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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Pamela Neppel, individually and as the parent and legal guardian of Z.N., an incapacitated individual, Plaintiff, Appellant, Cross-Appellee vs. Development Homes, Inc., Defendant, Appellee, and Cross-Appellant Sandra J. Marshall, individually; Mark Indvik, individually, and Mark and Amelia Indvik as Co-Guardians of S.O.; Konah Zunugo, individually, Defendants and Appellees.	Supreme Court No. 20200036 Civil No. 18-2017-CV-03249

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE

Appeal from Order for Judgment dated September 12, 2019
Appeal from Judgment dated September 12, 2019
Appeal from Order for Amended Judgment dated January 21, 2020
Appeal from Amended Judgment dated January 24, 2020
In the District Court of Grand Forks County
The Honorable Lolita Hartl-Romanick, Presiding

Supreme Court No. 20200036
Grand Forks County No. 18-2017-CV-03249

Oral Argument Requested

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LEGAL ARGUMENT

I. The district court and Appellees are not entitled charitable organization immunity under N.D.C.C. ch. 32-03.3.

A. Appellees' and the district court's reading of the legislative history would avail nearly all non-profit organizations to charitable immunity.

[¶1] Appellees Development Homes, Inc, Sandra Marshall, Mark Indvik, Amelia Indvik, and Konah Zunugo (collectively "DHI") assert the district court's interpretation and application of N.D.C.C. ch. 32-03.3 was not contrary to legislative intent. See Appellees' Brief, at ¶ 26. DHI further asserts the district court was correct in applying N.D.C.C. ch. 32-03.3 "to include only nonprofit charitable organizations which are supported by charitable contributions or contracts with the State." Id. at ¶ 27. In its Order on Defendants' Post-Trial Motion to Amend Judgment Re: Status as Charitable Organization the district court provided criteria, in accordance with its interpretation of H.B. 1452, for charitable organization immunity: (1) non-profit, tax exempt status as a 501(c)(3) corporation; (2) provide relief to the poor, disabled, underprivileged, or abused persons; (3) support of youth programs; or (4) prevention of abuse to children and vulnerable adults. See App'x, at 322 ¶¶ 34-35. In an effort to provide more clarity on who is a charitable organization under Chapter 32-03.3 the Court simplified the criteria: "[D]etermination of whether an organization is a charitable organization is ***based solely upon the organization's status as a nonprofit and whether it provides relief to any one or more of the statutorily listed groups***." Id. at 329 ¶ 47.

[¶2] DHI parrots the district court's holding that the plain language of N.D.C.C. ch. 32-03.3 is controlling, and. See Appellees' Brief, at ¶¶ 28-29 and App'x, at 321 ¶ 32. "Under the plain language of the statute, whether an entity is a charitable organization is based

solely on the organizations status as a nonprofit and whether it provides relief to any one or more of the statutorily listed groups." See Appellees' Brief, at ¶ 29. Accordingly, under this plain language argument the definition of a charitable organization under Chapter 32-03.3 is practically all-encompassing. See id. ("Whether an entity is a charitable organization is based solely on the organizations status as a non-profit and whether it provides relief to any one or more of the statutorily listed groups.")

[¶3] If the district court and DHI's plain language approach is adopted by this Court, the criteria for entitlement to charitable organization immunity is simply the organization's status as a non-profit and providing relief to one of the statutorily listed groups. Under that interpretation, even the groups discussed as being excluded in the legislative text of H.B. 1452 would qualify for charitable organization immunity—Planned Parenthood, PETA, Ducks Unlimited, economic development groups, fraternal organizations, and civic clubs. Charitable organization immunity would also apply to hospitals, nursing homes, all group homes in North Dakota, Boys and Girls Scouts of America, and other non-profit organizations not specifically excluded in the text of H.B. 1452 if they provided relief to one of the enumerated groups in Chapter 32-03.3. For example, the Good Samaritan Nursing Homes throughout the state are non-profit organizations that provide relief to the sick, elderly, and vulnerable people. Under DHI's and the district court's interpretation, Good Samaritan is an organization to which N.D.C.C. ch. 32-03.3 would apply.

[¶4] DHI asserts the plain language of Chapter 32-03.3 controls, and limits of liability insurance are not determinative of whether an organization is entitled to charitable immunity. See id. The legislature passed N.D.C.C. ch. 32-03.3 to lower insurance premiums. In the text of H.B. 1452, representatives repeatedly use limits of liability

insurance to differentiate between which organizations would qualify. See Index 284, at pp. 3, 4, 8, 9, and 15 of 26. Representative Klemin testified that H.B. 1452 "really deals with caps on claims of liability. . . . I think in this situation ***we are trying to lower the cost of insurance to these organizations so they can get insurance***." Index #284, at p. 8 of 26 (emphasis added). Representative Griffin echoed that statement by providing "I understand the intent of this bill is to lower insurance premiums. . . ." Id. at p. 15 of 26.

[¶5] DHI has liability coverage of two million dollars. See Index # 273. DHI's revenue from charitable donations accounts for 0.1% of its total revenue. See Index # 269, at 15:1-9, and Index # 260. The charitable donations that make up that revenue come from the greater Grand Forks community's gambling debts. DHI is not one of the "most charitable, charitable organizations" to which charitable immunity was intended to apply.

[¶6] Finally, DHI asserts the argument that the legislature intended to grant charitable immunity to only a limited class of severely underfunded organizations in need of government subsidized insurance premiums is improperly raised for the first time on appeal. This argument is meritless as it was raised in Neppel's Brief in Opposition to Development Homes, Inc.'s Motion to Amend the Judgment. See Index # 564, at ¶¶ 10-11.

[¶7] For the foregoing reasons, the DHI's and district court's interpretation of Chapter 32-03.3 is not consistent with legislative history as it avails nearly every nonprofit organization to the shield of charitable immunity, including those the legislature specifically sought to exclude.

B. The constitutional challenge to N.D.C.C. § 32-03.3-02(2) is properly before this Court.

[¶8] DHI asserts Neppel's constitutional challenge to N.D.C.C. § 32-03.3-02(2) is

improper because it does not comply with the North Dakota Rules of Appellate Procedure and is not supported by argument. See Appellees' Brief, at ¶¶ 31-34. Neppel's constitutional challenge is properly before the Court because the statute is challenged on an as applied basis. See Appellant's Brief, at ¶ 83 and Am. Express Centurion Bank v. Corum, 2017 ND 261, ¶ 8, 903 N.W.2d 710. It is not a facial challenge. Id. Neither is Neppel's challenge without reasoned analysis. Accordingly, the constitutional challenge is properly before this Court.

C. The district court abused its discretion by allowing DHI to amend the judgment to assert the affirmative defense of charitable immunity where it was not pled and a jury found DHI liable for an intentional tort.

[¶9] The district court erred by granting DHI the affirmative defense of charitable immunity when it failed to plead that defense. This action was initiated by service of the Summons and Complaint in December of 2017. See Index ## 1-2. DHI failed to plead the affirmative defense of charitable immunity in its Answer. See id. at # 15. The discovery deadline expired in January of 2019. This matter went to trial in July of 2019. DHI had seventeen months to amend its answer to assert the affirmative defense of charitable immunity. DHI failed to take such action. Instead, DHI merely raised the issue of charitable immunity in its response to Neppel's request for 4th Amended Complaint in February of 2019 and again in its May 32, 2019 motion for summary judgment. The Court did not address the issue of charitable immunity until its Order on Partial Summary Judgment, in which it denied charitable immunity.

[¶10] Affirmative defenses must be plead in the answer or a motion to amend. See First Nat'l Bank & Trust Co. v. Jacobsen, 431 N.W.2d 284 (N.D. 1988). Charitable immunity is an affirmative defense. See Granger v. Deaconness Hosp., 138 N.W.2d 443 (N.D. 1965). Rule 12, N.D.R.Civ.P., requires every defense to a claim for relief in any pleading must be

asserted in the responsive pleading. N.D.R.Civ.P. 12(b). Rule 8, N.D.R.Civ.P., requires a party to state any avoidance or affirmative defense. DHI did not raise charitable immunity in its Answer or request amendment prior to the deadline to do so. Instead DHI raised it in a summary judgment motion forty-seven (47) days before trial.

[¶11] The district court denied DHI's request for charitable organization immunity in its Order on Motion for Partial Summary Judgment. See App'x, at 188 and Index # 357. The district court ***denied*** DHI the affirmative defense of charitable immunity and ***denied*** its request to amend its answer to claim immunity. See id. at ¶ 94. After the trial, DHI moved to amend the judgment pursuant to its status as a charitable organization under N.D.C.C. ch. 32-03.3 based upon one-sided testimony of DHI's CEO on a dead issue. The district had denied DHI's request to assert the affirmative defense before trial.

[¶12] The district court abused its discretion by allowing an affirmative defense, that it had previously denied, to be raised and granted after trial. The prejudice to Neppel is obvious—Neppel was going in blind with no prepared cross-examination, documents, or rebuttal witnesses because the issue was moot. The district court did not *reserve* ruling on charitable immunity. It *denied* charitable immunity.

[¶13] The district court further abused its discretion by granting charitable immunity after a trial in which a jury found DHI committed an intentional tort. North Dakota recognizes exceptions to immunities when intentional torts are committed. See Bartholomay v. Plains Grain & Agronomy, LLC, 2016 ND 138, ¶ 6, 881 N.W.2d 249. In Bartholomay, this Court recognized a public policy exception to the exclusive remedy provisions of workers compensation statutes that allows for recovery when an intentional tort is committed. See id. The Court adopted the true intentional torts exception to these exclusive remedy

provisions, which allows an employee to pursue a civil cause of action only if the employer intended the act and intended the injury. Id. at ¶ 8.

[¶14] Neppel submits the same exception should be applied regarding charitable immunity and intentional torts. If applied, Neppel satisfies the true intentional torts exception. A jury found DHI liable for the tort of intentional infliction of emotional distress. In finding DHI liable, the jury found DHI engaged in extreme and outrageous conduct that was intentional ***and*** reckless. See Index # 512, at # 7. The jury verdict conclusively demonstrates DHI intended to injure Z.N. when it placed a known sexual predator as his roommate. This satisfies the true intentional torts exception.

[¶15] For these reasons, the district court abused its discretion by applying the unpled affirmative defense of charitable immunity to an intentional tort after trial.

II. The district court abused its discretion by denying Neppel's request to amend the complaint to assert a claim for punitive damages under N.D.C.C. § 32-03.2-11.

[¶16] The district court improperly denied Neppel their right to assert a claim for punitive damages by concluding a preponderance of the evidence does not support a finding of oppression, fraud, or actual malice. DHI asserts the district court was correct in concluding there was not sufficient evidence to support a finding that a ***preponderance*** of the evidence proves oppression, fraud, or actual malice. See Appellees' Brief, at ¶ 39. The following are some of facts to which the district court and DHI assert ***do not*** establish by a preponderance of the evidence that DHI acted with oppression, fraud, or actual malice:

1. Z.N. is a severely developmentally delayed individual who cannot speak or defend himself. Virtually everything Z.N. does is directed by a caretaker.
2. Z.N. was raped by S.O. after DHI placed him as Z.N.'s roommate.
3. Prior to the placement, DHI knew Z.N. was especially vulnerable to sexual assault as he had been previously sexually assaulted while under the care and supervision of DHI. S.O. was placed with Z.N. because Z.N. could not complain—because Z.N. can't talk.
4. Despite knowing Z.N. was particularly vulnerable to sexual assault, they placed S.O., a known sexual predator who has a non-gender specific preference whose target of

choice are those who are vulnerable or willing as Z.N.'s roommate.

5. The rape was witnessed by DHI employee and Defendant Konah Zunugo at 3:00am. Zunugo described the rape: "[S.O.]'s penis was inside Z.N.'s anus. When I pulled cover back [S.O.] pulled back and sat up in the bed. [S.O.]'s penis was upright and stiff." See Index # 422 at DHI Disclosures 10750.
6. Z.N. was not given medical treatment for thirty-two (32) hours. The police were also not called for more than thirty-two (32) hours. Those things were only done because Z.N.'s mother, Pamela Neppel, insisted on it.
7. Following the rape, Z.N. was not separated from his rapist. Instead, they watched television together. See Index # 423 at DHI Disclosures 13978. While watching TV together, Z.N. made himself throw-up. Id.

[¶17] Neppel submits a reasonable person would have a hard time finding a situation more oppressive or malicious. Accordingly, the finding by the district court was not the product of a rational mental process leading to a reasoned determination. It was arbitrary, capricious, unreasonable, and unconscionable.

[¶18] The purpose of the preponderance standard is to ensure some level of claim viability. It is unreasonable to conclude the facts and evidence presented to the district court fail to meet the preponderance standard. Pamela Neppel and Z.N. had a right to present this claim to the jury, and the district court improperly denied them that right. Accordingly, the district court erred in not allowing a claim of exemplary damages to be brought to the jury.

III. The District Court Erred in Denying Neppel's Right to Assert a Title 25 Claim for Violation of Rights.

A. The district court's denial of Z.N.'s Title 25 claim was improper because it denied Z.N.'s right to redress for violations of the rights guaranteed in Title 25.

[¶19] DHI asserts the district court was correct in concluding Z.N. did not assert a viable Title 25 claim because his claims were "not for the enforcement of any of Z.N.'s rights enumerated in N.D.C.C. ch. 25-01.2" and "the purpose of the legislation was the commitment of the state to institutionalized persons of basic fundamental human rights." Appellees' Brief, at ¶¶ 53. This is an absurdity. Z.N.'s basic fundamental rights certainly

include the right to be free from sexual assault, a right to be placed in a safe living environment, and a right to adequate medical treatment.

[¶20] Z.N. was raped and not provided medical treatment for more than thirty-two (32) hours. That is a blatant violation of his right to adequate medical treatment under N.D.C.C. ch. 25-01.2

[¶21] DHI also asserts the motion for Fourth Amended Complaint was untimely and raised for the first time on appeal. See Appellees' Brief, at ¶¶ 43, 52. Neppel's Motion for Fourth Amended Complaint was the fourth time raising the issue at the district court level. See App'x, at 23, 35, 63, 74 and Index ## 92, 93, 156-159. Neppel's Motion for Leave to File Fourth Amended Complaint was timely. North Dakota law only allows punitive damages by amendment to a pleading. See N.D.C.C. § 32-03.2-11(1) ("Upon commencement of the action, the complaint may not seek exemplary damages."). Further, a motion to amend the pleadings to add exemplary damages must have an applicable legal and factual basis. See id. Thus, discovery is inherently necessary before a motion for exemplary damages may be brought.

[¶22] Here, the motion for fourth amended complaint was brought December 10, 2018, after depositions were completed in November 2018. Further, DHI's responses to Neppel's request for production of documents was not received until April 4, 2018, at which time Neppel received approximately 18,000 pages of documents. Accordingly, Neppel's motion was timely.

B. The district court's interpretation of N.D.C.C. ch. 32-03.3 conflicts with the enforcement provision of N.D.C.C. ch. 25-01.2.

[¶23] DHI asserts the issue of punitive damages is futile because DHI has charitable organization immunity, so it cannot be subject to punitive damages. See Appellees' Brief,

at ¶ 39. Neppel submits the district court's interpretation and application of charitable organization immunity to a group home such as DHI directly conflicts with N.D.C.C. § 25-01.2-17. It is well established that when interpreting statutes, courts are to interpret them in a manner that is harmonious, not conflicting. See Thompson v. North Dakota Dep't of Agric., 482 N.W.2d 861, 863 (N.D. 1992). If DHI is entitled to charitable organization immunity, all group homes would be entitled to the same immunity because they are nonprofit organizations that provide services to vulnerable people. In that case, N.D.C.C. § 25-01.2-17 conflicts with N.D.C.C. § 32-03.3-02 because Title 25 allows for punitive damages and attorney's fees, and the charitable immunity statute does not.

IV. Response to Cross-Appeal

[¶24] The district court correctly concluded that reasonable persons could differ regarding whether DHI's conduct was extreme and outrageous. Indeed, the jury found DHI's conduct was extreme and outrageous, intentional and reckless. The district court's interpretation of N.D.C.C. ch. 32-03.3 severely diminishes enforcement of rights under N.D.C.C. § 25-01.2-17 by eliminating two statutorily prescribed remedies contained therein. The district court erred by interpreting N.D.C.C. ch. 32-03.3 in a manner that is irreconcilable with the enforcement of rights guaranteed to developmentally disabled individuals under N.D.C.C. § 25-01.2-17.

[¶25] In its cross-appeal, DHI asserts it's actions cannot be regarded as extreme and outrageous. However, whether a claim for intentional infliction of emotional distress can be dismissed as a matter of law under the reasonable person standard is well-settled. "When the facts are judged under the 'reasonable person' standard, we cannot, as a matter of law, conclude that reasonable persons would not differ as to whether or not the conduct complained of was extreme and outrageous." Swenson v. N. Crop Ins., Inc., 498 N.W.2d

174, 183 (N.D. 1993). "We uphold special verdicts on appeal whenever possible and set aside a jury's special verdict only if it is perverse and clearly contrary to the evidence." Fontes v. Dixon, 544 N.W.2d 869, 871 (N.D. 1996). DHI has presented no basis to reverse the jury's decision other than their view that placing a sexual predator as Z.N.'s roommate, not providing him immediate medical care, not calling the police, forcing him to watch tv with his rapist does not amount to extreme and outrageous conduct. Neppel disagrees; and so did the jury. Accordingly, the jury verdict on IIED must be upheld.

CONCLUSION

[¶26] For the reasons set forth herein, Appellant Pamela Neppel, individually and as the parent and legal guardian of Z.N., an incapacitated individual, respectfully requests this Court REVERSE the district court's orders denying Z.N.'s Title 25 claims, punitive damages, granting DHI charitable organization immunity, and REMAND this case for further proceedings consistent with the opinion and respectfully requests this Court consider specific instructions.

[¶27] DATED October 2, 2020.

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CERTIFICATE OF COMPLIANCE

I, Jonathon F. Yunker, hereby certify that the above Brief of Appellant complies with the page limitation set forth under Rule 32(a)(8)(A) N.D.R.App.P. I further certify that the Brief of Appellant contains twelve (12) pages.

DATED this 2nd day of October, 2020.

/s/ Jonathon F. Yunker

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CERTIFICATE OF SERVICE

I, Jonathon (Jack) F. Yunker, hereby certify and swear that:

[¶1] On October 2, 2020, the following documents:

1. Reply Brief of Appellant and Cross-Appellee

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[¶3] DATED October 2, 2020.

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