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CLERK OF SUPREME COURT

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

DEC 17 2009

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Al Skogen and Mike Skogen and )  
 Jason Bonde, )  
 )  
 Plaintiffs and Appellants, )  
 )  
 vs. )  
 )  
 Hemen Township Board of )  
 Township Supervisors, )  
 )  
 Defendants and Appellee, )  
 )  
 vs. )  
 )  
 Torin Swartout and Kevin )  
 Swartout, )  
 )  
 Intervenor. )

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STATE OF NORTH DAKOTA  
Supreme Court # 20090301  
District Court # 08-C-0254

APPEAL FROM ORDER AND JUDGMENT DATED AUGUST 24, 2009 AND  
ORDER DENYING MOTION TO RECONSIDER DATED SEPTEMBER 15, 2009

DISTRICT COURT OF THE SOUTHEAST JUDICIAL DISTRICT THE  
HONORABLE RICHARD W. GROSZ, PRESIDING BARNES COUNTY  
DISTRICT COURT NO. 08-C-0254

APPELLEE'S BRIEF

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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF ISSUES .....	1
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	1
LAW AND ARGUMENT .....	5
A. Standard Of Review .....	5
B. N.D.C.C. §32-12.1-03(3)(c) does apply under the facts and circumstances of this case	
CONCLUSION .....	8
APPENDIX	

## TABLE OF AUTHORITIES

<b>CASES:</b>	<b>Page</b>
<i>Rojas vs. Workforce Safety Insurance</i> , 2006 N.D. 221, ¶13, 723 N.W.2d 403, 406 . . . . .	5
<i>Rydberg vs. Rydberg</i> , 2004 N.D. 73, ¶10, 678 N.W.2d 534. . . . .	5
<i>BASF Corp vs. Symington</i> , 512 N.W.2d 692, 695 (N.D. 1994) . . . . .	5
<i>In re K.G.</i> 551 N.W.2d 554, 556 (N.D. 1996) . . . . .	5
 <b>STATUTES:</b>	
N.D.C.C. §32-12.1-03(3)(c) . . . . .	1, 3, 4, 5, 6, 7
N.D.C.C. §24-03-06 . . . . .	2, 4, 7
N.D.C.C. §32-06-02 . . . . .	3
N.D.C.C. §32-12.1-03(3)(d) . . . . .	6
N.D.C.C. §32-12.1-03(3) . . . . .	6
N.D.C.C. §58-14-01 . . . . .	7, 8
N.D.C.C. §58-03-15 . . . . .	8
 <b>OTHER:</b>	
Rule 7 of North Dakota Rules of Civil Procedure . . . . .	3

## **I. STATEMENT OF ISSUES**

1. Whether N.D.C.C. §32-12.1-03(3)(c) applies to bar Plaintiffs' claim for money damages against Hemen Township?
2. Whether the Court properly granted intervention to the Swartout Family Trust in this case?

## **II. STATEMENT OF THE CASE**

Plaintiff Al Skogen (hereinafter "Skogen") appeals from a decree of dismissal of the Barnes County District Court, the Honorable Richard Grosz presiding, dated August 19, 2009 and an Order denying Motion for Reconsideration issued by Judge Grosz on or about September 15, 2009. The end result of the decisions of Judge Grosz were dismissal of all claims of Skogen against the Hemen Board of Township Supervisors (hereinafter "Hemen Township").

The case was originally commenced by a Summons and Complaint dated March 6, 2008 wherein Skogen sought to compel installation of a culvert in a Hemen Township road and for money damages. Hemen Township timely answered the Complaint. Skogen served an Amended Summons and Complaint dated May 1, 2008 setting forth additional grounds upon which he was relying for the relief requested. Hemen Township answered the Amended Complaint.

Thereafter, Skogen brought a motion before the District Court seeking injunctive relief in the form of placement of a culvert in the Hemen Township road in question. On or about June 25, 2009 the Swartout Family Trust brought a motion to intervene in the case. That motion was resisted by Skogen.

The case was assigned to the Honorable Judge Richard Grosz. In a memorandum dated July 9, 2009, Judge Grosz set forth preliminary opinions as to the status of the case and invited

briefing by the parties as to whether Skogen's claims for injunctive relief and/or money damages could be maintained. After submissions were made by the parties the Court issued a memorandum dated July 29, 2009, dismissing Skogen's claims for relief with prejudice.

Skogen brought a motion for reconsideration and clarification dated August 24, 2009. The Court issued a memorandum dated August 27, 2009 clarifying his previous memorandum opinions dismissing Skogen's claims with prejudice. The Court's Order denying the Motion for Reconsideration is dated September 15, 2009. Skogen timely brought an appeal from the Orders of the Court dismissing his claims with prejudice.

### **STATEMENT OF FACTS**

Hemen Township agrees with Skogen that there was no evidentiary hearing in this matter and no transcript of any proceedings. Thus, the appeal is based solely on the record before the District Court in the form of the pleadings and submissions of the parties.

This case was originally commenced by a Summons and Complaint dated March 6, 2008. (App. 3). In the Complaint Skogen alleged that a Township road adjacent to his property was acting as an obstruction to a natural waterway in violation of N.D.C.C. §24-03-06. (App. 3). The Complaint sought relief from the Court in the form of an Order compelling Hemen Township to install a culvert in its roadway and for money damages allegedly caused by the obstruction of water by the roadway. (App. 3).

Hemen Township timely answered the Complaint setting forth its defenses to Skogen's claims. (App. 4). Skogen served an Amended Summons and Complaint on May 1, 2008 setting forth additional grounds allegedly supporting his requested relief. (App.5). Hemen Township answered the Amended Complaint of Skogen. (App. 6). Skogen, by Notice of Motion and Motion for Injunctive Relief dated May 15, 2009, next sought to have the District Court grant

injunctive relief in the form of requiring Hemen Township to install a culvert in the roadway allegedly obstructing a natural waterway. (App. 7). This motion by Skogen was based on Rule 7 of the North Dakota Rules of Civil Procedure and N.D.C.C. §32-06-02. (App. 7).

The filing of the Motion for Injunctive Relief prompted the Swartout Family Trust to make a Motion to Intervene in this action dated June 25, 2009. (App. 8). The Swartout Family Trust claimed that it had interest that would be adversely affected if the Court proceeded with the litigation in its absence and claimed that its interest were not adequately protected by the presence of any other party to the litigation. (App. 8). Hemen Township took no position on the Motion to Intervene and did not oppose the same. Skogen filed a brief in opposition to the Motion for Intervention dated July 6, 2009, claiming that no statutory authority supported the Swartout Family Trust intervention and that the claims and assertions of the Swartout Family Trust should be handled in another forum or venue. (App.9).

Judge Richard Grosz of the Barnes County District Court had been assigned to the case. On or about July 9, 2009. Judge Grosz issued a Memorandum suggesting that the claim for injunctive relief should be dismissed for Skogen's failure to exhaust administrative remedies. (App. 10). Judge Grosz specifically indicated that his analysis of that issue was interlocutory only and invited the parties to make submissions arguing that issue to him. (App. 10). After submissions were made by all interested parties the court issued a Memorandum opinion dated July 29, 2009. (App. 11). In that Memorandum the Court granted the Swartout Family Trust motion to Intervene. (App. 11).

The Memorandum went on to indicate that Skogen's claim for injunctive relief is properly handled through the appeal procedures set forth under North Dakota Law and not through an action before the District Court. (App. 11). Lastly, the Court opined that Skogen's

claim for money damages failed because N.D.C.C. §32-12.1-03(3)(c) barred the cause of action. (App. 11). This decision was based on the Court's determination that an order of a Township Board of Supervisors concerning installation of a culvert was the type of order referenced in N.D.C.C. §32-12.1-03(3)(c). (App. 11).

The Court entered an Order for Judgment and Judgment dated August 18, 2009 completely dismissing Skogen's claims with prejudice. (App. 12). Skogen then brought a Motion and Notice of Motion for Reconsideration and Clarification dated August 24, 2009. (App. 13). In his Motion for Reconsideration Skogen complained to the District Court that the statutory authority relied upon by the District Court addressed discretionary functions of the Hemen Township Board and that insufficient evidence and facts had been presented to allow the Court to determine whether or not the Hemen Township Board acted discretionarily or whether it's conduct was mandated by N.D.C.C. §24-03-06. (App. 13).

Judge Grosz issued a Memorandum opinion dated August 27, 2009 clarifying his position and affirming his denial of Skogen's claims in their entirety and with prejudice. (App. 14). Judge Grosz indicated that the discretionary immunity portions of North Dakota law were not implicated in this matter as N.D.C.C. §32-12.1-03(3)(c) does not involve the discretionary function exception to political subdivision liability. (App. 14). Judge Grosz went on to affirm that Hemen Townships Order denying placement of a culvert in it's roadway fit squarely within the provisions of the law upon which his decision was based. (App. 14). The Court also affirmed it's decision that the seeking of injunctive relief by Skogen in the instant lawsuit was improper as the appropriate remedy was pursuit of an administrative appeal pursuant to North Dakota Law. (App. 14).

By Notice of Appeal dated October 13, 2009, Skogen has appealed the Court's dismissal of his claims for relief. (App. 15). Specifically, Skogen has appealed Judge Grosz's Order and Judgment Dismissing Plaintiff's Action dated August 24, 2009 and Order Denying Motion To Reconsider dated September 15, 2009. (App. 16).

### LAW AND ARGUMENT

#### **A. Standard of Review**

Skogen has chosen to appeal Judge Grosz's Order denying his claim for monetary damages against Hemen Township based on application of N.D.C.C. §32-12.1-03(3)(c). Skogen has not taken issue with the Court's dismissal of his claim for injunctive relief and those claims will not be addressed herein. Skogen has also chosen to appeal the Court's granting of the Swartout Family Trust's Motion for Intervention. As Hemen Township did not take any position in regards to the Motion for Intervention at the District Court level it will not be addressing those issues before this Court. Thus, Hemen Township will allow the other parties to set forth the appropriate standard of review for consideration of the Court's granting of the Motion to Intervene.

As to the standard of review for application of N.D.C.C. §32-12.1-03(3)(c) it is well established that the application and interpretation of statutes are questions of law fully reviewable by the Supreme Court. *Rojas vs. Workforce Safety Insurance*, 2006 N.D. 221, ¶13, 723 N.W.2d 403, 406; *Rydberg vs. Rydberg*, 2004 N.D. 73, ¶10, 678 N.W.2d 534. Further, it is noted that the primary objective in interpreting a statute is to determine the legislatures intent. *BASF Corp vs. Symington*, 512 N.W.2d 692, 695 (N.D. 1994). This Court has long followed the "cardinal rule" of statutory construction that it's interpretation must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives



of the statutes. *In re K.G.* 551 N.W.2d 554, 556 (N.D. 1996).

Utilizing the above standard of review and guidelines for interpreting statutes it is seen that the District Court in this case properly applied N.D.C.C. §32-12.1-03(3)(c) to this case. As a result the District Courts dismissal of Skogen's claims for monetary damages against Hemen Township must be affirmed.

**B. N.D.C.C. §32-12.1-03(3)(c) does apply under the facts and circumstances of this case.**

N.D.C.C. §32-12.1-03(3)(c) governs the liability of political subdivisions. In subsection 1 of that statutory enactment the legislature set forth that political subdivisions can be liable in money damages where injuries are caused by employees of the political subdivision or injuries are caused from some condition or use of a tangible real or personal property by a political subdivision. See N.D.C.C. §32-12.1-03(3)(c). This liability is not without limitations however.

In fact, the statutory enactment of N.D.C.C. §32-12.1-03 contains specific exceptions to political subdivision liability created by the statutory enactment. As is pertinent to this case, N.D.C.C. §32-12.1-03(3)(c) states as follows:

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

This provision is a stand alone exception to political subdivision liability and is not dependent on any other portion of the statutory enactment. Specifically, it has no relation to N.D.C.C. §32-12.1-03(3)(d) which sets forth the discretionary function exception to political subdivision liability. Discretionary function analysis plays absolutely no role in determining whether the Court's dismissal of Skogen's claims for money damages was appropriate.

To Hemen Township's mind the true issue in this matter is relatively simplistic. It boils

down to whether or not the Hemen Townships Order denying the request for placement of a culvert in one of it's roadways was the type of act covered by the exception to political subdivision liability under N.D.C.C. §32-12.1-03(3)(c).

Hemen Township would answer that inquiry in the affirmative. Regardless of the underlying procedural posture in which the issue was presented to the Township Board the inescapable facts are that the Township Board was requested to make a determination as to whether N.D.C.C. §24-03-06 applied to compel action on its part. Its decision to issue an order denying any obligation under N.D.C.C. §24-03-06 falls, as indicated by the District Court, squarely within the confines of subdivision (3)(c) of N.D.C.C. §32-12.1-03.

It seems that Skogen's argument in this appeal is that the Township's Boards decision was erroneous. That is an irrelevant inquiry under the exception relied upon the District Court and Hemen Township. It seems abundantly clear that the legislatures intent in enacting N.D.C.C. §32-12.1-03(3)(c) was to exclude a political subdivisions orders, decisions or mandates from being the basis for a claim for money damages.

This makes clear and logical sense when it is considered that other portions of North Dakota law allow remedies to individuals where they take issue with the order, decree or mandate of a political subdivision as was pointed out by the District Court. It is also easily seen that if a political subdivisions orders, grant of administrative relief, decrees, or mandates could be the subject of claims for money damages a plethora of lawsuits would result and the functioning of political subdivisions would essentially bog down.

As to Skogen's argument that the District Courts interpretation and application of N.D.C.C. §32-12.1-03(3)(c) does violence to N.D.C.C. §58-14-01 Hemen Township believes that the District Court amply addressed that issue and, furthermore, did so correctly. The

District Court pointed out that when you look to N.D.C.C. §58-14-01 it incorporates the provisions of N.D.C.C. §58-03-15 which provides that actions must be “conducted as any other action or proceeding of a similar kind is conducted”. The District Court properly pointed out that in proceeding to seek relief from an administrative decision of a Township Board the proper remedy is an Administrative Appeal and not an action in District Court. Put simply, the manner in which Skogen sought to recover money damages from Hemen Township was not appropriate. Therefore, the District Court must be affirmed.

### CONCLUSION

For all the foregoing reasons the Hemen Township Board of Township Supervisors respectively requests that the Court affirm dismissal of Skogen’s claims in their entirety and award the Hemen Township Board of Township Supervisors it’s costs and disbursements and such other and further relief as allowed by North Dakota Law.

Dated: December 14<sup>th</sup>, 2009.

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