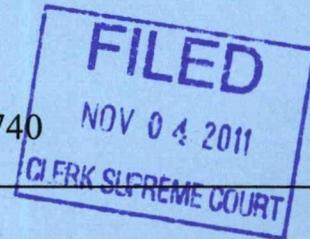


IN THE SUPREME COURT OF THE STATE OF IOWA

No. 11-0892

Fayette County Case No. LACV052740



KIMBERLY ANN SALLEE, individually and as next friend of LUCAS
GREGORY DURKOP, MARIA CHRISTINA RIVERA, and MATTHEW
JAMES SALLEE, and JAMES ALLAN SALLEE,

Plaintiffs-Appellants,

vs.

MATTHEW R. STEWART and DIANA STEWART, d/b/a
STEWARTLAND HOLSTEINS,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR FAYETTE COUNTY

THE HONORABLE MARGARET LINGREEN

APPELLANTS' FINAL BRIEF

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ROUTING STATEMENT

The Appellant believes that this case presents substantial questions and urgent issues of broad public importance, requiring prompt or ultimate determination by the Supreme Court, and thus should be retained by the Supreme Court for decision pursuant to Iowa Rule of Appellate Procedure 6.1101(1)(d).

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a district court's ruling on a Motion for Summary Judgment and a Motion re Iowa Rule of Civil Procedure 1.904(2), granting the Defendants' Motion for Summary Judgment, denying the Plaintiffs' Motion for Summary Judgment, dismissing the case, and overruling the Plaintiffs' Motion re IRCP 1.904(2) requesting that the Court rule specifically on two other theories advanced by them for the Defendants' liability for their injuries.

The Trial Court ruled that Chapter 461C of the Code is applicable to the facts and circumstances here, relieving the Defendants of any liability for the Plaintiffs' injuries and refusing to recognize any other theories for their

liability outside their roles as landowners of the property where the Plaintiff, Kimberly Ann Sallee, suffered physical injury.

B. Course of Proceedings and Disposition of Trial Court

The Plaintiffs filed their Petition at Law and Demand for Jury Trial on August 9, 2010, alleging that the Plaintiff, Kimberly Ann Sallee, while on a kindergarten class trip on May 18, 2010, at the Defendants' home and dairy farm in Fayette County, Iowa, along with her daughter, Maria Christina Rivera, was severely injured when she fell through a hole in the hay loft of a barn where she, Maria, and the class were directed by the Defendants as part of a tour of their dairy farm. (App. p. 6). Kimberly's husband, James Allan Sallee, and Kimberly's children, Maria Rivera, Lucas Gregory Durkop, and Matthew James Sallee joined with the claims of Kimberly for her physical injuries through consortium claims. (App. p. 9).

The Defendants appeared and answered on August 25, 2010, which Answer was amended on August 27, 2010, and then further amended on January 28, 2011, when the Defendants raised the applicability of Iowa Code Chapter 461C. (App. p. 10, 12, 14).

On March 31, 2011, the Plaintiffs moved to amend their Petition to raise alternate theories under which the Defendants were liable for the Plaintiffs' injuries. (App. p. 18).

On April 11, 2011, the Defendants filed their Motion for Summary Judgment on the basis of Chapter 461C of the Code. (App. p. 21).

On April 26, 2011, the Plaintiffs filed their Resistance to the Motion for Summary Judgment. They also submitted their own Motion for Summary Judgment on the issue of the Defendants' liability for their injuries. (App. p. 50).

On April 27, 2011, the Defendants filed their resistance to the Plaintiffs' Motion for Summary Judgment. (App. p. 143).

On May 2, 2011, the Plaintiffs filed additional cases in support of their resistance and their Motion, which the Defendants responded to with their Response to Supplemental Brief on May 3, 2011. (App. p. 155, 159).

The parties' respective Motions came on before the Court on May 2, 2011. The parties agreed to a continuance to allow Defendants' counsel an opportunity to respond to additional case authority presented by the Plaintiffs. The Court also granted the Plaintiffs' Motion to Amend Petition. (App. p. 157). The Amended Petition would be filed on May 10, 2011, to raise Maria's claim as an affected bystander who witnessed the fall and

additional theories of liability outside of the Defendants' responsibilities as landowners. (App. p. 162).

The Defendants did not file a formal Answer to the Amended Petition.

In a ruling filed on May 16, 2011, the Court sustained the Defendants' Motion for Summary Judgment, finding that the Plaintiffs' claims were precluded by Iowa Code Section 461C and denying the Plaintiffs' Motion for Summary Judgment. (App. p. 165). Thereafter, on May 26, 2011, the Plaintiffs filed a Motion pursuant to Iowa Rule of Civil Procedure 1.904(2) requesting that the Court specifically address their additional theories of liability, which they maintain fell outside of the Defendants' roles as mere landowners. (App. p. 170). The Defendants resisted this Motion on May 31, 2011. (App. p. 173).

On June 7, 2011, the Trial Court overruled the Plaintiffs' Motion pursuant to Iowa Rule of Civil Procedure 1.904(2), finding that any common law claims that the Plaintiffs would have against the Defendants were precluded by Chapter 461C. (App. p. 188).

The Plaintiffs filed their Notice of Appeal on June 9, 2011. (App. p. 190).

STATEMENT OF RELEVANT FACTS

On May 18, 2010, Kimberly Ann Sallee (“Kim”) was accompanying her daughter, Maria Christina Rivera (“Maria”) and her kindergarten class from Sacred Heart School in Oelwein on a tour of the dairy farm of Matthew and Diana Stewart (“Matthew” and “Diana,” or collectively, “the Stewarts”) in Fayette County, Iowa.

Matthew, Diana, and their family lived and worked on the farm. The farm consisted of their home and a number of outbuildings, along with several acres of farm ground. (App. p. 196, lns. 18-21; P. 57-61). Included in the outbuildings was a barn, which had a hay loft.

The kindergarteners from Sacred Heart had been coming out to the Stewarts’ property for a number of years. It was usually arranged with the Stewarts by the kindergarten teacher, Donna Hornberg (“Mrs. Hornberg”), who contacted the Stewarts to arrange the visit. This was usually in the spring when the weather conditions and the conditions of the farm itself made it better for the class to take the tour. (App. p. 198, lns. 16-25; P. 199 lns. 1-29).

Other people had been able to tour the farm in the past. These people always had to make arrangements with the Stewarts as to the day and time when they could tour the farm. Someone from the Stewart family always

had to be with anyone touring the farm. (App. p. 200 lns. 1-25; P. 201 lns. 1-25; P. 202 lns. 1-2; P. 204 lns. 3-25; P. 205 lns. 1-25; P. 206 lns. 1-10).

In addition to the Stewarts themselves, the school would always arrange to have a chaperone tour the farm with the class. On this particular day, May 18, 2010, Kim was one of those chaperones. (App. p. 201 lns. 1-9; App. p. 123 lns. 12-24).

As part of the routine established by the Stewarts, there were various stations set up around the farm for the children to see. (App. p. 215 lns. 21-25; P. 216 lns. 1-25; P. 217 lns. 1-8). One of these stations was an area where they could ride a horse, with the assistance of one of the Stewarts. (App. p. 206 lns. 11-16). There were areas in which the children could not go and things that they could not do. As part of the tour, the children would be taken by one of the Stewarts into the hay loft to play, if time permitted and if they were good on the rest of the tour. (App. p. 232 lns. 4-16). On May 18, 2010, Matthew Stewart personally conducted the class, along with Kim, Mrs. Hornberg, and another mother, Amy Posey ("Amy"), into the barn and up the ladder into the hay loft. Matthew directed Amy and Kim into the hay loft ahead of the children, and then the children, followed by Mrs. Hornberg and himself. This was to be sure that the children would be able to safely navigate the barn, ascend the ladder into the hay loft, and play

in the hay loft itself while supervised. (App. P. 216 lns. 17-25; P. 217 lns. 1-8).

Matthew's concern for the children extended to allegedly inspecting the hay loft the day of the tour, before the children arrived. This included standing on three bales of hay which he had set next to each other over a hole in the floor of the hay loft so that they straddled or bridged the hole. (App. P. 209 lns. 23-25; P. 210 lns. 2-5, 21-25; P. 211 lns. 1-9; P. 228 lns. 17-25; P. 229 lns. 1-3). This hole was used to throw hay down to any cattle that might be in the barn below. (App. p. 208 lns. 23-25; P. 209 ln. 1).

Matthew's concern also extended to the chaperones on the trip, and specifically to Kim herself, on May 18, 2010. He testified that, given Kim's weight (approximately 300 pounds), he was concerned about her going up the ladder into the loft and being in the loft itself. He was concerned about her hurting herself. This is what he said in his deposition:

“Q. Okay. And how did you think she would hurt herself?

A. Um, I can best characterize that as a person who is large has a greater risk of hurting themselves climbing a tree, climbing a rock face or any other way that they are leaving the ground.

Q. So you were concerned about her hurting herself just simply climbing up the steps or stairs?

A. No.

Q. Okay. Well, how else were you concerned with her hurting herself?

A. Climbing down the steps.

Q. Okay.

A. Um, a, the floor of a haymow is bales of hay. They are not as sturdy as a concrete floor. Twisting an ankle. None of these of which I thought of specifically that day. Um, it's just my sense that, um, a, for somebody of her size that accidents are easier to happen."

App. p. 200 lns. 14-25; P. 221 lns. 1-7.

Matthew even maintained that he tried to talk Kim out of going up into the loft, but she pushed him out of the way. She disputes this, and testified that she only had a concern about the sturdiness of the ladder. She was reassured by Matthew that it was safe. This is what Kim says Matthew told her:

"Q. Okay. Tell me exactly what you remember being the interchange between you and Mr. Stewart right before you went up the ladder.

A. He asked me if I was all right with going up in the hayloft. And he seen me look at the ladder, and he said, Oh don't worry about the ladder. The ladder is good and stable; it will hold you. And that was all that was said before I went up in the hayloft."

App. p. 233 lns. 22-25; P. 234 lns. 1-5.

Matthew never told Kim about the hole in the hay loft floor, covered only by three adjacent bales of hay. This was despite his declared concern

about it earlier on that day, his claim that he stood on the bales of hay to check that they would not give way under a person's weight, and his concerns about Kim's weight. (App. p. 229 lns. 4-25; P. 230 lns. 1-19).

Matthew would not only direct and coordinate the entry of the children and their chaperones into the hay loft, but also out of it. This included Kim, whom he directed to keep the children in the middle of the hay loft so that they would not come to the hay loft ladder all at once, and could be safely let down by the adults. This put Kim directly in the area where the hole existed. While standing there watching the children, as she was directed to by Matthew, she felt the bale she was standing on start to shake. Before she knew it, she had fallen through the floor of the hay loft onto the floor of the barn below. (App. p. 224 lns. 3-25; P. 225 lns. 1-25; P. 226 lns. 1-22). Plaintiffs' Exhibits 7, 8, and 9 show where the children were exiting the hay loft with the help of the adults, and "X" marks the spot where Kim was standing, keeping the children back from the ladder as directed by Matthew. (App. p. 62-64).

Kim suffered severe injuries to her left wrist and left leg. All of this was witnessed by the children in the hay loft, including Kim's daughter, Maria.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFFS' CLAIMS ARE ALL PRECLUDED BY IOWA CODE SECTION 461C FOR THE REASON THAT THE STEWARTS HAD OPENED THEIR PROPERTY TO THE PUBLIC FOR RECREATIONAL PURPOSES.

A. Standard of Review

In reviewing the grant of summary judgment, the question is whether the moving party demonstrated the absence of any genuine issue of material fact that showed entitlement to judgment on the merits as a matter of law. An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law. Requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the non-moving party. The Court's task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. The record is examined in the light most favorable to the party opposing the Motion for Summary Judgment to determine if the movant met his or her burden. Bill Grunder's Sons Construction, Inc. vs. Ganzer, 686 N.W.2d 193, 196 (Iowa 2004).

B. Preservation of Error

Kim and her family believe they have preserved all of the issues raised by this appeal for error by filing a timely appeal.

C. Merits

The relevant portions of Chapter 461C are as follows:

“461C.3 Liability of owner limited. Except as specifically recognized by or provided in section 461C.6, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or urban deer control, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.”

“461C.4 Users not invitees or licensees. Except as specifically recognized by or provided in section 461C.6, a holder of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes or urban deer control does not thereby:

1. Extend any assurance that the premises are safe for any purpose.
2. Confer upon such person the legal status of an invitee or licensee to whom the duty of care is owed.
3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.”

“461C.6 When liability lies against owner. Nothing in this chapter limits in any way any liability which otherwise exists:

1. For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.”

“461C.7 Construction of law. Nothing in this chapter shall be construed to:

1. Create a duty of care or ground of liability for injury to persons or property.

2. Relieve any person using the land of another for recreational purposes or urban deer control from any obligation which the person may have in the absence of this chapter to exercise care in the use of such land and in the person's activities thereon, or from the legal consequences of failure to employ such care.

3. Amend, repeal or modify the common law doctrine of attractive nuisance.”

Iowa Code Section 461C.2 defines “land” as follows: “‘Land’ means private land located in a municipality including abandoned or inactive surface mines, caves, and land used for agricultural purposes, including marshlands, timber, grasslands, and the privately owned roads, water, water courses, private ways and buildings, structures and machinery or equipment appurtenant thereto.” That subsection also defines “recreational purposes” to mean “...the following or any combination thereof: Hunting, trapping, horseback riding, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, motorcycling, nature study, water skiing, snowmobiling, other summer and winter sports, and viewing or enjoying historical,

archaeological, scenic, or scientific sites while going to and from or actually engaged therein.”

Kim and her family maintain that the Stewart property is not of the type that is protected under the statute, nor did the Stewarts open their property to the public, nor was it being used for a “recreational purpose” at that time.

1) The Stewart property was not of the type covered under Chapter 461C.

The Stewart property was not of the type that falls under the definition of land that is subject to immunity. In interpreting a statute, the Court must look to the object to be accomplished and interpret the statute so it will best effect, rather than defeat, the legislative purpose. Words in the statute should be given their commonly understood meaning, unless it is clear from a reading of the statute that a different meaning was intended or unless such construction would defeat the manifest intent of the legislation. Peterson vs. Schwertley, 460 N.W.2d 469 (Iowa 1990). The Iowa Supreme Court has found that the previous incarnation of 461C, Iowa Code Section 111C, was designed to encourage property owners to make land available for recreational uses by relieving property owners of any duty to keep premises

safe for “entry or use by others for recreational purposes.” Indeed, this purpose is set forth in Section 461C.1 of the Code, which reads as follows:

“461C.1 Purpose. The purpose of this chapter is to encourage private owners of land to make **land and water** areas available to the public for recreational purposes and for urban deer control by limiting an owner’s liability toward persons entering onto the owner’s property for such purposes.”

(Emphasis added).

First, this was property on which the Stewarts lived and worked. Anyone coming upon the property always had to be accompanied or supervised by a member of their family. Fagerhus vs. Host Marriott Corp., 795 A.2d 221 (Md. 2002) (A landowner who permits his land to be used for recreational hunting by people he neither accompanies nor supervises is covered by protections of recreational use statute). The Stewarts’ property was not open to the public generally. Snyder vs. Olmstead, 261 Ill. App. 3d 986, 634 N.E.2d 756, 760-761 (1994) (Recreational use statute only applies when the landowner allows the public as a whole to use the property for recreational purposes); McNamara vs. Cornell 583 N.E.2d 1015 (Ohio Ct. App. 1989). Although a portion of the property not involved in the incident here was farm ground, the focus of the tour was on property that contained not only the Stewarts’ home, but also their dairy farm consisting of a number

of buildings, including the barn that contained the hay loft. The purpose of 461C is to encourage landowners to open up outside and unimproved areas of land for “recreational purposes” that does not include the type of property and buildings here. An owner of land such as that listed under 461C may not be in control of or have knowledge of natural conditions on their land that might prove dangerous to someone entering upon it for the purposes enumerated in the statute. This is in contrast with a man made and operated business consisting of buildings and other structures obviously known to and controlled by the owners. Bashioum vs. County of Westmoreland, 747 A.2d 441 (Pa. Commw. Ct. 2000) (In ruling for the injured Plaintiff, the Court’s analysis centered on the specific site where the injury occurred (a slide), rather than on the totality of the largely undeveloped park. Because the slide was a “developed” feature, the defendant county could not claim protection under the Recreational Use of Land and Water Act); Ebarb vs. Guinn Bros. Inc., 728 So.2d 487 (La. Ct. App. 1999).

This can be gleaned simply by looking at the type of enumerated activities that fall within the term “recreational purposes.” All of these involve outside activities in natural or unimproved areas. True, the definition of “land” references buildings and structures, but only as “appurtenant” to the land, and not as the direct subject of the Code section, or the item of

principal use, as the barn and hay loft were here in the tour of the dairy farm. *Black's Law Dictionary* defines "appurtenant" as something that "...stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter." Black's Law Dictionary 103 (6th ed. 1991). Buildings and structures, along with other man-made creations such as roads, water courses, private ways, machinery, or equipment were included in the definition of "land" in the statute to insure immunity for the land itself, or for these structures if they were intended for recreational use, or increased the use of the property for recreational purposes. Bashioum vs. County of Westmoreland, 747 A.2d 441 (Pa. Commw. Ct. 2000); Dinelli vs. County of Lake, 691 N.E.2d 394 (Ill. App. Ct. 1998) (Protection of structure only applies if the structure itself was intended for recreational use or increases the usefulness of the property for recreational purposes).

The purpose was again to encourage private owners of land to make *land and water* areas available to the public for recreational purposes.

Michigan courts have addressed this issue. Although the present state of the law in Michigan favors a broader interpretation of their similar statute to protect landowners, the Michigan Supreme Court at one time unanimously interpreted the law more narrowly, to make it applicable to only outside and unimproved areas. In so interpreting their law, the Court

focused on the list of activities that fell under “recreational purposes.” Wymer vs. Holmes, 412 N.W.2d 213 (Mich. 1987). Wymer was later overruled in a five to two decision in Neal vs. Wilkes, 685 N.W.2d 648 (Mich. 2004). One of the dissenters concluded that the statute was designed to cover activities of the same “class, character, or nature” as those specifically listed in Michigan’s recreational use act – activities which “take place on large, undeveloped tracts of land.” In his dissent, this judge pointed out that a broad interpretation of the statute would apply to “people invited to...a party, or to a neighborhood barbeque...” Indeed, another court held that a similar statute did not confer immunity on a homeowner who had invited a neighbor over to skateboard in their privately owned residential garage, which was not kept open to the general public. McNamara vs. Cornell 583 N.E.2d 1015 (Ohio Ct. App. 1989).

If the Court accepts the interpretation of 461C favored by the Stewarts and the Trial Court, then in Iowa one would have immunity from a claim against a person invited over to see a flower garden on privately owned property who was then invited into the home to see a packet of seeds used to grow the flowers, slips on a freshly waxed floor, and injures themselves.

2) The Stewarts' property was not open to the public.

The Stewarts' property consisted of their home and their dairy farm. It was used exclusively for that purpose. In order for anyone to go on the dairy farm, prior arrangements needed to be made with the Stewarts. Times to tour the farm were arranged according to the Stewarts' schedule, and one needed to conform to the Stewarts' decisions with regard to where the tour would go and what would be seen. Visitors touring the property needed to be accompanied by the Stewarts or a member of their family. No cases could be found in Iowa directly addressing facts similar to these. There is authority in other jurisdictions with statutes similar to Iowa Code 461C that interpret their statutes. These authorities require something more than how the Stewarts controlled their property to find that the property was open to the public. McNamera et al. vs. Cornell, 583 N.E.2d 1015 (Ohio Ct. App. 1989); Perrine vs. Kennecott Mining Corp., 911 P.2d 1290 (Utah 1996).

3) The school tour of the farm does not fit within the definition of "recreational purposes."

There is no case decided by the Iowa Supreme Court or Court of Appeals deciding that a class tour of a dairy farm falls within a "recreational purpose." What is more, there is also no Iowa Supreme Court or Court of Appeals case that covers chaperoning as a "recreational purpose." The dairy

farm was a business. The tour of it is akin to a tour of the John Deere Tractor Works or some other manufacturing plant that people might visit to see how products are produced. Holland vs. Weyher/Livsey Constructors, Inc., 651 F.Supp. 409 (Wyo. 1987). (Dangerous industrial site was not covered by Wyoming recreational use statute merely because child was playing on site). In no way, shape, or form can it be equated to the activities listed in Chapter 461C.

For one or more of the foregoing reasons, the ruling of the Trial Court sustaining the Defendants' Motion for Summary Judgment on the basis of 461C should be reversed.

II. THE TRIAL COURT ERRED IN FINDING THAT THERE WERE NO ISSUES OF MATERIAL FACT THAT THE STEWARTS WILLFULLY FAILED TO GUARD OR WARN AGAINST THE DANGEROUS CONDITION, USE, OR STRUCTURE OF THE HAY LOFT OR THE ACTIVITY CONDUCTED IN IT BY KIM AND THE SCHOOL CLASS.

Iowa Code Section 461C.6 holds the landowner liable when he or she has willfully failed to guard or warn against a dangerous condition or structure. In the case of Hegg vs. U.S., 817 F.2nd 1328 (8th Cir. 1987) the federal court had to address this issue under previous Iowa Code Section 11C.1. In Hegg, the Court concluded that it was critical that the Plaintiff produce evidence that the Defendant was aware of any dangerous condition

in the swing set that had caused the Plaintiff's injuries or any previous injuries to users of it. In doing so, they cited the case of Mandel v. United States, 719 F.2d 967-968 (8th Cir. 1983), where the Defendant, aware of the danger of submerged rocks in a river, and of the reasonable foreseeability of injury to swimmers, recommended without warning that the Plaintiffs swim in the river.

Here, the evidence is that both of the Stewarts knew of the hole in the floor of the hay loft. Matthew Stewart testified that earlier in the day of May 18, 2010, he went up to the hay loft for the specific purpose of reviewing the safety of the hay loft. He allegedly stood on the bales of hay that covered the hole, which he had placed there to cover it. (The Plaintiffs do not believe this testimony of Matthew Stewarts and believe that a fact finder could find that this is all made up, and the product of a guilty conscience about maintaining such an obvious hazard. To accept this testimony by Matthew would require one to accept the picture of a grown man standing on a bale of hay essentially suspended in air, as a way to test whether it would hold a person's weight – clearly a fool's errand).

Whether or not Matthew Stewart checked the hole on the morning of May 18, 2010, he was aware of and had actual knowledge of the threat of the hole. His actions in putting a few hay bales over it ensured that the hole

would not be obvious to entrants into the hay loft. Matthew Stewart directed Kim and the kindergarten class into the hay loft. He did not warn them about the hole.

Additionally, he testified to his concerns about Kimberly Sallee going into the hay loft because of her weight, and acknowledged that the hay loft would pose a particular risk to a person her size and weight. With this knowledge, he testified that he directed Kim into an area of the hay loft to watch the children where he knew the hole in the floor to exist. He testified that he did not warn her of the hole in the hay loft floor, which lay in the area where she would have been standing. Interpreting this evidence in the light most favorable to Kim and her family as the Trial Court and this court are required to do, there is a factual issue that should be decided by the jury, and not by the Trial Court as a matter of law.

The ruling of the Trial Court sustaining the Defendants' Motion for Summary Judgment on the basis of the applicability of Chapter 461C should therefore be reversed.

III. THE TRIAL COURT ERRED IN FINDING THAT ALL OF THE COMMON LAW CLAIMS RAISED BY KIM AND HER FAMILY TO SUPPORT THE LIABILITY OF THE STEWARTS AS OTHER THAN LANDOWNERS AND OUTSIDE OF THE PROTECTIONS OF CHAPTER 461C WERE PRECLUDED BY THAT CHAPTER.

The Defendants are also potentially liable to the Plaintiffs not only as the owners of the property, but as the individuals who conducted the tour of the farm. In Scott vs. Wright, 486 N.W.2d 40 (Iowa 1992) the Court interpreted the previous embodiment of Chapter 461C, Chapter 111C, to find that nothing in the Chapter suggested a legislative intent to immunize all negligent acts of landowners, their agents, or their employees. Statutes will not be so interpreted as to deprive one of a common law right unless the statute unequivocally so states. Price vs. King, 146 N.W.2d 328, 924 (Iowa 1966). A maxim of construction of statutes in derogation of common law is that they must be strictly construed and the legislative intent to change common law must be clearly expressed. LePoidevin vs. Wilson, 330 N.W.2d 55, 562 (Wis. 1983). In Scott, the Court upheld a jury verdict against landowners who permitted their son-in-law to take visitors to their farm on a hay ride, in which the Plaintiff was participating when he was seriously injured after the wagon tipped over during the ride. Scott vs. Wright, 486 N.W.2d 40 (Iowa 1992). The Court found that there was nothing in the language of Chapter 111C that suggested a legislative intent to immunize all

negligent acts of landowners. Nor did the Court believe that such a broad application of the statute would serve the public purpose envisioned by the legislature. Though focused on reducing landowner liability, the statute was also enacted to serve “a growing need for additional recreational areas for use by our citizenry.” The Court then went on to find that the public’s incentive to enter and enjoy private agricultural land would be greatly diminished if users were subject, without recourse, to human error as well as natural hazards. Scott vs. Wright, 486 N.W.2d 40, 42 (Iowa 1992).

Other jurisdictions have focused on the difference between a landlord’s liability under a premises liability theory as opposed to “active negligence” on the part of a landowner. Although a landowner may not owe a duty of ordinary care to one entering on property as to the condition of the premises, the landowner who carries on an affirmative act, and act of operation or activity, does have an obligation to exercise ordinary care for the protection of that person. LePoidevin vs. Wilson, 330 N.W.2d 555, 558-559 (Wis. 1983).

In Iowa, an individual who assumes a duty may be held liable for a breach of that duty if the individual’s conduct places a third party in a more vulnerable position than if the obligation had not been assumed. Restatement (Second) of Torts Section 323 provides as follows:

“One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if a) his failure to exercise such care increases the risk of such harm, or b) the harm is suffered because of the other’s reliance upon the undertaking.”

Restatement (Second) of Torts Section 323.

The Iowa Supreme Court has applied Restatement §323 or cited it with approval a number of times. Mead v. Adrian, 670 N.W.2d 174 (Iowa 2003); American State Bank v. Enabnit, 471 N.W.2d 829 (Iowa 1991). The Defendants, as part of the tour of their farm, directed Kimberly Sallee, her daughter, and her daughter’s class into a hay loft knowing of the hole’s existence and their directing them into the hay loft placed them into a more vulnerable position than if they had not done so. Cohen vs. Heritage Motor Tours, Inc. 205 A.D.2d 105, 618 N.Y.S.2d 387, 389 (1994).

Additionally, an individual may incur liability for a misrepresentation that is relied upon by a third person. Restatement (Second) of Torts §310 provides as follows:

“An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor:

(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and

(b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.”

Restatement (Second) of Torts §310.

The Rule applies where the misrepresentation is made concerning the physical condition of a place or thing and induces the person to believe that the place or thing is in safe condition for his entry or use. Mandel v. United States, 719 F.2d 963, 968 (8th Cir. 1983). Misrepresentations can be made by words, acts, or conduct. They can be made affirmatively or by concealing or not disclosing certain facts. 37 Am. Jur. 2d Fraud and Deceit §57 (2004).

The Plaintiffs would submit here that by taking control of the Sacred Heart kindergarten class and chaperones and directing them around the farm and eventually into the hayloft, involved the Defendants undertaking gratuitously to provide services to them that they recognized were necessary for their protection. In doing so, the Stewarts failed to exercise reasonable care in performing this undertaking, which increased the harm to Kim and Maria, resulting in Kim falling through the hay loft floor and suffering the

injuries she did to her body and to Maria's emotions as a witness to her mother's fall.

Additionally, the Plaintiffs would submit that the Stewarts are liable under Restatement (Second) of Torts Section 310, for the reason that in conducting the tour and making representations with regard to the safety of the area they toured, by the fact that a class of kindergarteners were taken into these areas accompanied by the Stewarts, along with representations about the safety of certain areas (i.e. the ladder into the hayloft – according to both Matthew and Kimberly) the Defendants were representing that the barn was safe to go into – including the hayloft - on May 18, 2010. The Plaintiff, Kimberly Sallee, and her daughter, Maria, relied upon this when they entered the hay loft where the hole existed, a condition known to the Defendants, but not them.

On the basis of the Wright case, and the facts and circumstances of the case herein, there exist material facts that need to be decided by a fact finder, and the Defendants are not entitled to summary judgment as a matter of law. The District Court's ruling granting the Stewarts' Motion for Summary Judgment should be reversed on this basis.

IV. THE TRIAL COURT ERRED IN DENYING THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF THE STEWARTS' NEGLIGENCE.

The Plaintiffs also maintain that they are entitled to judgment as a matter of law that the Stewarts were negligent under the undisputed facts and circumstances of this case. Ordinarily, questions of negligence are for a jury determination, and it is only in exceptional cases that they may be decided as a matter of law. Paulsen vs. Des Moines Union Railroad Co., 262 N.W.2d 592, 596 (Iowa 1978); Johnson vs. Svoboda, 260 N.W.2d 530, 535 (Iowa 1977). The Stewarts maintained an open hole in their hay loft, over which there was suspended nothing but three bales of hay laid side by side. They directed Kim, her daughter Maria, and the entire Sacred Heart kindergarten class into its area without warning. Even though, according to Matthew Stewart, they knew that this could potentially pose a risk to them. Kimberly and her family believe that the evidence is overwhelming that a contrary verdict or finding could not stand with regard to the Stewarts' negligence in maintaining this hole and failing to warn of its existence on May 18, 2010. Paulsen vs. Des Moines Union Railroad Co., 262 N.W.2d 592, 596 (Iowa 1978); Johnson vs. Svoboda, 260 N.W.2d 530, 535 (Iowa 1977); McCauill vs. Universal Mfg. Co., 218 N.W.2d 592, 593 (Iowa 1974).

CONCLUSION

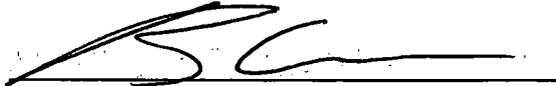
The Trial Court erred in granting the Stewarts' Motion for Summary Judgment, concluding that Kim and her family's claims were precluded by Chapter 461C of the Code. The Stewarts' land was not of the type that is protected under 461C and they had also not opened it to the public as contemplated by that chapter. Neither was the tour of the Stewart property the type of activity which falls under the definition of "recreational purposes." Furthermore, Kim and her family have raised claims against the Stewarts outside of their roles as landowners, removing them from any protection they could have been provided in that role under that Chapter. By their voluntarily undertaking the role of tour guides for the school tour of the farm, they essentially agreed to protect the class and their chaperones in the tour of the farm and eventually placed Kim and her daughter in a position to be harmed. Furthermore, the Stewarts, through their representations, led the class, Kim, and her daughter to believe that they would be safe in their tour of the farm and not encounter any conditions or activities that would cause them harm.

Finally, there are facts supporting the Stewarts' failure to protect Kim and her daughter of the dangerous condition of the hay loft was willful. By covering the hole in the hay loft floor with nothing more substantial than

more hay, and then directing the class and chaperones into the hay loft, the Stewarts willfully failed to warn them of the danger there. This, along with all of the foregoing, supports a finding that there are factual issues that have been generated by Kim and her family, and the Stewarts are not entitled to judgment as a matter of law.

Rather, Kim and her family maintain that if there is any issue that can be determined on the basis of the undisputed facts as a matter of law, it is the Stewarts' negligence in maintaining the hole in its dangerous condition, failing to warn Kim and her daughter, and conducting the tour and making representations with regard to the safety of the hay loft that resulted in injuries to both. Kim and her family respectfully request that the Court reverse the Trial Court's ruling granting the Stewarts' Motion for Summary Judgment and denial of the Motion for Summary Judgment filed by Kim and her family, granting the same, and remanding this matter back to the trial court for a determination of damages.

Respectfully submitted,



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REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument on the issues of this matter.

ATTORNEY'S COST CERTIFICATE

I, D. Raymond Walton, hereby certify the actual cost of reproducing the necessary copies of the preceding Appellant's Proof Brief consisting of

37 pages was \$ 92.13 and that amount

has been actually paid in full by me.



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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on November 3, 2011, I served this document by mailing a copy to all parties in this matter at their respective addresses, below:

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I further certify that on November 3, 2011, I filed this document by mailing the original along with eighteen (18) copies thereof to the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because: this brief contains 6,743 words, including the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman.



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