20090121

SUPREME COURT OF THE STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 16, 2009
STATE OF NORTH DAKOTA

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

APPELLANTS' REPLY BRIEF

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

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I. THE RECREATIONAL IMMUNITY STATUTE DOES NOT SHIELD THE SCHOOL DISTRICT FROM LIABILITY FOR CLAIMS THAT ARE NOT BASED UPON ITS DUTIES AS A LANDOWNER

[¶1]Fargo Public School's brief does not address the primary issue raised on appeal: whether the recreational immunity statute only applies to abrogate liability based *on duties arising from the ownership of land*. They argue that, under *Fastow v. Burleigh County Water Resource District*, 415 N.W. 2d 505 (N.D. 1987), *any claim for injury occurring on premises* falls within the sweep of the immunity statute. This is simply wrong. In *Fastow*, the question of whether there was any theory of liability that did not derive from the duty of a landowner was never even raised. Although the opinion does not dwell on the theories of negligence, every theory mentioned clearly dealt with a landowner's responsibility to make the property it controlled safe for use. 415 N.W.2d at 507. Whether it be providing an emergency phone, clearing away foreign objects, furnishing a lifeguard, or the like, all theories of recovery in *Fastow* had to do with the right of control of the property and the alleged failure to exercise it reasonably to protect property users. The *Fastow* decision made clear that the statute applied to direct landowner liability or vicarious liability for negligent acts of the landowner's employees "which relate to the condition of the property". *Id* at 509. This present case is markedly different. The claims advanced by appellant focused upon the relationship of the teacher and student and the duties that flow from that relationship.

[¶2]Fargo Public Schools asserts that "this is not a wrongful supervision case as to the School District". Although the reason for this position is unclear, since no authority is cited, it seems to be their position that it has no vicarious liability for a

teacher's breach of the duty to safeguard her students while in the course and scope of her employment. They assert that the cases cited by appellant as examples involving claims for negligent teacher supervision on school premises are factually distinguishable because the students did not "intend" to use the school facility for "recreational purposes" after school hours. Assuming for the sake of argument that these are areas of factual differences, Fargo Public Schools fails to say how the actions of the student are relevant to alter the teacher's legal duty of care or to relieve it of vicarious liability for her breaches of that duty. It would seem to be their position that so long as an injury occurs from an activity that may be characterized as "recreational" and happens to be on school property, then all potential sources of liability, not merely *landowner liability*, is immunized. If this is the Fargo Public School's interpretation of the recreational immunity statute, then it is a position that finds no support in the language of the statute itself, which states only that "an owner of land owes no duty . . .", N.D.Cent.Code § 53-08-02, and goes on to provide that "nothing herein limits in any way" the duty of a non landowner. N.D.Cent.Code § 53-08-06. The scope of this immunity statute should not be extended beyond application to landowner-based liability claims as the words of the statute indicate. All other common law or statutory liabilities or responsibilities remain intact.

II. EXTENDING THE RECREATIONAL IMMUNITY STATUTE TO ABOLISH CLAIMS FOR TEACHER NEGLIGENCE ON SCHOOL PREMISES VIOLATES EQUAL PROTECTION OF THE LAWS

[¶3]Appellees fail to articulate a constitutional basis for the expansive application of the recreational immunity statute to preclude claims for teacher negligence in the course of "educational" activities on school grounds. Instead they cite authority that the court should not entertain the constitutional issue because it was not addressed below. None of the authorities they cite involved an issue of the unconstitutional *application* of an otherwise valid statute which, like this one, did not even become an issue until following the trial. In this case, the trial court did not issue a decision applying the recreational immunity statute until the time that it entered final judgment after the trial and verdict. This appeal is the very first and most appropriate opportunity and forum for the parties to address the constitutional implications of the decision.

[¶4]This court has described the practice of not addressing issues previously raised below as a *general* rule. *See eg. In re R.A.S*, 2008 ND 185, 756 N.W.2d 771. As a general rule of sound appellate discretion, it is not one that is applied in every instance. *See eg. Federal Land Bank of Saint Paul v. Gefroh*, 418 N.W. 2d 602, 603 (N.D. 1988). Among the considerations that guide the court's exercise of discretion is the notion that the parties had ample opportunity to raise the issue in the court below and did not do so. *See eg. Peters-Reimers v. Reimers*, 2001 ND 62, ¶25, 624 N.W.2d 83, 90.

[¶5]Another evident discretionary consideration is the court's long stated presumption of the constitutionality of statutes. *See Allied v. Director of North*

Dakota Dept. of Transp., 1999 ND 2, ¶7, 589 N.W.2d 201, 203. In deference to the actions of the other branches of state government, the court has said it would not allow a tardy constitutional attack, but rather require parties to "bring out the heavy artillery" early. *Id.* In this case, however, the issue of the court's application of the statute neither raises a challenge to the statute itself, nor does it involve a late articulation of a longstanding issue. Since the issue did not arise until the trial court issued its post trial order for judgment, the "heavy artillery" was brought out at the very first inkling that it was appropriate.

[¶6]Another reason that the court should address the constitutional issue is because this case only raises an issue of application. The significance of a constitutional issue raised by application of the statute, versus a challenge to the facial validity of the statute itself, is best demonstrated by the response of the Attorney General to the notice of the issue in this case which is part of the record on appeal. The State has declined to intervene, because it sees no threat to the State's interest by an attack on the application of the statute.

[¶7]Since neither the interest of the State or the public in protecting its laws is at issue here, the only remaining considerations to guide the exercise of the court's discretion are the interests of justice in this case and the protection of what this court has termed an important constitutional right to seek redress in the courts. These considerations strongly favor addressing the constitutionality question. There is little to be gained by deferring the issue, since such a broad application of the statute will inevitably result in the same constitutional challenge in another case. Both appellees have had the same opportunity as appellant to brief this issue. The court

would be wise to exercise its discretion and end further uncertainty about the constitutional validity applying recreational immunity to limit non-landowner duties of care.

III. THE TRIAL COURT ERRED BY SEGMENTING THE EVIDENCE OF TEACHER HART'S FAULT AND "DISMISSING" PART OF THE CLAIM TO EXCLUDE SUBSTANTIAL EVIDENCE OF HART'S ACTIONS LEADING TO THE DANGEROUS STUNT REHEARSAL

[¶8]Since appellant was required to prove teacher Hart's culpability by "clear and convincing" evidence, the court's error in restricting proof of Hart's role in bringing about the bike stunt rehearsal was particularly prejudicial to appellant's opportunity for a fair trial of the claim against Hart. While the standard of proof is certainly relevant to determining whether there is sufficient evidence to permit a trial of a claim against Hart personally, there is no authority cited for the notion that each and every aspect or item of proof of Hart's conduct must be weighed in isolation and separately judged by the "clear and convincing" standard. Traditionally, it is the court's role to assess the *totality of the evidence* when determining whether summary judgment is warranted. *Eg. Van Vleet v. Pfeifle*, 289 N.W.2d 781, 785 (N.D. 1980) ("We think that the above circumstances and testimony, together with the totality of the evidence in the record, raised a genuine issue of fact . . ."). The court must review the evidence in the light most favorable to the party opposing the motion and give all inferences favorable to that party. *Keator v. Gale*, 1997 ND 46, 561 N.W.2d 286.

[¶9]Since the trial court's severe restriction of proof was based on its strict appraisal of narrowed relevance in light of its "dismissal" of the contention that Hart was responsible for giving the boys the notion to perform the stunt in school, it is really the erroneous granting of "partial summary judgment" as a matter of law that is before this court. The trial court's legal rulings are subject to de novo review. Legal error is not reviewed by the standard of "abuse of discretion" as Hart would seem to imply.

[¶10]The trial court's approach of dividing evidence related to the plan to *perform* from evidence of the plan to *rehearse*, defies logic and common sense. The concepts of performance and rehearsal are linked, not distinct. A rehearsal is "practice, usually private, in preparation for a public performance". *Random House College Dictionary*, 1st Ed. Rev.,(1980) p. 1112. The facts surrounding the plan to perform were inextricably bound up with the act of rehearsal.

[¶11]Hart's argument that the issue of her "suggestion" of this stunt requires direct evidence that she "approved" it, is an unduly narrow view of the evidence. The circumstantial evidence of her role is substantial, and circumstantial evidence is of equal value to direct evidence. *See State v. Emmil*, 172 N.W.2d 589, 591 (N.D. 1969). The allegation that Hart "suggested" the stunt does not mean she gave an express or explicit direction, as the trial court seemed to think. "Suggest" means to "mention or introduce (an idea, proposition, plan, etc.) for consideration or possible action". *Random House College Dictionary*, 1st Ed. Rev.,(1980), p. 1314. It means "to introduce indirectly to the thought; to propose with diffidence or modesty; to hint; to intimate". *Black's Law Dictionary*, 5th Ed.,(1979), p. 1285.

[¶12]Despite the brain injury that prevented M.M. from testifying on the subject of what he told his teacher and what she said in response, there was still ample circumstantial evidence of Hart's role in approving the idea for the stunt and of her role in introducing the notion that M.M. would be allowed to perform the bike stunt that he was trying to rehearse when he was injured. By restricting full proof of Hart's conduct, the trial court's rulings resulted in a warped presentation of the true facts and dealt a serious blow to appellant's prospect for a full and fair jury consideration of the issue of Hart's responsibility leading to this injury.

[¶13]The jury should have been allowed to consider Hart's prior history with the approval of the D.H. stunt, and her classroom use of the video of that stunt as part of the factual backdrop that colored the other testimony of her knowledge and approval. There is strong circumstantial evidence that Hart knew and approved M.M.'s rehearsal plan. The testimony of the three parents was consistent with the other evidence when viewed in its totality. Since J.B. testified that he did not tell Hart, he indicated that the only way she would have learned of the rehearsal was through the conversation with M.M. Although Hart's brief seeks to imply that just because J.B. did not tell Hart of the rehearsal this somehow proves M.M. did not, there was circumstantial evidence to the contrary. It was uncontested that Hart spoke to M.M alone about this plan to perform the stunt only minutes before he rehearsed. It is also uncontested that while J.B. was away and just after Hart talked to M.M. and left him outside the auditorium, another teacher saw M.M try to enter the auditorium with his bike at the end of the day and that, in contrast to J.B.'s self described "sneaking", M.M. openly greeted the teacher with bike in hand as he tried the doors

to the band room and that he did not act furtively or in any way like he was "sneaking". The testimony of Hart's three admissions of knowledge, if believed, left only one explanation of the source of that knowledge and certainly the jury, knowing Hart's prior history, would have been reasonable to disbelieve her denials of knowledge. Given her prior history, if fully proved to the jury, Hart's effort to suggest she would never be the type to permit such a foolish and dangerous act against all school policy and procedure, would have rung hollow to the say the least.

[¶14]The evidence of Hart's actions concerning the prior bike stunt were all plainly relevant in the case, and yet the trial court "dismissed" the theory that Hart suggested the stunt idea and strictly limited the proof of Hart's prior conduct as well as the conversations she had about performing the stunt on 60's day.

[¶15]The trial court ruling prevented a full and fair trial of Hart's responsibility. Instead, Hart was allowed to come into the courtroom and claim the stunt was "mortifying", that she would always require use of a helmet, and that she did nothing but discourage the idea. This defense was presented to the jury with confidence, because of the trial court's erroneous legal ruling, that most of her prior contradictory conduct involving the D.H. stunt would never be shared with the jury. Hart's argument that this jury simply believed her denials of knowledge may indeed be right. If so, however, that conclusion was not reached after a full and fair opportunity to consider M.M.'s proof . The trial court's ruling should be reversed and the issue of Hart's liability should be retried without the erroneous and substantial restriction of proof.

CONCLUSION

[¶16]Appellants submit that the judgment should be reversed and the case remanded for trial of the allegations of negligence, gross negligence, willful or wanton misconduct by Hart and the vicarious liability of the Fargo Public Schools for the injuries sustained by appellants M.M. and Thomas Moore. Appellants' request that the new trial be conducted without limitation of proof of Hart's role in suggesting and approving the stunt performance and rehearsal on this occasion or previously.

Respectfully submitted,

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