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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

NO. 20090121

M.M. and Thomas Moore,

Appellants,

vs.

Fargo Public School District #1 and Eugenia Hart,

Appellees.

Appeal from District Court, Cass County, North Dakota
East Central Judicial District
Honorable Steven E. McCullough

BRIEF OF APPELLEE EUGENIA HART

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2. Whether the District Court properly excluded evidence during the trial.
3. Whether the District Court properly instructed the jury on the definition of willful or wanton misconduct.
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5. Whether the Appellant's properly raised the Constitutionality of N.D.C.C. Ch. 53-08 at the District Court level.
6. Whether the District Court properly granted Summary Judgment to the defendant Fargo Public School District based upon recreational immunity.

STATEMENT OF CASE

[¶ 1] M.M. and his father, Thomas Moore, served a complaint upon the defendants Fargo Public School District and Eugenia Hart for personal injuries M.M. suffered on May 6, 2004 in attempting a bicycle jump in the Discovery Middle School. (A.A. p. 12). The defendants both submitted an answer to the plaintiff's complaint. (A.A. p. 16, 20). Both defendants moved for Summary Judgment. A Summary Judgment hearing was held on November 21, 2008. At that hearing the Court issued its oral order granting Summary Judgment to the School District based upon recreational immunity. (Tr. p. 61-62). In addition, the Court issued its oral order granting partial Summary Judgment to defendant Eugenia Hart on the portion of the plaintiffs complaint in which they allege she suggested to M.M. and J.B. they could do the bicycle stunt on May 7, 2004. (Tr. p. 60-61). The Court denied defendant Eugenia Hart's Summary Judgment motion on the issue of whether she had knowledge of the boys intended practice of the bicycle stunt which took place on May 6, 2004. (Tr. p. 58-60).

[¶ 2] A six person Cass County jury was empaneled on December 9, 2008. The jury listened to four days of testimony. On December 15, 2008, the jury rendered its verdict and only answered the following question on the verdict form: Was any act or omission of defendant Eugenia Hart either grossly negligent, reckless, or willful or wanton misconduct? The jury answered no. (Hart App. p. 1-3). (Tr. p. 834-835).

[¶ 3] On January 27, 2009, the District Court issued its Memorandum Opinion and Order granting, in part, Summary Judgment. This Memorandum placed into

writing the Court's oral orders from November 21, 2008. (A.A. p. 25). Order for Judgment was entered on February 3, 2009 dismissing plaintiffs claim and causes of action in its entirety with prejudice and without costs to any party. (A.A. p. 23-24). Notice of Entry of Judgment was sent on February 9, 2009. (Hart App. p. 4). Notice of Appeal was filed timely April 8, 2009. (A.A. p. 58).

STATEMENT OF FACTS

[¶ 4] For the 2003-04 school year, M.M. was a 9th grade student at Discovery Middle School. He was in house 9-3. His US History teacher was Eugenia Hart. (Tr. p. 577, 587). M.M. was a very good student and was involved in various extra-curricular activities including band and hockey. He was friends with J.B.. He was an avid biker and owned a mountain bike. (Tr. p. 533-535, 731).

[¶ 5] For the 2003-04 school year, J.B. was a 9th grade student at Discovery Middle School. He was also in house 9-3 and his US History teacher was Eugenia Hart. He was friends with M.M. and also had a friend by the name of D.H., who was two years older. (Tr. p. 213-214, 249, 587).

[¶ 6] Eugenia Hart was employed by the Fargo Public School District as a teacher at the Discovery Middle School for the 2003-04 school year.[1] Ms. Hart had been employed by the Fargo School District from 1970-1972. She took off a period of time to raise her children and was re-employed by the School District in 1984. She was a teacher in house 9-3. She retired from the Fargo Public School District at the end of the 2003-04 school term. Ms. Hart was an avid biker and had been on

[1]The proper spelling of the shortened version of Ms. Hart's first name is "Geni".

many bike trips throughout the United States and Europe. She always wore a helmet and encouraged everyone who rode a bicycle to wear a helmet. (Tr. p. 575, 579, 653, 712).

[¶ 7] As part of the curriculum for US History during the 2003-04 school year, Ms. Hart's classes studied the decade of the 1960's. To enhance their learning, Ms. Hart coordinated what became known as "60's Day". In "60's Day", all students in house 9-3 would participate in some manner by either doing a skit, performance, or some other type of activity which related to the 1960's. (Tr. p. 582-584). Students were not required to participate in skits and the participation in the skit was only 10 points which would not affect a students grade. (Tr. p. 585). In the event students wanted to sign up for 60's Day, a sign-up sheet was available. Students would need to contact Ms. Hart and get their name on an agenda. (Tr. p. 586-587). The day known as "60's Day" had been done for approximately 6 years prior to the 2003-04 school year. (Tr. p. 583). It was scheduled for May 7, 2004. (Tr. p. 585).

[¶ 8] D.H. was a student at the Discovery Middle School and at the time of M.M.'s accident was a Junior at Fargo South High School. D.H. had participated in 60's Day when he was a 9th grader at Discovery Middle School. Ms. Hart was his US History teacher. (Tr. p. 170). D.H. participated in 60's Day during the 2001-02 school year by performing stunts on his bike on the auditorium stage. (Tr. p. 171). At the end of his performance, D.H. drove his bike off of the stage in a "jump" and landed on the auditorium floor. (Tr. p. 198). As a result of jumping off the stage, D.H. broke the crank on his bike. (Tr. p. 199). Ms. Hart, who was in the auditorium at the time, described her reaction to D.H.'s stunt as being "mortified". (Tr. p. 652,

653). This performance by D.H. was filmed as were all performances during 60's Day of that year. The film was downloaded onto a Mac computer which was in house 9-3. In addition, D.H. received a copy of his stunt which he showed on several occasions to J.B.. (Tr. p. 199-200, 215, 250, 251).

[¶ 9] For the 2003-04 school year, M.M. and J.B. were in house 9-3, the house that did 60's Day. (Tr. p. 249-250). Because of this, it occurred to J.B. that he would be able to do the same bike stunt D.H. had done two years before. (Tr. p. 216). In fact, the first place J.B. actually saw the video of the bike stunt and talked about it was at D.H.'s house. These events took place before he ever saw the video in school. (Tr. p. 250). He did see the video in school as well. (Tr. p. 230).

[¶ 10] Before 60's Day, J.B. came up with an idea of doing a bike stunt similar to the one D.H. did several years before. He thought it would be neat if two people did the stunt of riding their bikes off the stage. After talking to D.H. and watching the video of D.H.'s performance, J.B. decided he would approach M.M. and see if M.M. had an interest in performing the stunt with him for 60's Day. (Tr. p. 214-215, 217).

[¶ 11] On May 6, 2004, the day before 60's Day, J.B. and M.M. decide they want to practice the stunt in the auditorium after school. That morning, J.B. had brought his road bike to school which was the wrong bike for the practice. After school he rode home and got his mountain bike which was better for jumping. (Tr. p. 232-233). M.M.'s bike was brought to the school by his father when he dropped him off at school that morning. (Tr. p. 476). J.B. testified the only person who knew about the practice was M.M. and he never told Ms. Hart they were going to practice.

(Tr. p. 230). The stage in the auditorium was set with chairs for a band concert which was to begin at approximately 7:00 that evening. (Tr. p. 265-267). J.B. and M.M. did not seek permission nor receive permission from Ms. Hart to enter the auditorium or to practice the stunt. (Tr. p. 271, 629). In fact, J.B. testified it was his intention to talk to Ms. Hart after the practice which took place on May 6, 2004, and get her permission to perform, and then they were going to get on the schedule and be allowed to jump off the stage in front of a bunch of people. (Tr. p. 272-273).

[¶ 12] M.M. does not recall any details about the videotaping of D.H.'s stunt, the planning of the practice, or talking to Ms. Hart. (Tr. p. 538-539). Therefore, the only individual who can testify as to the planning of the practice would be J.B..

[¶ 13] The outside auditorium doors to the Discovery Middle School were locked and there is no entrance from the outside. In addition, the auditorium doors at the entrance of the auditorium are also locked. (Tr. p. 669, 673).

[¶ 14] At approximately 3:30 in the afternoon on May 6, 2004, Ms. Hart and another student went into the lighting room outside of the auditorium to make arrangements for the 60's Day presentation. (Tr. p. 627-628). As Ms. Hart was leaving the lighting room, she encountered M.M.. M.M. apparently informed Ms. Hart they were thinking about performing a bike stunt similar to D.H.'s for 60's Day. Ms. Hart indicated to M.M. she did not think that was a good idea. (Tr. p. 628-629). There was no discussion between M.M. and Ms. Hart about practicing the stunt which M.M. and J.B. had already planned for that afternoon. (Tr. p. 629). Ms. Hart then left the area and proceeded to other activities outside the school. (Tr. p. 630).

[¶ 15] The only doors which were open to the Discovery Middle School at

approximately 3:30 on May 6, 2004 were the doors in the entrance to the school. All other doors were locked. (Tr. p. 669). J.B. testified he knew if he and M.M. brought their bikes through the main entrance they would be told no and they would not be permitted into the auditorium to practice the stunt. Their goal was to get their bikes to the auditorium without being seen. (Tr. p. 239). J.B. testified that his goal was to "evade" detection by school authorities who might question the fact that they had their bikes in school. (Tr. p. 236, 258-261). He knew there was a rule not allowing bikes in school. (Tr. p. 239).

[¶ 16] In an effort to avoid detection, J.B. and M.M. entered the auditorium with their bikes with the plan to practice the stunt inside of the auditorium on the afternoon of May 6, 2004. J.B. testified he and M.M. had obtained access to the auditorium. (Tr. p. 238-239). Thereafter, J.B. and M.M. brought their bikes into the auditorium to practice the stunt. They moved chairs around which were on the stage for the band concert. (Tr. p. 241). Without any permission from any school official, including Ms. Hart, the boys practiced the stunt of riding their bikes off the stage and landing on the concrete floor. (Tr. p. 254, 274). J.B. practiced his stunt first and made it successfully. Thereafter, M.M. attempted the stunt and according to J.B., did not have enough speed, flipped off the stage and landed on his head causing serious injuries. (Tr. p. 242).

[¶ 17] Thereafter, J.B. ran to get help from administrators and M.M. was subsequently transported to Innovis Medical Center to treat his head injuries. (Tr. p. 244-245). After the accident, J.B. stopped by the home of D.H.. J.B. appeared to be shaken and stressed. J.B. told D.H. that M.M. had been hurt and they had

snuck in. (Tr. p. 206-207).

[¶ 18] After leaving school on May 6, Ms. Hart rode her bike to Lunde's to pick up her vehicle. (Tr. p. 630-631). While at Lunde's she was notified of the accident. She immediately left and went to Innovis where she met M.M.'s parents in the emergency room. (Tr. p. 631-632). She did not recall making any statements to the Moore's and denied making any statements that she knew what the boys were up to and that she was responsible for M.M.'s injuries. (Tr. p. 232-234). After the accident, she returned to the auditorium and collected M.M.'s bike and delivered it to the Moore's home. (Tr. p. 634-635).

[¶ 19] 60's Day went on as scheduled on May 7. (Tr. p. 636). Ms. Hart did not recall having any conversations with Adair Boening as was testified to by Ms. Boening. (Tr. p. 636).

[¶ 20] There is no evidence Ms. Hart encouraged M.M. or J.B. to do the stunt. At no time did Ms. Hart know the boys were going to practice the stunt on May 6, 2004. At no time did Ms. Hart suggest to the boys, either M.M. or J.B., they could perform for a required classroom skit by imitating the daredevil actions of Evel Knievel through the use of a bicycle to perform a stunt in which they would jump off the auditorium stage. (A.A. p. 48).

[¶ 21] In addition, as the boys only came up with the idea of practicing on May 6, they did not ask permission of Ms. Hart to do the practice. (Tr. p. 234, 271, 629). Since Ms. Hart did not know the boys were going to practice the stunt on May 6 or perform the bike stunt on May 7, she could not have suggested to the boys to obtain parental consent. (Tr. p. 234).

[¶ 22] J.B. testified he did not inform his parents of the stunt or the practice due to the fact that he knew they would not allow it. (Tr. p. 253, 254).

[¶ 23] Several days after the failed practice session which lead to M.M.'s injuries, J.B. was interviewed by administrators at the Discovery Middle School. At that time, J.B. admitted they had snuck into the auditorium and had not informed Ms. Hart of the practice or the fact they were going to do the stunt. J.B. also told Discovery administrators he knew they would be denied permission if they had sought permission. (Tr. p. 684-686).

LAW AND ARGUMENT

1. The District Court correctly granted partial summary judgment to Ms. Hart.

A. Introduction

[¶ 24] The Moore's have raised several issues relating to the District Court's order granting partial summary judgment to Ms. Hart. After briefing and arguing the issue before the District Court, the Court issued its oral ruling granting partial summary judgment to Ms. Hart approximately 17 days before the trial. At trial, the jury found Ms. Hart's actions or omissions on May 6, 2004 were neither grossly negligent, reckless, or willful or wanton misconduct. On January 27, 2009, the District Court issued its Memorandum granting partial summary judgment to Hart. (A.A. p. 25). Judgment of Dismissal was entered on February 3, 2009. (A.A. p. 23).

[¶ 25] The Moore's argued the District Court erred in granting partial summary judgment to defendant Hart. While not addressing this issue head on, the Moore's have argued the District Court erred in dividing their claim into two distinct claims.

They argue the District Court compounded this error by excluding evidence at trial as to the issues covered by the partial summary judgment ruling. By granting summary judgment and excluding evidence of a prior incident and other evidence, Moore's argue the jury was denied an opportunity to consider evidence concerning Ms. Hart's alleged involvement in the planning and encouragement of the stunt. In addition, notwithstanding a total lack of relevant evidence and a higher burden of proof, Moore's wanted the opportunity to present evidence of Hart's prior involvement in a similar bike stunt in 2002 and to tie this into the 2004 incident involving M.M.

[¶ 26] Upon review of the record and the summary judgment proceedings plus the heightened standard of summary judgment, this Court will conclude the District Court properly granted Partial Summary Judgment to Ms. Hart, properly excluded evidence and allowed the Moore's to proceed to trial on an issue that was not properly plead but upon which they could produce relevant evidence. In the final analysis, this Court will conclude the Moore's did get their day in Court, the District Court made proper rulings and the jury, when presented with two different versions of the evidence simply decided to believe Ms. Hart.

B. Motion for Summary Judgment- Standard of Review.

[¶ 27] Ms. Hart brought a Motion for Summary Judgment in this matter. Summary Judgment is a procedural device for the prompt and expeditious disposal of an action without a trial if a party is entitled to judgment as a matter of law, and no dispute exists as to the material facts or the reasonable inferences to be drawn from the undisputed facts, or if resolving disputed facts will not change the result.

Groleau vs. Bjornson Oil Company, 2004 ND 55, ¶ 5, 676 N.W. 2d 763. In considering a motion for summary judgment, a court may examine the pleadings, depositions, admissions, affidavits, interrogatories and inferences to be drawn from that evidence to determine whether summary judgment is appropriate. Matter of Estate of Otto, 494 N.W. 2d 169, 171 (N.D. 1992). Negligence involves questions of fact and is generally inappropriate for summary judgment. When the evidence permits a reasonable fact finder to reach only one reasonable conclusion, negligence becomes a question of law and is appropriate for summary judgment. Summary judgment is appropriate when the nonmoving party cannot show a factual dispute on an element that the party must prove at trial. Perez vs. Nichols, 2006 ND 20 ¶ 7, 708 N.W. 2d 884. When no pertinent evidence on an essential element is presented to the trial court in resistance to the motion for summary judgment, it is presumed no such evidence exists. Barbie vs. Minko Construction Inc., 2009 ND 99 ¶ 6, 766 N.W. 2d 458.

C. The District Court properly "split" the Moore's cause of action.

[¶ 28] In her Motion for Summary Judgment, Ms. Hart requested the District Court dismiss her from this action as the Moore's were attempting to assess personal liability against her for her actions or omissions at the Discovery Middle School in May 2004, notwithstanding those actions and omissions were within the scope of her employment. The starting place for the analysis of the District Court's ruling on the Summary Judgment Motion is the Moore's complaint. As drafted, the complaint alleged a specific act on the part of Ms. Hart in which she allegedly "suggested to M.M. and others they could perform a dare-devil stunt and use their

bicycles to jump off an auditorium stage and land approximately four feet below on a concrete floor". (A.A. 12, 13). (Emphasis supplied). Under North Dakota's notice pleading requirements, a complaint need only contain a short and plain statement of the claims showing the pleader is entitled to relief. N.D.R.Civ.P. 8(a); Estate of Hill, 492 N.W. 2d 288, 296 (N.D. 1992). Nonetheless in their Complaint, the Moore's choose to specifically use the term "suggested" alleging that Ms. Hart had somehow suggested or encouraged to the boys they should do this stunt. It would also follow the use of more specific terms would be required to allege facts and circumstances against a School District employee under N.D.C.C. Ch. 32-12.1.

[¶ 29] The rest of the pleadings in the complaint against both Fargo Public School District and Ms. Hart were much more general than the specific allegation that Ms. Hart "suggested" the boys do this act. The Moore's also allege the defendants willfully, knowingly, and negligently subjected M.M. to a grossly unreasonable and unnecessary risk of danger to his personal safety. They also allege not only negligent conduct on the part of the "defendants" but also willful conduct on the part of at least Ms. Hart. (A.A. p. 13-14).

[¶ 30] It became rather apparent in response to Ms. Hart's Motion for Summary Judgment that the Moore's had very little if any evidence concerning their allegation that she "suggested" the boys do the stunt. (A.A. p. 44-48). Rather, in response to the Motion for Summary Judgment, the Moore's provided the District Court with specific statements allegedly made by Ms. Hart to Thomas and Gail Moore at the hospital shortly after the accident in which she accepted responsibility for the accident as she knew the boys were going to practice. The Moore's also

supplied to the District Court, three days before the Summary Judgment hearing, an affidavit of Adair Boening (J.B.'s mother) in which she testified Ms. Hart had made other statements to her on the morning of May 7 accepting responsibility for the accident. (Hart App. p. 5-6). Through this evidence, the Moore's had come up with a second theory upon which to base personal liability against Ms. Hart beyond the "suggestion" allegation; namely that Ms. Hart knew about the practice on May 6 and did nothing to stop it. The only possible reference of such a theory in the complaint would have been that the defendants "willfully, knowingly, and negligently subjected plaintiff M.M. to grossly unreasonable and unnecessary risk of danger to his physical safety...and as a direct and proximate result of defendant Hart's acts and omissions...plaintiff M.M. incurred severe injuries to his head and brain when he fell from the stage while riding his bicycle in a rehearsal and struck his head, with great force, on the concrete floor below." (A.A. p. 12-13).

[¶ 31] The Moore's argue the District Court in ruling on the Motion for Summary Judgment, improperly split up their cause of action and any distinction made by the District Court was "highly artificial". The Moore's argument is somewhat disingenuous at this point in the proceeding. The District Court in reviewing all of the evidence in response to the Motion for Summary Judgment and applying the "governing law" provided the Moore's with a cause of action they did not specifically plead. Had the Moore's stuck to the issue of the "suggestion", it was clear to the District Court that they could not produce any evidence on that issue and Summary Judgment was appropriate. However, in looking at the response to the Motion for Summary Judgment, the Moore's supplied the deposition testimony

of Thomas and Gail along with the affidavit of Adair Boening in which the District Court found factual disputes which needed to be decided by a jury. In essence, it was to the Moore's advantage the District Court "split" their cause of action. They would never had presented their case to a jury without the "splitting" of these causes of action. The action of splitting the cause of action was proper.

D. <u>The District Court properly applied the governing law and standard of proof to the Motion for Summary Judgment</u>.

[¶ 32] The Moore's alleged both defendants, Fargo Public School District and Ms. Hart, were liable for the injuries allegedly suffered by M.M. under the standards set forth in N.D.C.C. § 32-12.1-03 and 04. Under N.D.C.C. § 32-12.1-04, 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 shall be brought against the political subdivision. An employee such as Ms. Hart 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. See N.D.C.C. § 32-12.1-04(2). This Court has construed this statute to conclude that a political subdivision and employee could be jointly liable if the employee injured someone while acting within the scope of employment in a reckless, grossly negligent, willful, or wanton manner. See <u>Binstock vs. Fort Yates Public School District</u>, 463 N.W. 2d 837 (N.D. 1990); <u>Nelson vs. Gillette</u>, 1997 ND 205 ¶ 25, 571 N.W. 2d 332.

[¶ 33] At the Summary Judgment stage, Hart argued to the District Court that

in order to hold her liable, the Moore's would have to bear the burden of proof to show by clear and convincing evidence Ms. Hart was acting within the scope of her employment in a reckless, grossly negligent, willful, or wanton manner. See N.D.C.C. § 32-12.1-04(3). These terms are not defined within the statute itself. Although the party seeking summary judgment has the burden to clearly demonstrate there is no genuine issue of material fact, the Court must also consider the substantive standard of proof at trial when ruling on a summary judgment motion. Azure vs. Belcourt Public School District, 2004 ND 128 ¶ 8, 681 N.W. 2d 816. In that regard, the Judge must review the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Anderson vs. Liberty Lobby, Inc., 477 US 242, 254 (1986). See also In re Estate of Richmond, 2005 ND 145 ¶ 12, 701 N.W. 2d 897; State Bank of Kenmare vs. Lindberg, 471 N.W. 2d 470, 474 (N.D. 1991). If the evidence presented is of insufficient caliber or quantity to allow a rational finder of fact to find gross negligence, recklessness, or willful or wanton misconduct by clear and convincing evidence, there is no genuine issue of material fact. See Smith vs. Land O'Lakes, Inc., 1998 ND 219 ¶ 12, 587 N.W. 2d 173. Summary Judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. Azure, at ¶ 8.

[¶ 34] This Court has defined clear and convincing evidence as follows

"evidence which leads to a firm belief or conviction that the allegations are true." Zander vs. Workforce Safety and Insurance, 203 ND 194 ¶ 11, 672 N.W. 2d 668; Zundel vs. Zundel, 278 N.W. 2d 123, 130 (N.D. 1979). Therefore, in order to prevail at trial, plaintiffs would have to prove to the Court, by clear and convincing evidence, Ms. Hart's actions constitute willful action as they relate to M.M.

[¶ 35] The "governing law" referenced in Anderson vs. Liberty Lobby Inc, is set forth in several cases from this Court. In this case, the parties and the Court did not concentrate or produce evidence which would fall within the definitions of gross negligence or recklessness. Rather, the Court and the parties concentrated on the evidence and the law dealing with willful or wanton misconduct. In order to characterize an injury as having been willfully or wantonly inflicted, it was necessary to show Ms. Hart had knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; ability to avoid resulting harm by ordinary care and diligence in the use of 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 the result would likely prove disastrous to another. Van Ornum vs. Ottertail Power Company, 210 N.W. 2d 188, 202 (N.D. 1973). Willful and wanton actions are reckless, heedless, malicious; characterized by extreme recklessness, foolhardiness; recklessly disregardful of the rights of others or the consequences. See Smith ex rel. Smith vs. Kulig, 2005 ND 93 ¶ 12, 696 N.W. 2d 521 (citing Nelson vs. Gillette, 1997 ND 205, 571 N.W. 2d 332). Furthermore, it was argued by Ms. Hart that the Moore's needed to show Ms. Hart owed a duty to M.M.. 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. Whether the relation between two parties is such that it gives rise to a duty is a question of law for the Court to decide. Azure vs. Belcourt Public School District, 2004 ND 128 ¶ 10, 681 N.W. 2d 816. The record reflects the District Court applied these standards to Ms. Hart's Motion for Summary Judgment. (A.A. p. 40-41).

E. The District Court properly granted Summary Judgment to Ms. Hart on the "suggestion" issue as the Moore's failed to produce relevant evidence.

[¶ 36] In order to prevent summary judgment, the Moore's had to produce evidence, of a clear and convincing nature, that (1) Ms. Hart wrongfully suggested M.M. perform the jump on May 7, 2004 for the 60's Day presentation; and (2) that Ms. Hart had knowledge of the practice on May 6, 2004 and did nothing to prevent it.

[¶ 37] In response to Ms. Hart's summary judgment motion, Moore's presented deposition transcripts of J.B., D.H., and Ms. Hart herself who supposedly could testify on the first issue as to Ms. Hart's involvement in the suggestion of the stunt to be performed on May 7, 2004. The District Court reviewed the evidence. At the summary judgment hearing, Moore's counsel, in essence, conceded there was no specific evidence they could produce regarding Ms. Hart's suggestion to M.M. that he perform the bicycle stunt on May 7, 2004. After discussing the issue of what evidence the Moore's could produce on the issue of suggestion, the following exchange took place between the Court and plaintiff's counsel:

> "The Court: Ok. I am asking a specific question. If you can't answer it, just tell me you can't answer it. Don't try to feed me a line. What

> evidence is there that she affirmatively said you can do this stunt?
>
> Mr. Unger: She did not – according to the evidence, she did not say they could affirmatively do it. She did not say they couldn't." (Tr. p. 33-34).
>
> "The Court: Well, doesn't J.B. say the same thing? Where's the conflict in the evidence on that point? That's what I was getting at before when I asked where's the affirmative statement that she made because I didn't see them.
>
> Mr. Unger: Well, there is no evidence that she affirmatively said you can do this. Ok. There's no evidence in the record of that. And her best – her best defense of herself four years later is that she said she didn't think it would be a good idea so we have to assume that that's as good as her discouragement got. Alright." (Tr. p. 36-37).

[¶ 38] Based upon the failure of the Moore's to provide the District Court with any evidence of Ms. Hart's suggestion, Hart's Motion for Summary Judgment was partially granted and the Moore's could not move forward at trial with any type of evidence that Ms. Hart suggested to the boys they could do the stunt on May 7. (Tr. p. 60-61, A.A. p. 44-48). Therefore, since the evidence presented by the Moore's was of "insufficient caliber or quantity" to allow a jury to find Ms. Hart suggested to the boys they could perform this stunt on May 7, 2004, the District Court correctly granted partial Summary Judgment to her on that issue.

[¶ 39] To further support the granting of partial summary judgment to Ms. Hart, the District Court indicated Ms. Hart had actually discouraged the boys from doing the jump. (A.A. p. 44-45). From a review of the evidence it appeared the actual idea for doing a jump in 2004 originated with J.B. who had seen the jump on videotape with D.H. and who had actually received encouragement from D.H. The Court in granting the partial Summary Judgment stated "the Moore's have presented

absolutely no evidence that Hart suggested M.M. jump his bicycle from the stage to the floor of the Discovery Middle School Auditorium on May 7, 2004. To the contrary, all the evidence affirms that Hart discouraged, not encouraged, the doing of such a stunt. As such no reasonable jury could find, by clear and convincing evidence, some suggestion or encouragement of Hart constituted gross negligence, recklessness, or willful or wanton misconduct. As to Hart's liability for her suggestion or encouragement of M.M. to jump his bicycle from the stage to the floor of the Discovery Middle School on May 7, 2004, Hart is entitled to Summary Judgment and her motion is granted." (A.A. p. 48). The District Court properly granted partial Summary Judgment on the issue of whether Ms. Hart suggested to J.B. and M.M. to perform the stunt on May 7, 2004.

F. <u>The District Court properly excluded evidence of the origin of the performance and evidence relating to a prior performance</u>.

[¶ 40] The issue that remained after the partial summary judgment was whether Ms. Hart had knowledge of the practice which was to take place on May 6, 2004 and failed to stop the practice. This issue was presented at trial. The Moore's argue the District Court excluded relevant evidence surrounding the origin of the idea to perform the stunt. While the District Court attempted to exclude much of that evidence, much of it was presented to the jury. The jury in this matter listened to testimony on how the practice and performance were originated. For example, J.B., who accompanied M.M. on that fateful day, testified when he was in 7th grade in 2002, he was told by D.H. that he was going to do the bike stunt, and then he did the stunt and told him about it. (Tr. p. 214). J.B. also testified to the following

statements:

> "I knew that D.H. rode his bike off the stage. I guess one of the more eventful things about that since D.H. and I had done quite a few drops other than riding our bikes off the stage."
> "So I only knew at the time that there was something called 60's Day and that D.H. had ridden his bike off the stage as part of that." (Tr. p. 215).
> "But shortly after I found out I was in house 9-3 it occurred to me that I would be able to do the same stunt that D.H. did." (Tr. p. 216).

> "Q. J.B., is it a fact that you actually saw the video before at D.H.'s house before you saw it at the school?
> A. Yeah, that is a fact.
> Q. And that you had actually talked to D.H. about doing the stunt before you saw the video at school?
> A. Yeah.
> Q. And that decision - - or at least in your mind the decision that had been that you could do that bike stunt had been made before you saw this video?
> A. Yeah." (Tr. p. 250-251).

[¶ 41] Based upon this testimony, it can hardly be said that the jury was somehow in the dark on the origin of the bike stunt.

[¶ 42] The other issue the District Court sought to exclude evidence on was whether the boys had permission to do the performance on May 7, 2004. The exclusion of this evidence would be consistent with the prior summary judgment order. It is clear the Moore's attempted to introduce evidence at trial to infer that J.B. and M.M. must have had permission from Ms. Hart to do the stunt since D.H. did the stunt in 2002. (Tr. p. 171-172). The District Court indicated on several occasions it was irrelevant as to whether or not D.H. received permission in 2002. The District Court indicated it was likely to confuse the jury if they heard about that testimony and the District Court attempted to exclude the same. (Tr. p. 32, 35, 173-174, 180, 182). The admission of relevant evidence is governed by Rules of

Evidence and court decisions. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, North Dakota Rules of Evidence. A trial court has wide discretion in deciding whether proffered evidence is relevant and this Court will not reverse a trial courts decision to admit or exclude evidence on the ground of relevance unless the court abuses its discretion. Wolf vs. Estate of Seright, 1997 ND 240, ¶ 14 573 N.W. 2d 161. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Williston Farm Equipment, Inc. vs. Steiger Tractor, Inc., 504 N.W. 2d 545, 549 (N.D. 1993) (quoting North Dakota Rule of Evidence 403). The differential standard given by this Court to district courts in determining the relevancy of evidence is applied "to provide trial courts with greater control in the admissibility of evidence". Schaefer vs. Souris River Telecommunications Coop., 2000 ND 187, ¶ 10, 618 N.W. 2d 175. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, or if its decision is not the product of a rational mental process. Schneider vs. Schaaf, 1999 ND 235, ¶ 34, 603 N.W. 2d 869.

[¶ 43] The issue as to whether D.H. had permission in 2002 is irrelevant to the entire analysis of whether M.M. and J.B. had permission in 2004. The issue which is relevant is whether J.B. and M.M. had permission which was clearly addressed on cross-examination of J.B. Specifically, J.B. testified as follows:

"Q. I asked you on May 6 did you tell Ms. Hart you were going to

practice in the auditorium?
A. No, I did not. I did not." (Tr. p. 271).
"Q. As you sit here today, J., isn't it a fact that you had permission from no one to be in the auditorium on May 6, 2004?
A. Yeah, that is a fact. (Tr. p. 274).
Q. Is it also a true statement, J., that you did not ask permission because you knew it would be denied and they would say no?
A. Yeah. I was quite certain it would be denied." (Tr. p. 275).

[¶ 44] This testimony underscores the irrelevant nature of the D.H. incident in 2002. The District Court correctly excluded evidence concerning the issue of permission to D.H. In addition, a close reading of the Moore's brief on this issue will also indicate their dissatisfaction with the Court's ruling concerning what can be referred to as the "D.H." matter. In opposition to the motion for summary judgment made by Ms. Hart, the Moore's argued to the District Court they should be allowed to present all of the evidence concerning the D.H. matter which took place in 2002. Notwithstanding the District Courts statements that it did not want to try the "D.H. matter" and its efforts to exclude much of that evidence, many of the facts concerning the "D.H. matter" were presented to this jury. For example, the jury was presented with testimony that in 2002 at noon during 60's Day, D.H. decided to do a bike stunt in which he would ride his bike off of the stage. There was conflicting evidence concerning whether D.H. received permission from Ms. Hart to do the stunt. It is not factually disputed that during 60's Day in the afternoon in 2002, D.H. did perform a stunt which he rode his bike off the stage and ultimately broke his bike. It is also undisputed that Ms. Hart was present in the auditorium during the performance and the performance was ultimately videotaped. It was from this videotape actually shown by D.H. to J.B. that J.B. got the idea of doing the 2004

stunt in the first place. With the introduction of all of this evidence on a matter which happened two years before this accident, it can hardly be said that the exclusion of a portion of the "D.H. matter" constitutes an abuse of discretion requiring this Court to reverse. Rather, it is clear that the District Court properly excluded evidence which it believed would confuse this jury.

[¶ 45] The Moore's have specifically provided in a footnote examples of how the District Court's exclusion of evidence was a consequence of the Court's partial summary judgment ruling. The Moore's argue that the evidence excluded included various conversations and actions by Ms. Hart that gave the boys the notion to rehearse for a performance they believed would be allowed the next day. This evidence was excluded due to the District Court's decision that the evidence concerning the prior performance was irrelevant. This trial was going to concentrate on whether Ms. Hart had knowledge of the practice, not whether she encouraged the boys to perform. As has already been pointed out in the testimony, especially from J.B., Ms. Hart could not have had knowledge of the practice and therefore could not have given the boys "the notion to rehearse the performance". This is simply another attempt by the Moore's to disregard unrefutable evidence that Ms. Hart did not have knowledge of the practice. Simply put, the jury heard from J.B. and also heard versions of Ms. Hart's alleged statements of knowledge and responsibility from Gail and Thomas Moore and Adair Boening. It is clear the jury simply believed J.B.. Based upon all of the reasons herein, the District Court properly granted partial summary judgment to Ms. Hart and excluded evidence which related to that ruling. The arguments of the Moore's must be dismissed.

2. The District Court properly instructed the jury on willful and wanton misconduct and the duty of care toward children.

[¶ 46] The Moore's have called into question two jury instructions given by the District Court to the jury. Their first objection deals with the jury instruction concerning willful and wanton misconduct. The second objection deals with the alleged failure of the District Court to instruct on the duty of care to children.

A. Jury instruction on willful and wanton misconduct.

[¶ 47] The trial on this matter centered around whether the actions or omissions of Ms. Hart constituted reckless or grossly negligent conduct or willful or wanton misconduct. See N.D.C.C. § 32-12.1-04(3). These terms are not defined with N.D.C.C. Ch. 32-12.1. The Moore's correctly point out a plaintiff is entitled to have a jury instructed according to their theory of the case so long as the evidence and law warranted it. Johanson vs. Nash Finch Company, 215 N.W. 2d 271 (N.D. 1974). As the discovery was completed and the parties moved to the summary judgment stage, it became clear to the District Court and the parties that the plaintiffs case rested to a great extent on whether Ms. Hart had knowledge of the boys practice on May 6, 2004 and did nothing to prevent the boys from practicing. The District Court allowed the trial in this matter to proceed on that basis. It would therefore follow the District Court would have to consider jury instructions dealing with her alleged knowledge of the practice and her ability to prevent the practice from going forward.

[¶ 48] In a pretrial order, the District Court requested the parties to submit their jury instructions approximately a month before the scheduled trial. The

Moore's submitted jury instructions mostly from the pattern jury instructions. Those instructions included separate instructions on negligence (NDJI 2.05), gross negligence (NDJI 2.10), willful conduct (NDJI 2.12), and a drafted instruction on recklessness. Ms. Hart's instructions included the pattern jury instructions on ordinary negligence and gross negligence. Hart also submitted a jury instruction on willful or wanton misconduct based upon two North Dakota Supreme Court cases, namely: Van Ornum vs. Ottertail Power Company, 210 N.W. 2d 188, 202 (N.D. 1973); and Smith ex. rel. Smith vs. Kulig, 2005 ND 93 ¶ 12, 696 N.W. 2d 521.

[¶ 49] Initially, the Moore's argue that the District Court erred in not giving separate instructions on the definitions of willful and wanton misconduct.[2] They argued the District Court should have given the pattern jury instruction 2.12 on willful misconduct. Pattern jury instructions are not mandatory and trial courts are not required to use them. State vs. His Chase, 531 N.W. 2d 271, 274 (N.D. 1995). Pattern jury instructions are suggested instructions only. State vs. Skjonsby, 319 N.W. 2d 764, 775 (N.D. 1982). Therefore, it is not an error simply because the Trial Court did not give the requested pattern jury instruction. Rather, this Court has set forth the standard for reviewing an objection to jury instructions which have been given at a trial. Jury instructions must fairly and adequately inform the jury of the applicable law. Although a party is entitled to instructions that present the party's theory of the case, a district court is not required to instruct the jury in the exact

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[2] In her appendix, Ms. Hart has supplied the Court with a full and complete set of the District Court's jury instructions. The Moore's appendix contains selected jury instructions which do not appear to be accurate.

language sought by a party if the court's instructions correctly and adequately inform the jury of the applicable law. On appeal, jury instructions must be viewed as a whole, if they correctly advise the jury of the law, they are sufficient although parts of them, standing alone, may be erroneous or insufficient. Grager vs. Schudar, 2009 ND 140 ¶ 6, 770 N.W. 2d 692 (citations omitted). In addition, this Court has upheld jury instructions which "effectively track" language from prior Supreme Court decisions. Flatt ex. rel. Flatt vs. Kantak, 2004 ND 173 ¶ 27, 687 N.W. 2d 208.

[¶ 50] There were several discussions during the trial on the jury instructions especially in regard to the definitions of willful or wanton misconduct. (Tr. p. 601-603, 745-746). The District Court, in considering the various arguments of counsel and the plaintiffs request to give a separate definition on the terms of willful and wanton misconduct, stated as follows:

> "I'm not going to give a separate definition of willful and a separate definition of wanton. I am going to give what the North Dakota Supreme Court has said is willful and wanton. I am going to add another sentence that comes directly out of the most recent case I think. It's the Nelson vs. Gilette case. And that sentence is willful and wanton actions are reckless, heedless, malicious, characterized by extreme recklessness or foolhardiness." (Tr. p. 745).

[¶ 51] As will be outlined below, the position of the District Court was correct and the jury did receive a correct statement of the law concerning willful and wanton misconduct.

[¶ 52] The case the District Court was referring to on the definition of willful and wanton misconduct was Van Ornum vs. Ottertail Power Company, 210 N.W. 2d 188, 202 (N.D. 1973). In Van Ornum, this Court defined willful and wanton as follows:

> "In order to characterize an injury as having been willfully or wantonly inflicted, it is necessary to show knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; ability to avoid resulting harm by ordinary care and diligence and the use of the means at hand; and the elision 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." See also Stokka vs. Cass County Electric Coop., 373 N.W. 2d 911, 916 (N.D. 1985).

[¶ 53] In the jury instructions which were ultimately adopted, the District Court adopted in part the definitions of willful and wanton misconduct directly from Van Ornum. (Hart App. p. 20-21). In Van Ornum, the Court did not differentiate between wanton or willful conduct, but combined the two terms into a single definition which was referred to in this trial as "the Van Ornum standard". That standard has subsequently been applied in other cases in which this Court has once again explained what is meant by willful or wanton infliction of an injury. See Smith ex. rel. Smith vs. Kulig, 2005 ND 93 ¶ 12, 696 N.W. 2d 521. (Explaining this Court's definition of willfully or wantonly as set forth in Van Ornum). Therefore, it was proper for this Court to combine the terms willful and wanton misconduct as that is an accurate statement of law and it "effectively tracked" this Court's definition as applied in Van Ornum and Smith.

[¶ 54] In addition, the definition of willful and wanton misconduct in the jury instructions was supplemented by case law taken from Nelson vs. Gillette, 1997 ND 205 ¶27, 571 N.W. 2d 332. In Nelson vs. Gillette, a former client of Kidder County Social Services sued a social worker individually and the County to recover for alleged sexual abuse by the social worker. The basis of the claim against the social worker individually and the County was an alleged violation of the Governmental

Liability Act, N.D.C.C. Chapter 32-12.1, which is the same chapter which is being used by the Moore's to bring the action personally against Ms. Hart. In Nelson vs. Gillette, this Court defined willful and wanton actions as "reckless, heedless, malicious; characterized by extreme recklessness or foolhardiness; recklessly disregardful of the rights or safety of others or of consequences". Id. at ¶ 27. In Nelson vs. Gilette, this Court once again combined the definitions for willful and wanton misconduct.

[¶ 55] In the present case, the District Court took the Van Ornum standard and supplemented it with the standard set forth in Nelson vs. Gillette. The lynchpin to the Moore's case was the establishment of knowledge on the part of Ms. Hart of the practice and her failure to prevent the injuries M.M. suffered. The jury instructions given to the jury instructed the jury that they must consider Ms. Hart's alleged knowledge of the practice. A trial court need not give instructions in the specific language requested where the substance thereof is already fully and fairly covered by another charge. If an instruction adequately covers the law, it is not errored to refuse to give a requested instruction even though there was nothing objectionable in the requested instruction. Wasem vs. Laskowski, 274 N.W. 2d 219 (N.D. 1979). The Moore's arguement that isolated terms within the jury instruction requested and the jury instruction given were "substantially different" is simply misplaced. Simply put, the Moore's received a better instruction as crafted by the District Court than the one they requested. The District Court correctly denied the Moore's request to divide up the definition of willful and wanton as to do so would have been a misstatement of the law as set forth by this Court. The jury instruction,

which was a combination of the Van Ornum standard and the definition set forth in Nelson vs. Gillette effectively tracked prior cases and was an accurate statement of the law on willful and wanton misconduct. The jury instructions, when considered as a whole, correctly advised the jury of the law and were not erroneous or insufficient. The District Court committed no error in denying the Moore's requested jury instruction. The arguments of the Moore's on this jury instruction fail.

B. Jury instruction on duty to children.

[¶ 56] The second issue raised by the Moore's on jury instructions relates to the supposed failure of the District Court to give a jury instruction in regard to the duty of care to a child. (A.A. p. 56-57). The Moore's base their argument on the failure of the District Court to give an instruction based upon the Besette vs. Enderlin School District No. 22, 310 N.W. 2d 759 (N.D. 1981). In Besette, this Court reviewed and affirmed jury instructions relating to an accident which took place on a school playground. Several days into this trial, the Moore's requested jury instruction no. 4- "Duty of Care Owed to Child" be given to the jury. (A.A. p. 56-57).

[¶ 57] During the discussion of jury instructions between the District Court and counsel, the District Court indicated on several occasions that it believed the first paragraph of the Moore's proposed jury instruction was a correct statement of North Dakota law but allowing this jury instruction to stay intact may confuse the jury. The Court's preference was to separate plaintiffs requested jury instruction no. 4 into several parts based upon the heightened duty in the case relating to Ms. Hart. (Tr. p. 608-614).

[¶ 58] The Moore's take the rather inconsistent position that their proposed

jury instruction no. 4 was not given by the District Court. In essence, except for one sentence, the entire basis of the plaintiffs jury instruction no. 4 was in fact given to the jury in the written jury instructions. More importantly, the jury instructions which were given to this jury "effectively tracked" prior case law from this Court.

[¶ 59] The first paragraph of plaintiffs requested jury instruction no. 4 appears in the third page of the definition section of the District Courts jury instructions. (Hart App. p. 22). This paragraph is based upon language found in the Besette case. See, Besette vs. Enderlin School District #22, 310 N.W. 2d @ 763. (Hart App. p. 22).

[¶ 60] The second paragraph of plaintiffs requested jury instruction no. 4 for the most part is found in the District Court's jury instruction entitled "Measure of Duty of Minor to Exercise Care". (Hart App. p. 25). The second paragraph of the Moore's requested jury instruction no. 4 and the District Court's jury instruction on Measure of Duty of Minor to Exercise Care comes from Wentz vs. Deseth, 221 N.W. 2d 101 (N.D. 1974) in which the Court discussed the duty to a minor child. (A.A. p. 56; Hart App. p. 25). A comparison of these two jury instructions will reveal that the language is almost identical. More importantly, the jury instruction entitled "Measure of Duty of Minor to Exercise Care" is a pattern jury instruction labeled as C-220. (Hart App. p. 25). While it has already been argued by Ms. Hart that pattern jury instructions need not be given and are only used as a guide, jury instruction C-2.20 is a correct statement of the law. Furthermore, the case law which has been developed in North Dakota regarding issues concerning duty to minors is well established. Lastly, the jury instruction given by this Court upon the Measure of

Duty of Minor to Exercise Care "effectively tracked" prior case law.

[¶ 61] It is clear the District Court did not give the specific jury instruction requested by the Moore's. However, the sum and substance of that jury instruction was given by the District Court in two separate instructions. The fact that it was not labeled as the Moore's may have desired or that the jury instruction was severed does not give grounds for this Court to find the District Court made an error in providing erroneous jury instructions to the jury. Jury instructions must fairly and accurately inform the jury of the applicable law. Jury instructions are to be viewed as a whole, and if they correctly advise the jury of the law, they are sufficient although parts of them, standing alone, may be erroneous or insufficient. Kreidt vs. Burlington Northern Railroad, 2000 ND 150, ¶ 6, 615 N.W. 2d 153. The language, form, and style of the instruction in which a court expounds the law are matters addressed to the sound discretion of the court; the instructions maybe couched in any language or given in any form or style, so long as they fully and fairly inform the jury of the rules and principles of law applicable to the case and are plain, simple, and easily understood by the jury. Wasem vs. Laskowski, 274 N.W. 2d 219, 223 (N.D. 1979). The jury instructions given by the Trial Court correctly advised the jury of the law, were sufficient, and were not erroneous.

3. The Moore's failed to properly raise a constitutional challenge to N.D.C.C. § 53-08-01 through 53-08-06 and therefore are precluded from raising the issue on appeal.

[¶ 62] In their brief, the Moore's have raised an issue concerning the constitutionality of N.D.C.C. § 53-08-01 through 53-08-06, North Dakota's Recreational Immunity Statute. They argue these sections violate North Dakota

constitutional guarantee of equal protection as found in Article I Sections 21 and 22. They argue the statute creates arbitrary and unfair classifications of students. They allege the District Court violated M.M.'s right to equal protection by applying the recreational immunity statute in a way that arbitrarily distinguished between the right to tort recovery under two groups of students.

[¶ 63] Before this Court can undertake the task of analyzing the Moore's constitutional arguments, it must determine whether the issue was properly preserved at the District Court level and whether it can properly be raised in this appeal. A review of the entire record made at the District Court including the Motion for Summary Judgment Hearing on November 21, 2008 will reveal that at no time during this entire proceeding did the Moore's raise the constitutionality of N.D.C.C. § 53-08-01 through 53-08-06. It is well established issues not raised in a Trial Court cannot be raised for the first time on appeal. Cermak vs. Cermak, 1997 ND 187 ¶ 15, 569 N.W. 2d 280, Mahoney vs. Mahoney, 1997 ND 149 ¶ 13, 567 N.W. 2d 206. Requiring a party to present an issue to the trial court, as a precondition to raising it on appeal, gives the court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision. These rules have been applied to particular force to a constitutional issue. Allied Mutual Insurance Company vs. Director of North Dakota Department of Transportation, 1999 ND 2, ¶ 6, 589 N.W. 2d 201. Caldis vs. Board of County Commissioners, Grand Forks County, 279 N.W. 2d 665, 667 (N.D. 1979). Thus, this Court must apply the rule that issues not raised in a timely manner to allow a meaningful examination by the District Court will not be reviewed at the

Supreme Court for the first time on appeal. The Moore's are precluded from raising the constitutionality of the Recreational Immunity Statute.

4. The District Court properly granted Summary Judgment to the Fargo School District based upon recreational immunity.

[¶ 64] Shortly before the trial, the District Court granted the Fargo Public School District's Motion for Summary Judgment. The District had based its argument for summary judgment on recreational immunity, N.D.C.C. Ch. 53-08. The District Court indicated the Discovery Middle School fell within the definitions of the recreational immunity statute, that the boys were using the property for a recreational use, and the Moore's could produce no evidence to satisfy the willful and malicious exception to the recreational use immunity statute. (A.A. p. 30-36).

[¶ 65] In contrast, the Moore's argue the District Court erred in granting summary judgment. The Moore's argue the School District has a duty to protect children, that this is not a premises liability case, and the School District must provide a safe environment for school children based upon the relationship between the school and the children.

[¶ 66] In applying the recreational immunity statute to these facts, the proper analysis must include consideration of the location and nature of the injured person's conduct when the injury occurs. Kappenman vs. Klipfel, 2009 ND 89, ¶ 20, 765 N.W. 2d 716. It is beyond dispute that the accident took place in the auditorium of the Discovery Middle School which is owned and operated by the Fargo Public School District. The District Court found and it is undisputed that the Discovery Middle School falls well within the definitions of the protections afforded to land

owners by the statute. The second part of the analysis requires consideration of the nature of the injured persons conduct at the time of the accident.

[¶ 67] In looking at this portion of the test, the Court must review the definition of recreational as found in the statute. An owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes. N.D.C.C. § 53-08-02. A recreational purpose includes any activity engaged in or for the purpose of exercise, relaxation, pleasure, or education. The Moore's have argued that 60's Day was not educational and therefore falls outside of the parameters of the statute. However, evidence was presented to the District Court which underscored the educational purpose and value of 60's Day. Ms. Hart was a history teacher and for the last unit of the year, students in house 9-3 would study the 1960's. The students were encouraged to create a skit or some type of act which had some type of educational purpose to it. They would then sign up on a sheet and perform on "60's Day". (Hart App. p. 53-55).[3] The District Court, in finding there was some type of educational value to 60's Day, stated "M.'s subjective intent, which is also relevant but probably not controlling either (was to practice an activity for an educational purpose (school-related 60's Day)". (A.A. p. 32). While it is debatable that 60's Day had tremendous educational value, it did have some educational value as students were to pick a topic, research it, and be able to present on the topic. Therefore, the Moore's arguments that 60's Day did not have

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[3] These sign up sheets were submitted to the District Court in support of Ms. Hart's Motion for Summary Judgment.

any educational value must simply fail.

[¶ 68] According to the statute, the Fargo School District would owe no duty of care to keep the premises safe from others for recreational purposes. It must also be remembered in this case that the boy's basically "snuck in" and did not have permission to be in the auditorium. One can only imagine the opening of flood gates of litigation if it was determined that school districts owed a duty to students all of the time that they were on school premises regardless of their own misconduct. Other courts have rejected such a notion. Courts are not inclined to hold teachers accountable for injuries which occur when students themselves engage in misconduct. A teacher generally is not required to anticipate the hundreds of unexpected student acts which occur daily or to guard against dangers inherent in rash student acts. Verhel vs. Independent School District #709, 359 N.W. 2d 579, 686 (Minn. 1984), see also; Morris vs. Ortiz, 437 P. 2d 652 (Ar. 1968). Since the second test deals with the persons conduct, it can hardly be said that the law should allow a lawsuit to go forward when a student through his own misconduct, is hurt in practicing a stunt to which no one has knowledge.

[¶ 69] For all other reasons stated herein, and for other reasons which will be presented by the Fargo Public School District, the District Court properly granted summary judgment to the School District based upon recreational immunity.

CONCLUSION

[¶ 70] For all other reasons stated herein, appellant, Eugenia Hart, requests this Court affirm the Judgment of the District Court in all respects.

Dated this 29th day of October, 2009.

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