IN THE COURT OF APPEALS OF IOWA

No. 1-967 / 11-0892
Filed February 29, 2012

KIMBERLY ANN SALLEE, Individually and as Next Friend of LUCAS GREGORY DURKOP and MARIA CHRISTINA RIVERA, 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, Margaret L. Lingreen, Judge.

Kimberly Ann Sallee appeals from a district court's grant of summary judgment to defendants upon its determinations that the defendants were entitled to recreational use limited liability pursuant to Iowa Code chapter 461C (2009), and that the affirmative actions of the landowners did not create a common law basis for liability. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

D. Raymond Walton of Beecher Law Offices, Waterloo, for appellants.

Karla J. Shea of McCoy, Riley, Shea & Bevel, P.L.C., Waterloo, for appellees.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Kimberly Ann Sallee[1] appeals from a district court's grant of summary judgment to defendants upon its determinations that the defendants were entitled to recreational use limited liability pursuant to Iowa Code chapter 461C (2009), and that the affirmative actions of the landowners did not create a common law basis for liability. Because we agree that the landowners were entitled to recreational use limited liability to the extent they invited a group to visit their dairy farm, and there is no evidence of "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity," we affirm the grant of summary judgment in their favor on the plaintiff's claims of premises liability. However, because we believe there is a disputed issue of material fact as to the claims of common law negligence outside the defendants' limited premises liability, we remand to the district court for further proceedings.

I. Background Facts and Proceedings.

The following facts are not disputed. On August 9, 2010, Kimberly Ann Sallee was one of the chaperones for her daughter's kindergarten field trip to a dairy farm owned by Matthew and Diana Stewart and doing business as Stewartland Holsteins (Stewarts). The kindergarten teacher has been invited to bring her class to the Stewarts' dairy farm on an annual basis for several years. On the class trip, which included Sallee and her daughter, the children were guided by the Stewarts to different activities, including horseback riding, calf feeding, tractor viewing, and playing in the hayloft. Sallee was in the hay loft with

[1] Sallee filed this suit for damages on behalf of herself, her children, and husband. We will refer to the plaintiffs collectively as Sallee.

the children when the hay bale on which she was standing, and which was covering a chute, gave way and she fell to the floor approximately six feet below. As a result of the fall, Sallee broke her wrist and ankle.

Sallee filed suit against the Stewarts alleging they breached "their duty . . . to maintain the premises in a manner safe for the use of business invitees in the normal and reasonable scope of such use, and/or to warn invitees . . . of dangerous conditions on the premises." Sallee later amended her petition to also assert the defendants "were acting as tour guides" upon whom the "Plaintiff and her daughter relied" and who "failed to exercise reasonable care in the conduct of the tour when they directed the Plaintiff and her daughter into the hay loft where the dangerous condition of the hole existed" and "made misrepresentations with regard to the safety of the hay loft."

The Stewarts answered and asserted the affirmative defense provided in Iowa Code sections 461C.3 and .6 (2009).[2] They filed a motion for summary judgment asserting this affirmative defense of recreational use limited liability available to landowners who allow the public to use their land for recreational purposes.

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[2] Chapter 461C was formerly codified at Iowa Code chapter 111C.

Under chapter 461C, a land owner's premises liability is limited. Section 461C.3 provides:

> 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 to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Section 461C.6, however, provides the limited liability does not extend to willful or malicious acts on the land owner's part. Section 461C.6 reads in pertinent part:

> Nothing in this chapter limits in any way any liability which otherwise exists . . . [f]or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

Sallee resisted and filed a cross-motion for summary judgment. She argued chapter 461C did not apply because entry onto the dairy farm was not "for recreational purposes"; and the farm was not "available to the public." Plaintiffs also contended that even if chapter 461C was applicable, the Stewarts were liable as a matter of law pursuant to section 461C.6 for "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."

Following a hearing, the district court issued its ruling in favor of the Stewarts. The court noted the purpose of chapter 461C, as set out in section 461C.1,

> is to encourage private owners of land to make land and water areas available to the public for recreational purposes . . . by limiting an owner's liability toward persons entering onto the owner's property for such purposes.

Definitions are provided in section 461C.2, and there "recreational purpose" is defined:

> "Recreational purpose" means 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.

Iowa Code § 461C.2(5). The district court found the activities of the field trip fell within the definition of "recreational purpose": horseback riding is specifically included in the statutory definition; and "observing and feeding calves . . . qualifies as nature study." Because the chapter was applicable, under section 461C.6 the Stewarts could only be liable if the evidence showed their "willful or

malicious failure to guard or warn against a dangerous condition, use, structure, or activity."

On that issue, the district court found no willful or malicious failure on the part of the Stewarts.

Finally, the district court ruled against Sallee on her claim that, by acting as tour guides, the Stewarts affirmatively left the protection of the recreational land use statute and entered into the realm of Restatement (Second) of Torts section 323, which provides:

> 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
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> (a) his failure to exercise such care increases the risk of such harm, or
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> (b) the harm is suffered because of the other's reliance on the undertaking.

The district court entered judgment in favor of the Stewarts and Sallee appeals.

II. Scope and Standard of Review.

We review a district court's ruling on summary judgment for errors at law. Iowa R. App. P. 6.907. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

III. Discussion.

"The elements of a negligence claim include the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages." *Van Essen v. McCormick Enters.*

Co., 599 N.W.2d 716, 718 (Iowa 1999). "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement (Third) of Torts: Liab. for Physical Harm § 7(a), at 90 (Proposed Final Draft No. 1, 2005) [hereinafter Restatement (Third)]; *Thompson v. Kaczinski*, 774 N.W.2d 829, 834–35 (Iowa 2009). "However, in exceptional cases, the general duty to exercise reasonable care can be displaced or modified." *Thompson*, 774 N.W.2d at 835 (citing Restatement (Third) § 6 cmt. f, at 81–82). "An exceptional case is one in which 'an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.'" *Id*. (citing Restatement (Third) § 7(b), at 90).

"In the end, whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm." *J.A.H. ex rel. R.M.H. v. Wadle & Assocs.*, *P.C.*, 589 N.W.2d 256, 258 (Iowa 1999). And the existence of a duty is a question of law for the court, which may be adjudicated on a motion for summary judgment. *Van Essen*, 599 N.W.2d at 718.

A. Existence of a duty. Sallee's negligence allegations are premised upon the Stewarts' "duty . . . to maintain their premises in a manner safe for the use of business invitees."[3] *See id.* at 719 (stating it is "well established under Iowa law that a possessor of land owes a duty of care to entrants upon the land, including business invitees").

[3] "A business invitee is one 'who is invited to enter or remain on land for [a] purpose directly or indirectly connected with business dealings with the possessor of [the] land.'" *Van Essen*, 599 N.W.2d at 719 n.2 (citation omitted).

> The possessor of land is under a duty to use ordinary care to keep the premises in a reasonably safe condition for business invitees. This duty requires the possessor to use reasonable care to ascertain the actual condition of the premises. The duty also requires the possessor to make the area reasonably safe or to give warning of the actual condition and risk involved.

Konicek v. Loomis Bros., Inc., 457 N.W.2d 614, 618 (Iowa 1990) (citations omitted). However, relying upon Iowa Code section 461C.3, the Stewarts contend the statute articulates countervailing principles and policies abrogating their duty to Sallee and the category of persons who visited their dairy farm for recreational purposes.

B. Abrogation of duty. "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 . . . ." Iowa Code § 461C.3 (emphasis added). Moreover,

> a holder of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes . . . does not thereby . . . [c]onfer upon such person the legal status of invitee . . . to whom a the duty of care is owed.

Id. § 461C.4. When applicable, the recreational use limited liability found in chapter 461C grants to land owners who offer the use of their land for recreational purposes a "broad abrogation of duty." *Peterson v. Schwertley*, 460 N.W.2d 469, 471 (Iowa 1990) (interpreting statutes formerly codified at chapter 111C).[4] *Cf. Scott v. Wright*, 486 N.W.2d 40, 42 (Iowa 1992) (declining to apply

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[4] As noted in *Peterson*:

> The language of these statutes is based on a model act drafted by the Council of State Governments in 1965. *See Public Recreation on Private Lands: Limitations on Liability,* 24 Suggested State Legislation 150 (1965). Forty-five states have enacted these "recreational use" laws which limit the duties of landowners toward visitors who enter upon their land for recreational purposes. *See* J. Page, *Law of Premises Liability*

now section 461C.3, which "is couched in terms of premises liability," to a suit alleging negligence in operation of a motor vehicle).

Sallee asserts the statutory abrogation of duty is *not* applicable because (1) the Stewarts' property is not the type covered by the chapter; (2) the farm was not open to the public; and (3) the school tour does not fit within the definition of "recreational purpose." We will address each in turn. In doing so, we apply well-established principles of statutory interpretation and construction:

> When confronted with the task of statutory interpretation our goal is to determine legislative intent from the words used by the legislature, not from what the legislature should or might have said. We cannot extend, enlarge, or otherwise change the meaning of a statute under the pretense of statutory construction. When we interpret a statute, we are required to assess the statute in its entirety, not just isolated words or phrases. Indeed, "we avoid interpreting a statute in such a way that portions of it become redundant or irrelevant." We look for a reasonable interpretation that best achieves the statute's purpose and avoids absurd results.

In re Conservatorship of Alessio, 803 N.W.2d 656, 661 (Iowa 2011) (internal citations omitted).

1. Type of land qualifies for limited liability. Sallee argues the focus of the field trip was "on property that contained not only the Stewarts' home,[5] but also their dairy farm consisting of a number of buildings, including

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> § 5.18, at 115–16 (1988). *See also* Annotation, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User,* 47 A.L.R.4th 262 (1986).

460 N.W.2d at 470. We might look to other jurisdictions for guidance in interpreting similar statutory language, as has our supreme court. *See id.* at 471–72 (surveying case law of other jurisdictions on question of whether permissive use is a prerequisite to application of recreational use limited liability); *see also Bird v. Economy Brick Homes, Inc.*, 498 N.W.2d 408, 409 (Iowa 1993) (noting "[d]ecisions from other jurisdictions have held that the placement of a cable across an access road, without more, did not amount to willful or malicious conduct").

[5] There is nothing in this record to suggest the Stewarts' home was open to those on the field trip and therefore we need not address Sallee's arguments and

the barn that contained the hay loft." Sallee claims the statute is designed to encourage landowners to open up "outside and unimproved areas" and thus the dairy farm is not the type of property to which chapter 461C is applicable. She emphasizes section 461C.1 which states "[t]he purpose of the chapter is to encourage private owners of land to make *land and water* areas available to the public for recreational purposes." (Emphasis added.)

The legislature could have confined the recreational use limited liability to unimproved, outdoor areas. But it did not. Rather, the legislature defines "land" expansively in section 461C.2(3) as meaning:

> 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.*

(Emphasis added.) The Stewarts' dairy farm and appurtenant buildings qualify for limited liability by this definition. *See Neal v. Wilkes*, 685 N.W.2d 648, 651 (Mich. 2004) ("The [Recreational Land Use Act] makes no distinction between large tracts of land and small tracts of land, undeveloped land and developed land, vacant land and occupied land, land suitable for outdoor recreational uses and land not suitable for outdoor recreational uses, urban or suburban land and rural land, or subdivided land and unsubdivided land. To introduce such distinctions into the act is to engage in what is essentially legislative decision-making." (footnote omitted)); *Waggoner v. City of Woodburn*, 103 P.3d 648, 653 (Or. 2004) (rejecting plaintiff's claim that recreational use immunity was

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hypotheticals aimed at the purported dangers of extending limited liability to a homeowner.

applicable only to property that is rural and undeveloped). *But see Rivera v. Philadelphia Theological Seminary*, 507 A.2d 1, 7 (Pa. 1986) (concluding recreational use act did not apply to indoor swimming pools).

2. The dairy farm was made "available to the public." Sallee contends the Stewarts' property was not open to the general public and thus they were not entitled to recreational use limited liability. Sallee contends the statutory limited liability is not applicable here because prior arrangements had to be made to go to the farm, and members of the Stewart family accompanied the visitors touring the property.

The language in Iowa's statute does not require that the land be open to the general public. In fact, our supreme court has stated permission to use the land is not necessary. *See Peterson*, 460 N.W.2d at 470–71 (finding landowner was immune from liability for injuries to person who dove into pond where landowner had posted "no trespassing" signs). The *Peterson* court explained why it chose not to distinguish between land that had been opened to the public and land which the public may have used without permission:

> We do not disagree with the contention that the purpose of this legislation was to encourage property owners to make lands suited for recreational uses available for that purpose. We believe, however, that a blanket abrogation of duty to all recreational users (except as provided in section [461C.6]) will more readily promote that objective than will an abrogation of duty limited to recreational use by licensees and invitees. If the abrogation of the landowner's duty is so limited, landowners remain vulnerable to claims by injured invitees and licensees who choose to dispute the granting of the license or invitation. Absent an express agreement governing the right of user, this will often pit the landowner's word against the land user's word. The uncertainty of the protection afforded a landowner under that scenario is less likely to encourage landowners to permit recreational use by others than would the

> broader abrogation of duty suggested by the language of section [461C.3].

Id. at 471.

Sallee directs our attention to two opinions from other jurisdictions. We have reviewed *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1291 (Utah 1996), which we find inapposite. There, the court denied immunity to the lessor and lessee of property overseen by, and restricted to use by the members and guests of a "rodeo club of dues-paying members." *Perrine*, 911 P.2d at 1291. That court stated, "If the plain meaning of the Landowner Liability Act was ignored and landowners who opened their land to only selected members of the public could nevertheless qualify for immunity, the result would be nonsensical and contrary to the Act's stated purpose." *Id.* at 1293. Here, the Stewarts had permitted yearly visits from kindergarten and Headstart classes, as well as accommodated requests from individuals and families that wished to visit. These field trips, while pre-arranged, were unlike the exclusivity of the rodeo club in *Perrine*.

In *McNamera v. Cornell*, 583 N.E.2d 1015 (Ohio Ct. App. 1989), an Ohio court found statutory recreational use immunity was not available to a homeowner who had been sued after the plaintiff broke a leg skateboarding on a "skateboard bowl" in the homeowner's garage. *See McNamera*, 583 N.E.2d at 1017–18. The *McNamera* court thus held the plaintiff was a "recreational user," but concluded that whether the homeowner was entitled to immunity was dependent upon whether the skateboard bowl was held open to the general public for recreational use. *Id.* at 1017. The ruling was not based upon statutory

language; rather, it was based upon a prior decision of the Ohio Supreme Court, which held that "[s]ince the purpose of the legislation conferring immunity is to encourage owners of premises suitable for recreational pursuits to open their lands for public use, it follows that where the land in question is not held open to the public, the immunity does not apply." *Loyer v. Buchholz*, 526 N.E.2d 300, 302 (Ohio 1988).

While we agree that the purpose of the statute informs the interpretation, *see id.*, the operative language we must apply is that of section 461C.3: "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 to give any warning of a dangerous condition, use, structure, or activity on such premises *to persons entering for such purposes*." (Emphasis added.) The focus of our inquiry is thus on whether the persons entering the land did so for recreational purposes. We believe this focus is emphasized by section 461C.4, where it is unambiguously stated that such a user is not an invitee.

> 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* . . . 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.

Iowa Code § 461C.4 (emphasis added). *See Howard v. United States*, 181 F.3d 1064, 1071 (9th Cir. 1999) ("The [Hawaii Recreational Use Statute] does not

contain a requirement that a landowner allow each and every individual of the general public access and use of the land; to the contrary, under the plain language of the statute, unless the landowner charges a fee or acts maliciously or willfully, the landowner is immunized for injury to "any person" using his or her land for recreational purposes *unless* that "person" is a "house guest."); *Johnson v. Stryker Corp.*, 388 N.E.2d 932, 934 (Ill. App. Ct. 1979) ("An examination of the rest of the Act reinforces our conclusion that the legislature never intended to limit the application of the statute to landowners opening up their land to the general public.").

Like *Peterson*, the allegations relating to the Stewarts as landowners present a "clear case of premises liability" to which the recreational use limited liability might apply. *See Scott*, 486 N.W.2d at 42 ("By contrast, Scott's suit against Wrights rests—not on duties addressed by section [461C.3]—but on vicarious liability for alleged negligence in the operation of a motor vehicle. We are convinced, as was the district court, that this intervening act of negligence takes the case outside the purview of chapter [461C]."). We therefore address Sallee's contention that the district court erred in concluding she was a person who was on the property "for recreational purposes."

3. "Recreational purpose." Sallee argues a class tour of a dairy farm does not fall within the definition of "recreational purpose." She states simply, "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 . . . ." We find her reliance upon *Holland v. Weyher/Livsey Constructors, Inc*., 651 F. Supp. 409 (D. Wyo. 1987), is misplaced. In that case, eleven-year-old Jody Holland and a

friend entered on to land owned by Union Pacific Land Resources Corporation to play on a "hill" near their residence. *Holland*, 651 F. Supp. at 411. "The hill was actually an abandoned pile of coal tailings in which subsurface fires smoldered. Plaintiff was seriously burned when he broke through the surface of the slag heap." *Id.* In rejecting Union Pacific's claim of immunity, the court stated:

> The legislature intended to increase access to Wyoming's recreational areas, not to permit landowners to lay traps for the public and then claim immunity under the Act. The tailings, moreover, were located in an industrial subdivision, not on recreational land. Defendants' analysis of the statute would convert any area into "recreational land" whenever a child wanders onto a dangerous site to play.

Id. at 412. This case offers nothing to strengthen Sallee's claim that the statute does not apply because "[t]he dairy farm was a business."[6] And if it is Sallee's implication that the hayloft was an inherently dangerous trap, we reject that characterization.

As noted earlier in this opinion, the legislature defined "recreational purpose" in section 461C.2(5), which provides:

> "Recreational purpose" means 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.

In *Hegg v. United States*, 817 F.2d 1328, 1330 (8th Cir. 1987), the Eighth Circuit Court of Appeals upheld a summary judgment ruling for the defendant. The circuit court approved the district court's ruling, which

[6] However, her statements in this regard emphasize that her claim is based upon premises liability.

> rejected Hegg's third contention that she was not engaged in a "recreational purpose" when she was swinging because "swinging" is not specifically mentioned in the list of activities included within the statutory definition. The court reasoned that the list of activities expressly mentioned as within the statutory definition of "recreational purpose" was intended to be illustrative only, not complete and exclusive. The court held that in view of the general purposes underlying the statute and the popular and reasonable understanding of the meaning of the term "recreational purpose," swinging fell within that definition.

Hegg, 817 F.2d at 1330.[7] *Cf. Hall v. Turtle Lake Lions Club*, 431 N.W.2d 696, 697 (Wis. Ct. App. 1988) (noting legislative overruling of more restrictive court interpretations). We believe this analysis is sound. The definition of "recreational purpose" states it "means the following *or any combination thereof*," again suggesting the legislature intended an expansive definition.

We have found but a few cases that are at all instructive. The first is *Fisher v. United States*, 534 F. Supp. 514, 515 (D. Mont. 1982), where

> [a]s a part of her school's educational program, a teacher at a Missoula school arranged a field trip on the refuge for a group of kindergarten and special education students. On the day of the accident the teacher and an employee of the Fish and Wildlife Service decided that, prior to the field trip, the children would have lunch in the area of a maintenance barn on refuge lands and then take the guided tour of the refuge. During the lunch period some children, in disregard of the warnings of the teacher, played on a snowplow blade. In the course of the play, the blade fell upon plaintiffs' daughter and killed her.

The plaintiffs argued that the purpose of the field trip was educational and not recreational and thus the United States was not entitled to the immunity provided in Montana's recreational use statute. *Fisher*, 534 F. Supp. at 515.

The district court disagreed, stating:

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[7] Our supreme court cited to *Hegg* in both *Peterson*, 460 N.W.2d at 470, and *Bird*, 498 N.W.2d at 409, though did not discuss the definition of "recreational purpose."

> The only purpose of the recreational use statute is to encourage landowners to make their lands freely available to the public by limiting the landowners' tort liability. While the general purpose of a law may not control the specific unambiguous language of it, policy does give guidance in cases where interpretation is needed. The statute, in defining the term "recreational purpose," uses the terms "picnicking," "hiking," and "other pleasure expeditions." At the time of the accident the decedent was doing the things which are done on a children's picnic although the activities scheduled to occur later were, at least in the minds of the school authorities, educational. Once on another's land, a person is exposed to the same basic risks whether he be a student or a sightseer. Certainly under the facts here there was no difference in risk to the children whether they picnicked or rode a bus as students or sightseers. A visit to a zoo, a museum, or a wildlife refuge may be educational, recreational, vocational, or some combination of all three.
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> . . . .
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> In this case I think the policy of the law is served and the words of it are not violated if it be held that the statute is applicable in any case where the entry is made for what could reasonably be regarded by the general public as a recreational purpose regardless of some different purpose in the mind of a particular user.

Id.

And the district court cited *Fetherolf v. State, Department of Natural Resources*, *Division of Parks & Recreation*, 454 N.E.2d 564 (Ohio Ct. App 1982), where the court concluded that a person sitting and watching others swim constituted a "recreational user" within the meaning of that state's recreational use statute.

> Plaintiff contends that he was not a recreational user because, as a result of his injured shoulder, he was unable to use the recreational facilities which were to be enjoyed by his family but, instead, was only going to sit and watch.
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> R.C. 1533.18(B) defines recreational user, as follows:
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> "'Recreational user' means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency thereof,

> to enter upon premises to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits."
>
> Accordingly, whether plaintiff was a recreational user at the time in question depends upon whether he entered the park for the purpose of engaging in a recreational pursuit within the contemplation of the definition. Construed most strongly in his favor, the evidence does indicate that plaintiff was not going to swim but, instead, while his family swam, he was going to sit by the lake presumably on the beach area to which he was walking at the time of his fall. Sitting on the beach watching others swim (including members of one's family) constitutes a recreational activity within the contemplation of the definition set forth in R.C. 1533.18(B), *supra.* Plaintiff's affidavit clearly indicates that he intended to engage in a type of recreational activity, albeit not one of the recreational pursuits specifically mentioned in the statute, but one of the same general type and nature as set forth. Sitting on the beach or otherwise close to the water is a recreational pursuit associated with swimming. Accordingly, plaintiff was a recreational user since he entered the park for the purpose of engaging in such recreational pursuit.

Fetherolf, 454 N.E.2d at 565–67. *But see Rintelman v. Boys & Girls Clubs of Greater Milwaukee*, 707 N.W.2d 897, 905–06 (Wis. Ct. App. 2005) (reversing summary judgment for the owner of a retreat facility and against a chaperone on an educational retreat, who fell while walking from one building to another: employing a multi-factored test of "the material considerations in determining whether the statute applies to a particular activity," the court concluded the summary judgment failed to establish the facility's claim—and statutory requirement that—the plaintiff "entered the owner's property to engage in a recreational activity," Wis. Stat. § 895.52(2); court noted that "*if* there were evidence that Mrs. Rintelman was participating in recreational activities while at Unifest 2000, there might be an issue whether the walk during which she fell was so inextricably connected with those activities to make the statute applicable").

Here, the district court determined the test for whether an injured person was on the property for recreational purposes is an objective one. *See* 62 Am. Jur. 2d *Premises Liability* §144, at 520 (2005). As the district court concluded, "Sallee, as chaperone of the children's activities, which included horseback riding, nature study, and play in the Stewarts' hayloft, was engaged in a recreational purpose while she was present on the Stewarts' land." We agree that viewing the activities of the field trip objectively, its activities included those statutorily defined as "recreational" and thus entitled the Stewarts to recreational use limited liability. We find no error.

C. Does record raise issue of willful activity on part of Stewarts? Sallee next argues that if section 461C.3 is applicable, the district court erred in finding there was no issue of material fact as to whether there was a "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity" under section 461C.6.

On that issue, the district court wrote:

> In the instant case, the Stewarts covered the floor chute with hay bales and [Matthew] Stewart tested the cover with his own weight. There was no evidence in the record the Stewarts had a conscious design to injure. There is no evidence of intent to harm, nor is there evidence of an indifference to whether harm will result.
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> Likewise, there is no evidence the Stewarts' placement of bales over the chute would naturally or probably result in injury. There is no evidence the Stewarts knew or reasonably should have known that their conduct would result in injury and there is no evidence the Stewarts continued to use hay bales over the chute in reckless disregard of the consequences.
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> The Court concludes there is no evidence in the record that the Stewarts willfully or maliciously failed to guard or warn against a dangerous condition, use, structure, or activity.

The factors considered by the district court were those our supreme court noted in *Bird*, 498 N.W.2d at 409–10, referring to other courts' definitions in the context of land use statutes. *See Hegg*, 817 F.2d at 1332 (stating it was "critical in the case Hegg failed to produce any evidence that the defendant was aware of any dangerous condition in the swing set or of any previous injuries to users"); *Mandel v. United States*, 545 F. Supp. 907, 913 (W.D. Ark. 1982) (requiring the plaintiff show: "(1) defendants' conduct would naturally or probably result in injury; (2) that defendants knew or reasonably should have known that their conduct would so result in injury; and (3) that defendants continued such course of conduct in reckless disregard of the consequences"); *Rushing v. Louisiana*, 381 So.2d 1250, 1252 (La. Ct. App. 1980) (requiring the landowners to have had a conscious design to injure); *Burnett v. City of Adrian*, 326 N.W.2d 810, 812 (Mich. 1982) (stating "willful and wanton misconduct" as conduct that "shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does"). In *Bird*, the court held that placement of the cable across an access road, without more, did not create an issue of material fact as to whether the defendant acted willfully or maliciously. 498 N.W.2d at 410.

Sallee notes the summary judgment record contains Matthew Stewart's testimony that he tested the hay bales the morning of the field trip. She states she doesn't believe this testimony. But we agree with the district court that this record does not create an issue of material fact as to whether the defendants acted willfully or maliciously.

D. Affirmative assumption of duty by Stewarts acting as "tour guides." Sallee contends the district court erred in finding her common law claims were precluded by chapter 461C, and in denying her own motion for summary judgment on the issue of the Stewarts' negligence.

Relying upon *Scott*, Sallee asserts she is claiming negligence on the Stewarts' part outside their duties as landowners. Sallee states she is not asserting a claim of negligent or fraudulent misrepresentation; rather she argues that under section 7(a) of the Restatement (Third) and *Thompson*,

> by inviting Kim and the kindergarten class and setting up a tour of the farm, taking Kim and the class around through various areas of the farm and activity stations created by the Stewarts, and eventually up into the hay loft, they were assuming a duty as tour guides for the class by virtue of the risks that were imposed upon them. This required the Stewarts to exercise reasonable care, either to take precautions to fix dangers like the hole or not take them into dangerous areas or to warn them of any dangers like the hole.

The district court, in ruling on Sallee's rule of civil procedure 1.904(2) motion, found the *Scott* case distinguishable and rejected the plaintiffs' common law negligence claims. The court emphasized Sallee's injuries resulted "from the condition of the premises": consequently, the recreational use statute was "controlling and negates the common law."

In *Scott*, 486 N.W.2d at 42, our supreme court emphasized the statute's purpose to abrogate a duty to recreational users for premises negligence:

> By its terms, [section 461C.3] immunizes landowners from only two specific duties of care toward persons using agricultural property for recreational purposes: to keep the premises safe and to warn of dangerous conditions. Nothing in the language of chapter [461C] suggests a legislative intent to immunize *all* negligent acts of landowners, their agents, or employees. Nor do we believe such 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 recreation areas for use by our citizenry." Explanation to H.F. 151 at 3, 62nd G.A. (Iowa 1967). 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.

Our supreme court's decisions in *Bird* and *Peterson*, finding limited liability for owners of recreational land, did not involve the landowner's actions to organize or guide the public's use. In *Peterson*, the court ruled the landowner was not liable for injury at a pond where the plaintiff was trespassing. 460 N.W.2d at 471. In *Bird*, the court ruled that "placement of the cable across an access road on recreational land, *without more*, did not create an issue of material fact" on the question of willful or malicious actions by a landlord. 498 N.W.2d at 410 (emphasis added). However, the court was not asked to decide whether the landowner had a duty to warn if he guided the public on his land in the vicinity of the cable.

Sallee's claim is closer to the situation in *Scott*. The "intervening" negligence of the tractor driver in *Scott* who pulled the recreational users around the apple orchard on a hayride, was not a premises liability problem and so the statute did not apply. 486 N.W.2d at 42. The landowner consented to the use of their tractor by the tractor driver, who took the invitees on an organized activity, a hayrack ride—an affirmative action which was different than an unescorted use of the apple orchard. The duty in *Scott* was based on vicarious liability for the alleged negligence of the driver in the operation of the motor vehicle, *see id.*, and therefore did not include a premises liability problem. Thus the "intervening act" of operating a motor vehicle in a negligent manner—the something more implied

in *Bird*—"takes the case outside the purview of chapter [461C]." *Id*. Similarly, the purported negligence on the part of the Stewarts in guiding the field trip around the farm raises an issue separate from the limitations on their duty as recreational landowners. It is one thing to allow the public to use land for recreational purposes. It is another to organize specific activities and to guide visitors through the land.

The language of our statute includes the abrogation of the duty to warn on the part of landowners whose property is entered or used for recreational purposes. *See* Iowa Code § 461C.3. And except for "willful or malicious failure . . . to warn against a dangerous condition, use, structure, or activity," *see id.* § 461C.6(1), "a holder of land who . . . permits without charge any person to use such property for recreational purposes . . . does not thereby [e]xtend any assurance that the premises are safe for any purpose." Iowa Code § 461C.4(1). As landowners, the Stewarts had no duty to warn; and if the public entered or used their land without the Stewarts' guidance, Sallee's claim would fail. However, once the Stewarts undertook responsibility for guiding the field trip attendees, the articulated policy of the chapter 461C does not cover the relationship between landowner and the invited public, and we believe they were required to exercise ordinary care in that endeavor.

Whether there is negligence in the Stewarts' performance of their affirmative duty is not resolved on this summary judgment record.

IV. Conclusion.

With respect to Sallee's premises liability claims, we affirm the district court's grant of summary judgment to the Stewarts. As to Sallee's claims that the

defendants "were acting as tour guides" upon whom the "Plaintiff and her daughter relied" and who "failed to exercise reasonable care in the conduct of the tour when they directed the Plaintiff and her daughter into the hay loft where the dangerous condition of the hole existed" and "made misrepresentations with regard to the safety of the hay loft," we reverse and remand for further action consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Vogel, P.J., concurs; Doyle, J., concurs in part and dissents in part.

DOYLE, J. (concurring in part and dissenting in part)

I concur with the majority's reversal and remand on the tour guide issue, but I respectfully dissent from the majority's affirmance concerning Sallee's premises liability claims. Sallee was at the farm as an adult chaperone for her daughter's kindergarten class field trip. There is no summary-judgment evidence that Sallee entered the farm for any recreational purpose, nor is there any evidence she participated in any activity for recreational purposes. Under the state of the record before us, I conclude the Stewarts failed to meet their burden to prove they are entitled to protection under Iowa's recreational use immunity statute.

In granting summary judgment in favor of the Stewarts, the district court concluded "Sallee, as chaperone of the children's activities, which included horseback riding, nature study, and play in the Stewarts' hayloft, was engaged in a recreational purpose while on the Stewarts' property." The majority agreed, stating "that viewing the activities of the field trip objectively, its activities included those statutorily defined as 'recreational' and thus entitled the Stewarts to recreational use limited liability." I disagree and find the holding in *Rintelman v. Boys & Girls Clubs of Greater Milwaukee, Inc*., 707 N.W.2d 897 (Wis. Ct. App. 2005), to be persuasive.

Rintelman, a chaperone of an educational retreat, fell while walking from one building to another and brought an action against the owner of the retreat facility, and others, seeking recovery for her injuries. *Rintelman*, 707 N.W.2d at 899. In applying Wisconsin's recreational use immunity statute, the district court ruled Rintelman's claims were barred. *Id*. The Wisconsin Court of Appeals

reversed and remanded, concluding "there is nothing in the summary-judgment record that would permit a jury to find that Mrs. Rintelman attended Unifest 2000 at Camp Whitcomb/Mason 'to engage in a recreational activity.'" 707 N.W.2d at 906.

The pertinent portions of Wisconsin's recreational use immunity statute, as considered by the *Rintelman* court, are substantially the same as Iowa's statute under consideration here. *Compare* Wis. Stat. § 895.52(2)(a)(1) (2009) ("[N]o owner . . . owes to any person who enters the owner's property to engage in a recreational activity . . . [a] duty to keep the property safe for recreational activities.") *with* Iowa Code § 461C.3 (2009) ("[A]n owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes . . . ."). Although the Wisconsin statute specifically enumerates many more activities under its definition of "recreational activity" than are listed in Iowa's statutory definition of "recreational activity," Wisconsin's definition is substantially similar to Iowa's definition of "recreational purpose." *See* Iowa Code § 461C.2(5); Wis. Stat. § 895.52(1)(g).

Just as Rintelman argued in her case, Sallee argues here that she, as a chaperone, was not engaged in any "recreational purpose" activity at the time she was injured, or at any other time while at the farm. There is nothing in the record to suggest Sallee was at the farm for any purpose other than as an adult escort of the children to ensure their proper behavior. Further, the record is devoid of any evidence she participated in any recreational activity. It was the Stewarts' burden to "affirmatively establish the existence of undisputed facts entitling [the Stewarts] to a particular result under controlling law." *Farm Bureau*

Life Ins. Co. v. Chubb Custom Ins. Co., 780 N.W.2d 735, 739 (Iowa 2010). This they failed to do.

The mere presence on property suitable for recreational activity when a plaintiff is injured does not, *ipso facto*, make applicable the immunity provisions of Iowa Code section 461C.3. Indeed, the statute requires "*entry or use by others for recreational purposes*." Iowa Code § 461C.3 (emphasis added). There is nothing in the summary-judgment record that would permit a jury to find that Sallee entered or used the farm "for recreational purposes." Sallee entered the farm premises charged with the duties to keep the kindergartners in line. There is nothing in the record before us to indicate Sallee did nothing more than discharge her duties as chaperone while at the farm. Accordingly, I would reverse the district court's ruling that found Iowa Code chapter 461C to be applicable to Sallee while she was present on the Stewarts' land, and I would remand for trial on that issue.