the injured party. A special relationship is demonstrated if all of the following elements exist:

(1) Direct contact between the political subdivision and the injured party.

(2) An assumption by the political subdivision, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.

(3) Knowledge on the part of the political subdivision that inaction of the political subdivision could lead to harm.

(4) The injured party's justifiable reliance on the political subdivision's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the political subdivision, or the political subdivision action increases the risk of harm.

4. This chapter does not obligate political subdivisions for an amount that is more than the limitations upon liability imposed by this chapter. Subject to this chapter, any payments to persons constitute payment in full of any compromised claim or judgment or any final judgment under this chapter.

5. Notwithstanding this chapter, a political subdivision or its insurance carrier is not liable for any claim arising out of the conduct of a ridesharing arrangement, as defined in section 8-02-07.

6. A political subdivision is not liable for any claim based on an act or omission in the designation, repair, operation, or maintenance of a minimum maintenance road if that designation has been made in accordance with sections 24-07-35 through 24-07-37 and if the road has been maintained at a level to serve occasional and intermittent traffic.

CREDIT(S)

S.L. 1977, ch. 303, § 3; S.L. 1981, ch. 131, § 5; S.L. 1987, ch. 261, § 2; S.L. 1987, ch. 320, § 4; S.L. 1987, ch. 406, § 1; S.L. 1995, ch. 329, § 8; S.L. 1999, ch. 303, § 3; S.L. 2005, ch. 299, § 2.

Current through the 2008 general election

West's North Dakota Century Code Annotated Currentness
Title 32. Judicial Remedies
Chapter 32-12.1. Governmental Liability
§ 32-12.1-04. Political subdivision to be named in action--Personal liability of employees--Indemnification of claims and final judgments

1. An action for injuries proximately caused by the alleged negligence, wrongful act, or omission of an employee of a political subdivision occurring within the scope of the employee's employment or office shall be brought against the political subdivision. If there is any question concerning whether the alleged negligence, wrongful act, or omission occurred within the scope of employment or office of the employee, the employee may be named as a party to the action and the issue may be tried separately. A political subdivision must defend the employee until the court determines the employee was acting outside the scope of the employee's employment or office.

2. An employee shall not be personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of the employee's employment or office.

3. No employee may 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 unless the acts or omissions constitute reckless or grossly negligent conduct, or willful or wanton misconduct. An employee may be personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment or office. The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was either acting outside the scope of the employee's employment or office or the employee was acting within the scope of employment in a reckless, grossly negligent, willful, or wanton manner. Employees may be liable for punitive or exemplary damages. The extent to which an employee may be personally liable pursuant to this section and whether the employee was acting within the scope of employment or office shall be specifically stated in a final judgment.

4. A political subdivision shall indemnify and save harmless an employee for any claim, whether groundless or not, and final judgment for any act or omission occurring within the scope of employment or office of the employee. The indemnification shall be made in the manner provided by this chapter and shall be subject to the limitations herein.

CREDIT(S)

S.L. 1977, ch. 303, § 4; S.L. 1981, ch. 351, § 1; S.L. 1987, ch. 406, § 2.

Current through the 2008 general election

West's North Dakota Century Code Annotated Currentness
Title 53. Sports and Amusements
Chapter 53-08. Liability Limited for Owner of Recreation Lands
§ 53-08-01. Definitions

In this chapter, unless the context or subject matter otherwise requires:

1. “Charge” means the amount of money asked in return for an invitation to enter or go upon the land.

2. “Land” includes all public and private land, roads, water, watercourses, and ways and buildings, structures, and machinery or equipment thereon.

3. “Owner” includes tenant, lessee, occupant, or person in control of the premises.

4. “Recreational purposes” includes any activity engaged in for the purpose of exercise, relaxation, pleasure, or education.

CREDIT(S)

S.L. 1965, ch. 337, § 1; S.L. 1995, ch. 162, § 7.

Current through the 2008 general election

West's North Dakota Century Code Annotated Currentness
Title 53. Sports and Amusements
Chapter 53-08. Liability Limited for Owner of Recreation Lands
§ 53-08-02. Duty of care of landowner

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

CREDIT(S)

S.L. 1965, ch. 337, § 2.

Current through the 2008 general election

West's North Dakota Century Code Annotated Currentness
Title 53. Sports and Amusements
Chapter 53-08. Liability Limited for Owner of Recreation Lands
§ 53-08-06. Duty of care or liability for injury

Nothing in this chapter may be construed as creating a duty of care or grounds of liability for injury to person or property. Nothing herein limits in any way the obligation of a person entering upon or using the land of another for recreational purposes to exercise due care in that person's use of such land and in that person's activities thereon.

CREDIT(S)

S.L. 1965, ch. 337, § 6.

Current through the 2008 general election