20090121

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 29, 2009
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

M.M. and Thomas Moore, Plaintiffs and Appellants, vs. Fargo Public School District No. 1, and Eugenia Hart, Defendants and Appellees.	)	Sup. Ct. No.: 20090121 Cass Co. No.: 09-07-C-01528

Appeal from Judgment entered February 3rd, 2009
Honorable Steven E. McCullough
Cass County District Court, East Central Judicial District
Supreme Court No. 20090121
Cass County Civil No. 09-07-C-01528

BRIEF OF APPELLEE FARGO PUBLIC SCHOOLS

Ronald H. McLean (ID# 03260)
Jane L. Dynes (ID# 04495)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
(701) 232-8957

TABLE OF CONTENTS

TABLE OF AUTHORITIES

¶ No.

FEDERAL CASES

STATE CASES

¶ No.

STATE STATUTES

¶ No.

STATEMENT OF ISSUES

[¶1] Whether the district court properly granted summary judgment to the Fargo Public School District through application of N.D.C.C. Chapter 53-08?

[¶2] Whether the Moores are precluded from raising a constitutional equal protection challenge for the first time on appeal?

STATEMENT OF CASE

[¶3] M.M., a minor, and his father Thomas Moore brought this action for personal injuries sustained by M.M. on May 6, 2004. The Moores' allegations all rise from the injuries M.M. sustained on May 6, 2004 when, after school hours, he tried to jump his bicycle off the stage in the Discovery Middle School auditorium. The Moores brought their action for negligence against the Fargo Public School District No. 1 (hereinafter referred to as "School District" or "Fargo Public Schools") stemming from the actions of Eugenia Hart (hereinafter "Ms. Hart"), a history teacher employed by the School District, acting in the course and scope of her employment. (Appellant's Appendix p. 12, hereinafter referred to as "A.A"., Complaint ¶ III). The Complaint specifically asserted that the alleged actions of Ms. Hart resulted in M.M., and another student, using their bicycles "to jump off an auditorium stage and land approximately four feet below on a concrete floor." (Id. at p. 13). The Complaint sought to impose liability on the School District and Ms. Hart as a result of Ms. Hart's alleged acts and omissions under the standards of N.D.C.C. Ch. 32-12.1. (A.A. p. 13).

[¶4] Before trial, both Fargo Public Schools and Ms. Hart moved for summary judgment. Fargo Public Schools' motion for summary judgment sought protection from liability for the claimed injury pursuant to N.D.C.C. Ch. 53-08, Liability Limited for Owner of Recreational Lands. The district court construed N.D.C.C. Ch. 53-08 to the facts submitted in support of, and in opposition to, the summary judgment motions. (A.A. p. 30-32). The court determined M.M. used the Discovery Middle School auditorium stage to practice jumping his bike from the stage to the floor below. If he made the jump, M.M. intended to obtain Ms. Hart's' permission to perform the bike jump

in a class event, scheduled to take place the next day. The district court found M.M.'s activity in the Discovery auditorium on May 6, 2004 was for an educational purpose and concluded that the recreational use statute applied to immunize the School District from liability for ordinary negligence. (A.A. p. 32)

[¶5] The district court also determined that the exception to application of recreational use immunity to the School District required a showing of "willful and malicious" conduct. Based on the facts presented at summary judgment, there was no evidence that Ms. Hart, the school district, or any agent or employee of the school harbored any malicious intent to injure M.M. (A.A. p. 33-34). The district court also determined that the Moores' claims concerning the negligence or wrongful acts of Ms. Hart relating to M.M.'s use of the Discovery Middle School auditorium stage during non-school hours were barred by recreational use immunity as to the School District pursuant to N.D.C.C. § 32-12.1-03(1). (A.A. pp. 36). The scope of the recreational use immunity statute covered all claims brought by the Moore's against the School District and, as such, the School District was entitled to summary judgment of dismissal as a matter of law as to all of the claims asserted against it. (A.A. p. 36).

[¶6] Ms. Hart's moved for summary judgment on two bases of liability asserted by the Moores. The first basis of liability alleged that Ms. Hart suggested or encouraged M.M. to do a bike jump from the auditorium stage on May 7, 2004, as part of the class' 60's day activity. The Moores presented no evidence to support the allegation. The district court found that Ms. Hart actively discouraged M.M. from doing the bike jump. (A.A. p. 46-48). Ms. Hart was granted summary judgment on this claim.

[¶7] The second basis of liability the Moores alleged against Ms. Hart was that she knew of and failed to prevent M.M.'s rehearsal of the bike jump on May 6, 2004 when the injury occurred. The district court determined that Ms. Hart could only be held liable if her alleged acts or omissions constituted reckless or grossly negligent conduct, or willful or wanton misconduct. (A.A. p.39). The district court determined that there was a factual issue as to whether Ms. Hart knew of M.M.'s intent to practice jumping his bike off the Discovery Middle School stage on May 6, 2004. That issue went to trial under the heightened standard of proof for negligence. (A.A. p. 43).

[¶8] As to the Fargo School District, this appeal is limited to challenging the district court's grant of the School District's summary judgment motion through the application of the statute limiting the liability of owner's of recreational lands.

STATEMENT OF FACTS

[¶9] The Moores alleged the School District and Ms. Hart were liable for the injuries M.M. incurred after school on May 6, 2004 when M.M., then 15 years old, jumped his bike off the stage in the auditorium of the Discovery Middle School. (A.A. pp. 12-15).

[¶10] Ms. Hart was M.M.'s ninth grade history teacher at Discovery in 2003-2004. (Fargo Public School's Appendix pp.6-7 hereinafter referred to as "FPS App."). One of M.M.'s friends was J.B. (FPS App. p. 7, M.M. Depo.).[1] Ms. Hart's curriculum included a unit of study on the 1960's which required everyone to participate in some way in the activities of "60's Day." (Id. p. 9). To enhance the students' 1960's learning experience, Ms. Hart's students would participate by doing a skit, sing, lip sync or some other type of activity related to the 1960's on "60's Day." (FPS App. p. 17-18). The students might research an important figure from the decade or explore the decade's music or fashion culture. (FPS App. p. 20-21). The unit of study culminated in performances scheduled to take place on May 7, 2004 in the Discovery auditorium. (Id. p. 20). Students were required to participate in the 60's Day in some fashion. (FPS App. p. 18-20). Students were not compelled to participate in the 60's Day skits. On May 6, 2005 Ms. Hart prepared the lists of students who had signed up to participate in the 60's Day performances on May 7, 2004. (FPS App. p. 26-27 and 29-31). M.M. was not on the list of performers.

[¶11] J.B. decided to jump his bike off the stage "around the time" he learned he was in house 3, presumably the fall of 2003. (FPS App. P. 40). He got the idea from watching a former Discovery student's personal video of that student's "bike drop" from the

[1] The School District cites to its Appendix because it contains materials available to the district court at the summary judgment.

Discovery stage during a 60's Day performance years earlier. (FPS App. p. 40). J.B. had seen additional school videos of past 60's Day performances and decided to ask M.M. to do the bike jump with him. Id. p. 45. J.B. talked to M.M about jumping his bike off the stage together as part of the "60's Days" performances halfway through the 2003-2004 school year. (Id. p. 36). J.B. knew the videos he saw at school were shown to give the students ideas about how they could participate in "60's Day" but he also knew students were not supposed to copy earlier performances. (FPS App. p. 45-46). The video of prior skits was shown not more than one month before May 7, 2004 to "build up anticipation about "60's Day." (FPS App. p. 45).

[¶12] J.B. stated that no one encouraged them to do a particular act. (Id. p. 45). He and M.M. decided to do the bike stunt together. (Id. p. 35). J.B. recalled talking to Ms. Hart about doing the bike jump specifically recalled that she "never said that we could do it." (Id. p. 35). J. B. did not tell his parents about his plan to jump his bike off the auditorium stage because he knew they would not have let him do it. (Id. p. 36 and 43). J.B. does not dispute that Ms. Hart told him that the jump was not a good idea. (FPS App. p. 44, 46, and 48).

[¶13] J.B. raised the notion of doing the bike jump for the 60's day performances on May 7, 2004 and recalls Ms. Hart's response as, "No. This is not a good idea." (FPS App. p. 25, Hart Depo p. 81-82). J.B. and M.M. did not tell her they were planning on performing the bike jump on May 7, 2004. (FPS App. p. 33, Hart Depo. p. 75). Additionally, Ms. Hart did not know that they planned to rehearse their bike jump in the auditorium after school on May 6, 2004. Her students did not rehearse their "60's Day"

activities at school. If students did want to rehearse at school they would have had to ask her permission and, if granted, she would stay with them. (Id. p. 23, Hart Depo. p.79).

[¶14] Ms. Hart's students signed up to participate in the "60's Day" performances at least the day before the show so that she could organize the performances and put the show program together. (Id. p. 26-27, Hart Depo. p. 92-93). Some acts could be added at the last minute but she generally kept to the scheduled program. (Id) J.B. and M.M had not signed up to do a "60's Day" performance as of March 6, 2004. (Id. p. 40, Hart Depo. p. 92).

[¶15] Ms. Hart saw M.M. in the hallway outside the auditorium after school on May 6, 2004 and, when he mentioned his interest in jumping his bike off the auditorium stage as a part of the "60's Day" performances, she walked him to the door and told him that the stunt was not a good idea. (Id. p. 25, Hart Depo. p. 82-83). She told M.M. that his dad would not be happy if he tried to do such a stunt. Id. She saw no bike with M.M. and believed the auditorium doors to be locked because they always were. (Id. p. 25, Hart Depo. p. 82-84). Students and teachers understood that the auditorium doors were always locked unless a classroom teacher was supervising an activity. (Id. p. 27, Hart Depo. pp. 94-95). She had had to have the custodian unlock the door for her on May 6, 2004 and she made sure it was locked when she left. (Id. p. 25).

[¶16] J.B. and M.M. tried to get in the main auditorium entrance doors after school on May 6, 2004 but they were locked. (FPS App. p. 36, J.B. Depo. pp. 18-20). They got in through the locked side door of the auditorium. (Id. p. 36 and 44). The interior auditorium door was not locked. (FPS App. p. 36-37). The door was ajar to make for easy access for the band students to set up for a concert that was to take place that night.

(Id. p. 37). In order for them to rehearse their jumps from the stage, they had to move 20 chairs that were already set up for the band concert. Id.

[¶17] J.B. acknowledged that he and M.M. brought their bikes into the auditorium hoping to avoid anyone seeing them. (FPS App. p. 38, J.B. Depo. p. 26). J.B. knew that bikes were not allowed in the school. (Id. p. 38 and 27). He knew they had not received anyone's permission and, if they were discovered, they would be told to take their bikes and leave. (Id.) Only after the May 6th rehearsal did they intend to ask for Ms. Hart's permission to jump their bikes off the stage as part of the "60's Day" performances on May 7th. (Id.) J.B. confirms that he and M.M. never obtained approval from Ms. Hart to perform the jump from the stage. (Id. p. 41, J.B. Depo. p. 37). He and M.M. never signed up to perform on "60's Day." (FPS App. p. 48, J.B. Depo. p. 65).

[¶18] J.B. and M.M. waited until they thought everyone had left the auditorium and then they brought their bikes in. (Id. p. 44, J.B. Depo. p. 51-52). M.M. opened the door for Jake to get the bikes in. (Id.) J. B. acknowledges that if they had asked permission they would have been told no. (Id.) Despite Ms. Hart's refusal, J.B. thought the jump would eventually be allowed and he shared that belief with M.M. (Id. p.47, J.B. Depo. p. 61-62).

[¶19] J.B. and M.M. took steps to avoid a teacher trying to stop them from practicing their jumping from the stage on their bikes so they took steps not to get caught. (FPS App. p. 47, J.B. Depo. p. 63-64). They used a side door and did not take their bikes through the Discovery hallways. Id.

[¶20] Thomas Moore, M.M.'s father, testified that his son told him on May 5, 2004 at about 10:00 p.m. that he (M.M.) had been practicing riding his bike at Lindenwood Park.

(FPS App. P. 58). M.M. told his father he intended to jump his bike off the stage at Discovery School for the "60's Day" performance. (Id. Moore Depo. pp. 30-31 and FPS App. p. 38). Moore specifically told M. M. "You are not gonna do that. That's just—the whole thing is stupid." (FPS App. P. 58). Moore specifically forbade M.M. from doing the bike jump. Id. Moore told M.M. he lacked the necessary skills, the bike was new and he did not want it damaged. Id. Moore told his wife that he had forbidden M.M. to ride his bike off the Discovery stage for the "60's Day" activities on May 7th. (Id. p. 59, Moore Depo. p. 34). Moore testified that "his kids do not disobey him". Id. Moore did not know about the practice session on May 6, 2004. Id. On May 6, 2004, Moore believed that his son would not jump his bike off the Discovery auditorium stage. (FPS App. p. 59, Moore Depo. p. 36). Moore drove his son to school on May 6, 2004 with M.M.'s bike in the car. (Id. p. 60). M.M. did not tell his dad that he intended to rehearse his bike jump after school that day. (Id.)

[¶21] At the summary judgment oral argument, the Moores conceded, not once but twice, that there was no evidence that Ms. Hart, affirmatively told M.M. that he had permission to jump his bike off the stage for the 60's Day performance. (November 21, 2008 Summary Judgment Tr. p. 33-34 and 36). Thus, there was no support for the Moores' claim that Ms. Hart "suggested" the stunt. The only issue as to Ms. Hart was whether she had knowledge of the May 6th rehearsal and whether she had a duty to supervise it. (Id. p. 37). The Moores also agreed that, if participation in the 60's Day skit impacted a student's grade, it was educational. (Id. p. 45).

[¶22] The Moores allegations against the School District relate to use of School District property because their claims center on M.M.'s use of the Discovery auditorium

stage as a bike jump site. (A.A. App. p. 36). The district court determined that the scope of the recreational use immunity statute encompassed all of the claims brought by the Moores against the school district.

[¶23] The undisputed facts are that the School District is a political subdivision of the state of North Dakota. (A. A. p. 28). The School District owns and operates the land, buildings and structures known as the Discovery Middle School. Id. Participation in the 60's Day could have result in a small number of points being added to a student's grade (but not enough to change a student's grade). Id. The physical structure of the stage included a drop from to the floor below of approximately 3½ feet to 4 feet. Id. The day before 60's Day was to take place, May 6, 2004, after the conclusion of the regular school day, M.M. and J.B. entered the auditorium of the Discovery Middle School to practice making the jump with their bicycles. Id.

LAW AND ARGUMENT

I. The District Court correctly applied the facts and law in granting the School Districts Motion for Summary Judgment

A. Summary Judgment Standard of Review

[¶24] Summary judgment is appropriate for prompt and expeditious disposition of an action without trial "if either litigant is entitled judgment as a matter of law and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving factual disputes will not alter the result." Duemeland v. Norback, 2003 N.D. 1, ¶ 8, 655 N.W. 2d 76. In determining whether summary judgment has been properly granted, this Court views the evidence in the light most favorable to the party opposing the motion giving that party the benefit of all favorable reasonability. Hasper v. Central Mutual Insurance Co., 2006 N.D. 220, ¶ 5, 723 N.W. 2d 411. The party opposing

the summary judgment motion must present competent admissible evidence to show the existence of a genuine issue of material fact. Riemers v. Omdahl, 2004 N.D. 188, ¶ 4, 687 N.W.2d 445, 448. Mere speculation is not enough to defeat a motion for summary judgment and a scintilla of evidence is not sufficient to support a claim. Evidence may become speculative in light of other evidence. Beckler v. Bismarck Public School District, 2006 N.D. 58, ¶ 11, 711 N.W. 2d 172, 176.

[¶25] On appeal from a grant of summary judgment, this Court decides whether the information available to the district court precluded the existence of genuine issue of material fact and entitled the moving party to judgment as a matter of law. Hasper, 2006 ND 220 ¶ 5, 723 N.W.2d at 411. Whether the district court properly granted summary judgment is a question of law subject to de novo review. Id.

B. The District Court Properly Applied the Recreational Use Immunity Statute to Fargo Public Schools Based on the Facts.

[¶26] North Dakota's recreational use immunity statutes were enacted to encourage landowners to open their land for recreational purposes by giving them immunity from suit under certain circumstances. Olson v. Bismarck Parks and Recreation District, 2002 N.D. 61, ¶ 6, 642 N.W. 2d 864, 867 and N.D.C.C. Ch. 53-08. Because of the recreational immunity statutes, 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. N.D.C.C. § 53-08-02. The district court determined N.D.C.C. Ch. 53-08 applied to relieve the School District of liability based on the facts and as a matter of law.

1. Rules of statutory interpretation support the district court's determination.

[¶27] The primary objective in interpreting a statute is to ascertain legislative intent. *See* Baukol Builders, Inc. v. County of Grand Forks, 2008 N.D. 116, ¶ 22, 751 N.W. 2d 191. Words of a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are to be harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, the letter of the statute is disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05. Application of these rules to the recreational immunity statute leads to the conclusion that the School District was properly afforded its protection in this case.

[¶28] The pertinent provisions of N.D.C.C. Ch. 53-08 provide as follows:

> **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.
>
> **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.

> **53-08-03. Not invitee or licensee of landowner.** Subject to the provisions of section 53-08-05, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> 1. Extend any assurance that the premises are safe for any purpose;
> 2. Confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed; or
> 3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

[¶29] Under the plain language of the statute, "recreational purposes" includes any activity engaged in for the purpose of exercise, relaxation, pleasure or education. N.D.C.C. § 53-08-01(4) in circumstances not related to education, riding and jumping bikes are typically recreational activities.

[¶30] The Moores concede that the North Dakota recreational use immunity statute applies to immunize the School District from alleged breaches of duty arising from its lands. (See, Appellants' Brief ¶ 14). Thus, the issue here is limited to whether M.M. was engaged in "recreational purposes" at the time of his injury.

2. M.M.'s conduct at the time of his injury determines recreational purpose.

[¶31] M.M.'s stated purpose in being at Discovery Middle School after school on May 6, 2004 was to practice a bike jump off the Discovery stage. He then hoped to get permission and perform the jump in a school activity set for May 7, 2004. To determine whether the statute applies to M.M.'s activity, it is necessary to consider the location and nature of his conduct when the injury occurred. Leet v. City of Minot, 2006 N.D. 19, ¶ 20, 721 N.W. 2d 398, 406.

[¶32] A worker was injured at the city's auditorium when a curtain divider system fell and injured him when he was setting up for an upcoming seniors' event. Leet v. City of Minot, 2006 N.D. 191, 721 N.W. 2d 398. The worker brought a negligence action against the city. The user's intent in entering the property was used to determine whether the recreational use immunity statute applied. Id. ¶20. The owner's intent, though not controlling, was also a consideration. Analysis of "recreational purpose" requires consideration of the location and the nature of the injured person's conduct when the injuries occur. Id. ¶ 20. Because the worker's presence in the auditorium was for employment, he was not there for recreational purposes. Id. ¶¶ 16, 20 and 21. Application of the Leet analysis leads to the conclusion that M.M. was using the Discovery stage for recreation purposes and the School District was properly afforded the protection of recreational use immunity.

[¶33] Most recently, this Court reviewed the recreational use immunity statute in Kappenman v. Klipfel, 2009 N.D. 89, 765 N.W. 2d 716. Brason Kappenman was killed when his ATV dropped into a washout which formed a trench across a section line road in Albion Township. Id. ¶ 2. At the time of the accident, Brason was scouting locations for a deer stand. Id. The district court granted Albion Township summary judgment, in part, because the claims against it were barred by recreational use immunity. Id. ¶ 5. This Court reversed because Brason's use of the rural road was primarily for travel and not recreation. Id. ¶ 23. The Court agreed with the reasoning of the Utah Supreme Court which noted that the purpose of its recreational immunity statute could not include public roads unless the roads were capable of being closed to the public at anytime. Id. ¶ 24. Travel is the primary purpose of roads. To apply the recreational immunity statute to

public roads does not further the statute's purpose which is to encourage landowners to open land which would otherwise be closed. Id. ¶ 25. Recreational immunity did not apply to the section line in Kappenman because the road was open and available to the public for non-recreational travel. Id. ¶ 28.

[¶34] Kappenman does not control in the instant case. Factual differences make it distinguishable. Travel on public roads may occasionally be for purposes of recreation but that does not change the primary purpose. A public road is always open for travel. That is not the case with a school building which is often closed. Affording schools recreational use immunity in appropriate cases furthers the goal of encouraging them to make their buildings accessible for recreational use. Further, Discovery Schools' primary purpose will always be the education of its students and education is specifically listed in the statutory definition of recreational purpose.

[¶35] M.M. was not on the Discovery School auditorium stage as part of a commercial, employment related activity. Leet, 2006 N.D. 19, 721 N.W. 2d 398. Nor was M.M. on the auditorium stage using it for its primary purpose as a concert venue. Kappenman, 2009 N.D. 89, 765 N.W. 2d 716. M.M. was injured when on May 6th, after school hours, without permission from any School District employee or agent, he used the Discovery auditorium stage as a bike jump platform. M.M.'s purpose in jumping his bike off the stage that day was to practice, perfect, then obtain permission to perform the jump in the "60's Day" performance scheduled for the next day. M.M. intentionally used the Discovery stage structure to practice a stunt. The conduct causing the injury was related to his use of a school structure but it was not part of a school sponsored activity and was not part of the mandatory school day.

[¶36] Clearly, M.M.'s bike jumping activity would be considered recreational if done at a park. However, M.M. specifically chose to use his own free time after school hours to gain entry to the auditorium to practice his bike jumping skills. M.M.'s bike jumping activity is recreational as he had been doing it in Lindenwood Park with J.B. in the preceding days. He obviously engaged in the bike jumping activity for fun, pleasure or exercise. The fact that the May 6th practice occurred in conjunction with his specific intent to master the bike jump for the next day's activities at school made it educational as well.

[¶37] Recreational use immunity, as applied by the district court in this case, is in line with previous interpretations by North Dakota courts. Milton Stokka was killed while snowmobiling when he struck an unmarked guide wire on the side of the road. Stokka v. Cass County Electric Coop, Inc., 373 N.W. 2d 911, 912 (N.D. 1985). Cass County Electric was granted summary judgment under N.D.C.C. Ch. 53-08. On appeal, this Court stated, "The statute clearly limits the liability of land owners for injuries sustained by recreational users of land. The propriety of limiting land owner's liability for injuries sustained by recreational users is a matter lying within the province of the legislature." Id. at 914. The justice, wisdom, necessity and utility of the legislation are questions for the legislature and not the judiciary. Id. The legislature intended that immunity be given to owners of lands open to others for recreational activity including education. There is no appreciable difference in the recreational nature of snowmobiling and bike jumping. Had the injury occurred through M.M.'s use of a piece of outside playground equipment to practice his bike jumping during his after-school free time if would certainly be considered recreational.

[¶38]

3. There is no statutory conflict in applying N.D.C.C. Ch. 53-08 together with N.D.C.C. Ch. 32.1.

[¶39] Despite the Moores' arguments to the contrary, there is no conflict in applying N.D.C.C. Ch. 53-08 together with N.D.C.C. § 32-12.1-03. Fastow v. Burleigh County Water Resources District, 415 N.W. 2d 505 (N.D. 1987). Fastow was rendered a quadriplegic by diving into a swimming hole at a recreational area owned by the water district and leased to the park district. Fastow alleged both districts breached their duty to provide, among other things, proper and adequate lifeguard protection, adequate supervision and adequately trained employees. Id. p. 507. He alleged further that the specific employees of the districts failed to properly supervise and manage the facilities. Id. Both districts brought summary judgment motions pursuant to N.D.C.C. § 53-08-02. This Court construed N.D.C.C. Chs. 53-08 and 32-12.1 together to determine that, in North Dakota, N.D.C.C. § 53-08-02 provides liability limitations for political subdivisions such as water, park and (as here) school districts. Id. p. 507.

[¶40] Furthermore, this Court determined that the liability limitations for recreational land owners contained in N.D.C.C. § 53-08-02 were applicable to political subdivisions in the same way those protections were applicable to a private owner of recreational land. This application was specifically incorporated into the statute by amendment. Most importantly for this appeal, however, Fastow provides:

> We conclude that the trial court did not err in determining that Chapter 53-08, N.D.C.C., is applicable to political subdivisions.
>
> The trial court determined that subsection 32-12.1-03(1), N.D.C.C., provides two separate and independent grounds upon which a political subdivision can be held liable for

> injuries: (1) a political subdivision can be liable for injuries caused by some condition or use of property in the same manner as a private person, and (2) a political subdivision can be liable for injuries caused by the negligence or wrongful act or omission of an employee acting within the scope of the employee's employment.
>
> We believe the trial court correctly construed subsection 32-12.1-03(1), N.D.C.C., as creating two separate grounds upon which a political subdivision can be held liable for injuries. Nevertheless, where as in this case injuries are sustained by a nonpaying recreational user, Chapter 53-08, N.D.C.C., precludes liability against the political subdivision for ordinary acts of negligence by its employees which relate to the condition of the property. See, Wirth v. Ehly, 93 Wis.2d 433, 287 N.W.2d 140 (1980). Unless the political subdivision, through its employees, has committed a "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity on the property," the political subdivision is not liable for injuries to a nonpaying recreational user of the property. See, Stokka v. Cass County Electric Cooperative, Inc., 373 N.W.2d 911 (N.D. 1985).

[¶41] Thus, there is no statutory inconsistency arising from the interplay of political subdivision liability under N.D.C.C. Ch. 32-12.1 and recreational use immunity under N.D.C.C. Ch. 58-08 and under the facts of this case.

[¶42] This Court concluded that the language in Fastow, which established political subdivision immunity under N.D.C.C. Ch. 53-08, was dictum when it determined the liability protection did not apply to political subdivisions. Hovland v. City of Grand Forks, 1997 N.D. 95, 563 N.W. 2d 384. Again, however, the statute was later revised to specifically apply to political subdivisions.

[¶43] Finally, the Moores' criticism of the quality of education encompassed in the "60's Day" activities set for May 7th does not negate the fact that it had educational value. The District Court noted that despite the Moores contention that "60's Day" had arguably

less educational value than they would have liked, the activities of "60's Day" did have educational value. Additionally, Moores' counsel acknowledged that giving points towards a class grade for participation in a class activity is educational. (November 21st Summary Judgment Tr. Pp. 45).

4. The lack of evidence as to malicious and wanton conduct makes the exception to recreational immunity inapplicable.

[¶44] Recreational use immunity is not absolute. N.D.C.C. § 53-08-05 provides:

> **53-08-05. Failure to warn against dangerous conditions - Charge to enter.** This chapter does not limit in any way any liability that otherwise exists for:
>
> 1. Willful and malicious failure to guard or warn against a dangerous condition, use, structure, or activity; or
> 2. Injury suffered in any case in which the owner of land:
>   a. Charges the person for entry onto the land other than the amount, if any, paid to the owner of the land by the state; and
>   b. The total charges collected by the owner in the previous calendar year for all recreational use of land under the control of the owner are more than:
>   (1) Twice the total amount of property taxes imposed on the land for the previous calendar year; or
>   (2) In the case of agricultural land, four times the total amount of property taxes imposed on the land for the previous calendar year.

[¶45] Prior to 1993, the language of N.D.C.C. § 53-08-05(1) was "willful or malicious." The language in effect at the time of M.M.'s injury read "willful and malicious." (*emphasis added*). The change reflects that the standard has become more stringent than "willfulness." See, Justice VandeWalle's special concurrence in Stokka, 373 N.W. 2d 911, 917 (N.D. 1985). The Eighth Circuit considered the "willful and malicious" standard in Cudworth v. Midcontinent, 380 F. 3d 355 (8th Cir. 2004). The Eighth Circuit

noted that the term 'malicious' "typically means 'given to, marked by, or arising from malice' and 'malice' most commonly connoted an 'intention or desire to harm another. . ." Id. at 381.

[¶46] Because the legislature did not specify otherwise when amending 53-08-05(1), the Cudworth court determined that the plain meaning of "malicious" requires an intent to injure. At the summary judgment oral argument herein there was no evidence that the School District or its agents intended to harm M.M. Thus, no trial was warranted on the willful and malicious exaction. (A.A. p. 34).

5. This is a not a wrongful supervision case as to the School District.

[¶47] Despite their concession that the recreational use immunity statute applies to limit the School District's liability for injuries arising from use of its buildings, and despite the Fastow decision establishing that N.D.C.C. Chs. 53-08 and 32-12.1 can co-exist in application to political subdivisions, the Moores focus on an educator's general common law duty to safeguard students. It must be noted, however, that school teachers are not required to anticipate or guard against the dangers inherent in rash student acts. Verhel v. Independent School District #709, 359 N.W.2d 579, 686 (Minn. 1984). Additionally, almost without exception, the cases cited by the Moores involve injuries occurring during mandatory school time (unlike M.M.'s injury) or in school sanctioned activities (again not M.M.'s injury). Moreover, the cases involve injuries which did not stem from the injured person's intentional, affirmative and volitional activity specifically related to the recreational use of the land owners' structures.

[¶48] M.M.'s injuries did not stem from activity during a mandatory recess period. Besette v. Enderlin School District, 310 N.W. 2d 759 (N.D. 1981). The Moores' reliance

on Godar v. Edwards, does not further their cause. Godar v. Edwards, 588 N.W. 2d 701 (Iowa 1999). Godar's claims against the school district arose from claimed sexual abuse by a district employee. The claims did not involve claims relating to the intentional use of property. Here, it is undisputed that M.M.'s use of the Discovery auditorium stage was after the mandatory school day and without permission.

[¶49] Similarly unpersuasive is the case involving an injury of a first grader during a game conducted within a specific school class during the school day. Johnson v. School District of Millard, 573 N.W. 2d 116 (Neb. 1998). Again, the case did not involve an injury stemming from the student's intentional use of a school structure and did not involve recreational activity after school hours. Equally distinguishable because of M.M.'s specific intent to use School District property for recreational purpose are the following: Lightfoot v. School Administrative District No. 35, 816 A. 2d 63 (M.E. 2003). (the student did not intend his arm to go through a glass window while running drills in the school hallways as a member of the wrestling team). Wilson v. Norristown Area School District, 783 A. 2d 871 (P.A. Cmwlth Ct. 2001) (student did not intend to fall on school staircase during drill ordered by coach) Oehler v. Dioceses of Buffalo, 277 A.D. 2d 967 (N.Y. 2000) (student did not intend his hand to go through a pane of glass while gathering on a staircase during a class activity) Mooney v. North Penn School District, 493 A. 2d 795 (P.A. Cmwlth 1985) (blindfolded student did not intend to fall on steps during simulated Iranian hostage crisis); Larry v. Commercial Union Insurance Co., 277 N.W. 2d 821 (Wis. 1979). (Toddler injured at daycare when five year old picked her up and dropped her). Though not an exhaustive list of all the cases cited in the Moores'

brief, the above review shows that the cases cited are factually distinguishable and cannot be persuasive on issues of recreational use immunity.

[¶50] Furthermore, the above cited cases did not involve the application of a recreational use immunity statute similar to North Dakota's.

[¶51] As noted previously, the Moores' efforts to negate application of the recreational use immunity statute to the School District through allegations of Ms. Hart's negligent supervision or wrongful acts must fail. Fastow stands for the proposition that claims concerning negligence of a political subdivision employee, when related to the use of property, are barred recreational use immunity in the same way as claims related to the conditions of the property itself. Fastow, 414 N.W. 2d at 509. As noted by the district court, the alleged negligent or wrongful acts of Ms. Hart related entirely to M.M.'s use of the Discovery stage as a platform upon which to practice jumping his bike. (A.A. p. 36). Thus, the scope of the recreational statute bars all the claims brought by the Moores against the School District. Id.

[¶52] For the first time the Moores argue that Ms. Hart is a recreational user under N.D.C.C. § 53-08-06. (Appellant's Brief ¶ 18) N.D.C.C. § 53-08-06 provides as follows:

> **53-08-06. Duty of care or liability for injury.** . . . 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.

This argument must fail because Ms. Hart was not on the District's property for recreational purposes. Whether Ms. Hart was a user of the Discovery premises for "recreational purposes" requires looking at her purpose in being at the school. Ms. Hart's purpose in being at Discovery during the school day was for employment. Thus,

N.D.C.C. § 53-08-06 does not operate to make Ms. Hart a "recreational user." Leet, 2006 ND 191. 721 N.W.2d 398.

[¶53] Under the recreational use immunity statute, it is not required that a claim be based on a dangerous or defective condition. In Fastow, the negligence allegations were based on breaches of duty to provide proper and adequate lifeguard protection among other things as well failure to properly supervise and manage the facilities. Fastow, 415 N.W. 2d 505, 507. The Moores' allegations are based on similar failures to provide adequate supervision claims and, in like in Fastow, the recreational use immunity statue properly applies.

[¶54] Affording the School District the liability protection of the statute does not result in an abrogation of all political subdivision liability for schools. The decision here is necessarily limited to the facts of the case. M.M's activity was recreational (bike jumping) but it was also educational in that M.M.'s intent in practicing the jump that day, in the auditorium, without his teacher's knowledge, was to master the jump for the 60's day performances. M.M.'s injuries arose from his choice to use his free time to practice a bike jump from the Discovery stage.

[¶55] Affirming the grant of summary judgment to the School District on the basis that it was entitled to immunity as an owner of recreational lands in this case does not negate the liability of political subdivisions under N.D.C.C. § 32-12.1-03 and 32-12.1-04. It was M.M.'s intentional use of the School District's stage as a bike jump during his own free time and not part of a sanctioned school activity that permits application of immunity. The Moores reference to dissimilar factual scenarios cannot further their cause.

"Reference to abstract, factual dissimilar hypotheses. . . are not helpful." Stokka v. Cass County Electric Cooperative, 373 N.W. 2d 911, 915.

[¶56] The trial court applied the recreational use immunity statute as written and interpreted by this court in Fastow and Leet. The court's decision was based on the facts of this case, specifically M.M.'s voluntary intentional use, during his free time, of the School District's stage as a platform to practice a bike jump. This activity was recreational and because M.M hoped he could do the stunt in an upcoming class activity, it was also education related. This determination does not wholly relieve schools that have custody of children under mandatory attendance laws, from exercising care for their safety on school property during those hours.

II. The Moores Cannot Assert a Constitutional Challenges for the First Time on Appeal.

[¶57] The Moores' assertion of a violation of their equal protection rights pursuant to United States and North Dakota Constitutions must be summarily dismissed. Nowhere in the Moores' brief do they assert that they raised this constitutional argument in the district court. The summary judgment transcript is also void of such claim by the Moores. Nowhere in the Moores' briefs in opposition to summary judgment did they raise a constitutional issue. No constitutional claim is contained within the Moores' Complaint. It is a well known precept that an issue cannot be presented for the first time on appeal. An issue not presented to the trial court will not be considered for the first time on appeal. Swenson v. Northern Crop Insurance, Inc., 498 N.W. 2d 174, 178 (N.D. 1993). This ensures the development and review of the issues in the lower court.

[¶58] This constraint applies with particular force to constitutional issues. Id. *citing* Gange v. Clerk of Burleigh County District Court, 429 N.W. 2d 429, 432 (N.D. 1988). A

party challenging the constitutionality of a statute "must bring up the 'heavy artillery. . . or forgo the attack entirely." Allied Mutual Insurance Co. v. Director of the North Dakota Department of Transportation, 1999 N.D. 201, ¶ 7, 589 N.W. 2d 201, 203. Such heavy artillery is necessary because a statute carries a strong presumption of constitutionality unless the challenger clearly shows the statute contravenes the state or federal constitutional. Id.

[¶59] The Moores did not present this constitutional challenge in the district court. Thus, it is proper for this court to deny consideration of the issue because it was not raised in a timely manner to allow for meaningful examination by the trial court.

CONCLUSION

[¶60] Based on the foregoing, the district court's grant of summary judgment to the Fargo Public School District is properly affirmed. M.M. jumped his bike off the stage of Discovery auditorium after school hours and without anyone's permission. This was an intentional act which specifically related to M.M.'s use of School District property for his own recreational purposes. All the allegations in this case relate to M.M's use of the Discovery stage as a platform for a bike jump. The district court correctly found the recreational use immunity was available to the School District. Finally, the Moores failed to properly raise their constitutional challenge in the district court and therefore, it cannot be properly raised or considered for the first time on appeal. For the reasons stated herein and for the arguments submitted by Appellee Hart, Appellee Fargo Public Schools respectfully requests that the court affirm the district court's grant of summary judgment.

Dated this 29th day of October, 2008.

s/ Jane L. Dynes

Ronald H. McLean (ID# 03260)
Jane L. Dynes (ID# 04495)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
(701) 232-8957

AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS

M.M. and Thomas Moore
vs.
Fargo Public School District No. 1, and Eugenia Hart
Supreme Court No. 20090121
Cass County Civil No. 09-07-C-01528

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

The undersigned, being first duly sworn, deposes and says that she served the attached

BRIEF OF APPELLEE FARGO PUBLIC SCHOOLS

on October 30, 2009, by sending a true and correct copy thereof by electronic means to the following e-mail addresses, to-wit:

Michael W. Unger
90 South 7th Street, Suite 4700
Minneapolis, MN 55402
E-Mail mwunger@ungerlegal.com

Craig E. Johnson
Johnson, Ramstad & Mottinger PLLP
15 Ninth Street South
Fargo, ND 58103
E-Mail cjohnson@jrmlawfirm.com

Michael J. Geiermann
Schulz Geiermann & Bergeson
425 North Fifth Street
P.O. Box 2196
Bismarck, ND 58502-2196
E-Mail gmann@slgblaw.com

To the best of affiant's knowledge, the e-mail address above given is the actual address of the party intended to be so served as published in the North Dakota Supreme Court's online directory. The above documents are e-mailed in accordance with the provisions of the North Dakota Rules of Appellate Procedure and Administrative Order 14.

s/ Jane L. Dynes
Jane L. Dynes

Subscribed and sworn to before me this 29th day of October, 2008.

s/ Robyn Maxwell
(SEAL) Robyn Maxwell, Notary Public
State of North Dakota
My Commission Expires April 5, 2012

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellants in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and (7)(A) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,298.

Ronald H. McLean (ID# 03260)
Jane L. Dynes (ID# 04495)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
(701) 232-8957

By s/ Jane L. Dynes
Ronald H. McLean
Jane L. Dynes