

Nos. A05-1377 and A05-1378

State of Minnesota  
In Court of Appeals

David Granville and Marlyss Granville, as parents and natural guardians of Kailynn Granville, a minor,  
*Respondents (A05-1377),*

Jacqueline Johnson, as parent and natural guardian of Shanel Andrews, a minor,  
*Respondent (A05-1378),*

vs.

Minneapolis Public Schools,  
Special School District No. 1,

*Appellant.*

RESPONDENTS' BRIEF AND APPENDIX

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUES ..... 1

STATEMENT OF THE CASE ..... 2

STANDARD OF REVIEW ..... 4

STATEMENT OF FACTS ..... 5

ARGUMENT ..... 16

    I.    A Brief History of Immunity and Minnesota Statute Section 466.12 subd. 3a. .... 16

    II.   The \$1.50 Figure in Minnesota Statute Section 466.12 subd. 3a Bears No Rational Relationship to Current Market Conditions and is Therefore Arbitrary ..... 18

        A.    The distinction between school districts drawn by section 466.12 subd.3a is neither genuine nor substantial, but is manifestly arbitrary ..... 20

        B.    There is No Evident Connection Between the Distinctive Needs Peculiar to the Class and the Prescribed Remedy ..... 22

        C.    While Financial Stability is a Legitimate Purpose for the State to Pursue, it Cannot be Met by an Outdated Statutory Rate ..... 22

    III.  Appellant is not Entitled to Have a Finding of Unconstitutionality Applied Prospectively Only ..... 24

    IV.  Addressing Tort Claims Will Not Undermine Appellant’s Educational Budget ..... 26

V. Upholding Section 466.12 subd. 3a Will Create A Statutory Scheme That Tells Schools They Have No Responsibility For Safety ..... 27

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

### CASES

Nissen v. Redelack 74 N.W.2d 300, 304, 246 Minn. 83, 90 (1955) .....	17
Allen v. Indep. Sch. Dist. No 17 216 N.W. 533, 534, 173 Minn. 5, 6 (1927) .....	17
Butler v. Jordan 750 N.E.2d 554, 571 (Ohio 2001) .....	27
Fear v. Indep. Sch. Dist. 911 634 N.W.2d 204, 209 (Minn. Ct. App. 2001) .....	4
Granville v. Minneapolis Public Schools, Special School District No. 1. 668 N.W.2d 227 (Minn Ct. App. 2003) .....	1, 3, 4, 6, 7, 19, 20
Hahn v. City of Ortonville 47 N.W.2d 254, 259, 138 Minn. 428, 434 (1953) .....	18
Johnson v. State 553 NW.2d 40, 45 (Minn. 1996) .....	4
Kissoondath v. U.S. Fire Ins. Co. 620 N.W.2d 909, 917 (Minn. Ct. App. 2001) .....	5
Lienhard v. State 431 N.W.2d 861, 867-68 (Minn. 1988) .....	24
Meier v. City of Columbia Heights 686 N.W.2d 858, 863 (Minn. Ct. App. 2004) .....	4
Nieting v. Blondell 235 N.W.2d 597, 601 (Minn. 1975) .....	17, 25

Sigurdson v. Isanti County 448 N.W.2d 62, 66 (Minn. 1989) .....	5
Spanel v. Mounds Views School District, 118 N.W.2d 795 (Minn. 1962) .....	1, 9, 16, 17, 21, 23, 26
State v. Russell 477 N.W.2d 886, 888 (Minn. 1991) .....	20, 22
Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co. 503 N.W.2d 793, 795 (Minn. Ct. App. 1993) .....	5

## **STATUTES**

MINN. STAT. § 120A.22 .....	27
Minnesota Statute Section 466.12 subd. 3a .....	1-3, 6, 8, 9, 13, 15, 16, 18, 20-26, 28

## **RULES**

MINN. R. CIV. P. 12.02(e) .....	6
---------------------------------	---

## **OTHER**

MINN. CONST. art. I, § 2 .....	19
U.S. CONST. amend. V .....	24
U.S. CONST. amend. XIV, § 1 .....	19

## STATEMENT OF ISSUES

1. **Did the District Court, following this Court's precise directions on remand, correctly conclude that the evidence proved that the 1969 rate of \$1.50 per student in Minnesota Statute Section 466.12 subd. 3a (which provides a school district immunity from tort liability if insurance cannot be obtained at this rate) is arbitrary under current market conditions and that this statute is therefore unconstitutional?**

Following the precise directions of this Court when it remanded these cases for discovery and consideration of Minnesota Statute Section 466.12 subd. 3a in light of a factual record, the district court examined whether its statutory rate of \$1.50 per student per year (set in 1969 and unchanged since) was "arbitrary" under "current market conditions." The district court concluded it was arbitrary, because un-rebutted expert testimony established that not a single "school district in the state can obtain insurance for \$1.50 or less under current market conditions." Accordingly, the district court denied Appellant's motion for summary judgment, holding that Section 466.12 subd. 3a is not rationally related to a legitimate governmental purpose, and is therefore unconstitutional.

### **Apposite authorities:**

Minn. Stat. § 466.12 subd. 3a

Granville v. Minneapolis Public Schools, Special School District No. 1.  
668 N.W.2d 227 (Minn Ct. App. 2003)

Spanel v. Mounds Views School District,  
118 N.W.2d 795 (Minn. 1962)

## STATEMENT OF THE CASE

These two consolidated case are once again before this Court on an issue that goes to the heart of safety and responsibility in all of the State's public schools, namely whether a public school may seek absolute and complete immunity for injuries to students caused by its negligence because it cannot obtain liability insurance at a dollar rate fixed in 1969 and unchanged since. These cases were first before this Court without any factual record, because the district court had granted the motion of Appellant, Minneapolis Public Schools, Special School District No. 1, to dismiss the two students' injury cases on the pleadings.<sup>1</sup> This Court, recognizing that it could not decide in a vacuum the critical question of whether a dollar rate unchanged for over 30 years had any validity today, remanded these cases to the district court with the following guidance and directions:

At this early stage of the proceedings, there is insufficient evidence from which the district court can determine whether the legislature's choice of a rate of \$1.50 per student is arbitrary under current market conditions, as appellants assert, or, on the contrary, creates a constitutional classification that is relevant to the statute's purpose. The rate of \$1.50 per pupil has not changed since subdivision 3a was enacted in 1969. *See* Minn.Stat. § 466.12, subd. 3a (1969). In order to decide whether the statute meets the federal and state rational-basis tests, evidence demonstrating whether immunity triggered by the \$1.50 per pupil rate permits constitutional operation of the statute is required. Without such analysis, the district court's conclusion that the school district is entitled to immunity is erroneous.

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<sup>1</sup>The two students are Shanel Andrews (10 years old when she was injured) and Kailynn Granville (10 years old when she was injured). The claims were brought by their parents as natural guardians, Jacqueline Johnson, as parent and natural guardian of Shanel Andrews; and David Granville and Marlyss Granville, as parents and natural guardians of Kailynn Granville.

Granville v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1, 668 N.W.2d 227 324-35 (Minn. Ct. App. 2003)(emphasis added).

On remand, District Judge Heidi Schellhas did exactly as directed, and “analyzed” the “evidence” of whether this \$1.50 rate was “arbitrary” under “current market conditions.” This evidence came primarily in the form of the un-rebutted affidavit and deposition testimony of Respondents’ expert on the cost of school insurance over the past decades, David Lanigan, who testified that under current market conditions, “it is not possible for any school in the state of Minnesota to obtain general liability insurance at the rate of \$1.50 per pupil per year.”(A.A. 41.)<sup>2</sup>

Rather than focusing on the arbitrariness of the statute’s \$1.50 rate under current market conditions, or making any attempt to rebut Mr. Lanigan’s expert opinions, Appellant instead argued to the district court that the focus should be on school funding issues, and presented expert testimony on this subject, in the form of an affidavit of Gary Olsen. (A.A. 68-79.) Mr. Olsen’s affidavit did not address anything other than school funding issues. (A.A. 68-79.) In short, Appellant presented no evidence below related to the \$1.50 rate at issue.

With this factual record, Judge Schellhas found the \$1.50 rate in Minnesota Statute section 466.12 subd. 3a arbitrary under current market conditions, and that the statute therefore violated Respondents’ State and Federal Equal Protection rights. (A.A. 15-16.)

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<sup>2</sup> In this brief, the designation of A.A. refers to Appellant’s Appendix. The designation of R.A. refers to Respondents’ Appendix.

Judge Schellhas determined that because not a single “school district in the state can obtain insurance for \$1.50 or less” per student per year, the statute was not rationally related to achieving its legitimate purpose and that it no longer draws permissible distinctions between members inside of the class and those outside of the class for which it was created. (A.A. 15-16.) Therefore, she concluded “the immunity triggered by the \$1.50 per pupil rate does not permit constitutional operation of the statute.” (A.A. 16.)<sup>3</sup>

### STANDARD OF REVIEW

This appeal address the denial of Appellant’s immunity-based defense. Denial of an immunity-based defense is a question of law reviewed *de novo* by appellate courts. Meier v. City of Columbia Heights, 686 N.W.2d 858, 863 (Minn. Ct. App. 2004)(*citing Johnson v. State*, 553 NW.2d 40, 45 (Minn. 1996)). In these consolidated matters, Appellant carries “the burden of showing particular facts demonstrating an entitlement to immunity.” *Id.* (*citing Fear v. Indep. Sch. Dist. 911*, 634 N.W.2d 204, 209 (Minn. Ct. App. 2001)(*review denied* Dec. 11, 2001))

Additionally, this Court has already examined the constitutional framework to be applied to the issues in this case, finding “current market conditions” to be the appropriate manner in which to measure the constitutionality of this statute. Granville v. Minneapolis

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<sup>3</sup> The district court mistakenly believed that Respondents had not provided the Attorney General with proper notification of their intent to challenge the constitutionality of Section 466.12 subd. 3a. To correct this misunderstanding, Respondents provided the district court with information to clarify the notice actions taken by Respondents. (R.A. 55-60.)

Pub. Sch., 668 N.W.2d 227 (Minn Ct. App. 2003). This framework has become “the ‘law of the case’, and may not be re-litigated or re-examined in a second appeal.” Kissoondath v. U.S. Fire Ins. Co., 620 N.W.2d 909, 917 (Minn. Ct. App. 2001)(*citing* Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 503 N.W.2d 793, 795 (Minn. Ct. App. 1993)(*review denied* Sept. 30, 1993). The law of the case doctrine applies “when an appellate court has ruled on a legal issue and remanded the case for further proceedings on other matters.” Sylvester Bros, 503 N.W.2d at 795(*citing* Sigurdson v. Isanti County, 448 N.W.2d 62, 66 (Minn. 1989)). Because this Court has already decided that “current market conditions” is the appropriate test, Appellant should not be heard to argue otherwise.

### **STATEMENT OF FACTS**

On November 1, 2001 Respondents Shanel Andrews (then 10 years old) and Kailynn Granville (then 10 years old) were 5th grade students at Loring Elementary School, part of the Minneapolis Public School (Appellant) system. Their physical

education class that day was supervised by a substitute teacher, who decided that the class would play a game called “flashlight tag.” The teacher had the children run around the gymnasium in total darkness until they were “tagged” by a flashlight beam. (A.A. 3-4.)

Predictably, because they were running in total darkness, two of the children (Respondents Andrews and Granville) ran headlong into one another in the pitch black gymnasium. Both received serious injuries.

After suffering their respective injuries in the darkened gymnasium, Respondents each

notified Appellant of their potential claims pursuant to Minnesota statutory requirements. In response, Appellant notified Respondents of its belief that it was immune from liability and had no intention of addressing any personal injury claims. Respondents each filed suit in Hennepin County District Court seeking redress for their injuries. (A.A. 3-4.)<sup>4</sup> Prior to answering Respondents' complaints or conducting any discovery, Appellant moved for dismissal of both claims under MINN. R. CIV. P. 12.02(e) claiming immunity under Section 466.12 subd. 3a. Based upon nothing more than a letter from the Department of Commerce indicating that Appellant met the statutory requirements for immunity, the district court dismissed Respondents' claims.

Respondents appealed the dismissal on the basis that Section 466.12 subd. 3a violated their equal protection rights and deprived them of a fundamental right in violation of the State Remedies Clause. This Court found that the statute did not deprive Respondents of a fundamental right and that the equal protection claim was to be reviewed on a rational standard basis. This Court reversed the district court's dismissal and specifically directed the court below to determine if the "legislature's choice of a rate of \$1.50 per student is arbitrary under current market conditions," Granville v. Minneapolis Pub. Sch., 668 N.W.2d 227, 235 (Minn Ct. App. 2003). The Minnesota Supreme Court denied the petitions of the Respondents and Appellant for further review. (R.A. 63.)

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<sup>4</sup> The Complaint in Appellant's index is that of Respondent Kailynn Granville. The Complaint of Respondent Shanel Andrews is identical in all material respects.

As noted, this Court gave very specific and precise directions to the district court on remand as to the analysis it was to conduct. Because of the length of time that had passed since the \$1.50 per pupil figure was enacted in 1969, this Court was concerned “whether the legislature's choice of a rate of \$1.50 per student is arbitrary under current market conditions” and in order to determine “whether the statute meets the federal and state rational-basis tests”, the district court would need to examine “evidence” on this question. Granville, 668 N.W.2d at 235 (emphasis added)

On remand, the parties conducted discovery solely on this insurance/immunity issue to provide the district court with this evidence.<sup>5</sup> In order to find out what led the Minneapolis School District to invoke the immunity of this statute (the first time any school district in the state had invoked this immunity since the statute was enacted in 1969 (R.A. 61.))<sup>6</sup>, Respondents obtained documents in discovery and from the public record bearing on this decision, and deposed Appellant’s past and current Directors of Risk Management, Kenneth Meyer and Lisa Strombeck. In order to find the answer to the critical question of where this \$1.50 rate fits within “current market conditions,” Respondents also consulted with David Lanigan, an independent insurance agent who has spent over 30 years working with school

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<sup>5</sup> Discovery has yet to be conducted into liability or damages issues. Those matters have been reserved for further discovery pending this Court’s ruling on the present appeal.

<sup>6</sup> The affidavit of Paula Jossart is part of the record from Plaintiffs’ initial opposition to the motion to dismiss brought by Minneapolis Public Schools on August 15, 2002.

districts to provide their insurance coverages. This expert, Mr. Lanigan, initially provided an affidavit in response to the school district's summary judgment motion. Upon the school district's request, Mr. Lanigan was then made available by Respondents for his deposition. All of the above ultimately painted an unflattering and complete picture of the context of the Minneapolis School District's decision to seek immunity under Section 466.12 subd. 3a, as well confirming the common sense expectation that a 1969 rate of \$1.50 was long since outdated.

The documentation and depositions provided by the Appellant school district revealed that their decision to seek immunity under this statute was the result of both happenstance and a complete lack of knowledge or understanding of the history and public policy underlying Minnesota's abolition of sovereign immunity, all against the backdrop of fiscal concerns. On June 19, 2001 the Minneapolis Board of Education met for its regularly scheduled meeting. At that meeting, the School Board undertook consideration of several of the Superintendent's recommendations, one of which was that the school district become self-insured for liability exposure for the 2001-2002 school year. The School board passed the recommendation unanimously. (R.A. 50.)

As part of the decision to self-insure, the school district set aside self-insurance reserves sufficient to satisfy general liability claims. (R.A. 19.) Then Director of Risk Management, Kenneth Meyer, and his assistant Bob Zenz, were also charged with making sure that the Defendant complied with all of the requirements for becoming a self-insured

entity. (R.A. 9.) While undertaking this task, Mr. Zenz “stumbled” upon Minnesota Statute Section 466.12 subd. 3a. (R.A. 9-10.) Seeing it as a basis to save money for the school district, Mr. Meyer then brought the statute to the attention of the Superintendent and the general counsel. (R.A. 10.) After conferring with these parties,<sup>7</sup> Mr. Meyer on August 28, 2001, applied to Department of Commerce for confirmation that the school could not obtain insurance at the rate specified in Section 466.12 subd. 3a. (R.A.45.) The only information that Defendant supplied to the Department of Commerce was a quote comparison table from Defendant’s insurance broker. (R.A. 46.) (At no time did Mr. Meyer inform the Department of Commerce that Defendant was actually self-insured and maintained a self-insurance fund.) The Department, by return letter dated September 14, 2001, certified that the Defendant was unable to obtain insurance at a rate below \$1.50 per pupil per year. (R.A. 47.)

Yet, without even a cursory knowledge of the history of sovereign immunity in Minnesota, most importantly its abolition on public policy grounds in Spanel v. Mounds

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<sup>7</sup> It is also important to note that at no time did Mr. Meyer, the Superintendent or the general counsel’s office ever go to the School Board (the body that determines policy issues for Appellant) to seek approval of this proposed change in school district policy. (R.A. 14.) Even though the school district then asserted the defense of immunity under Section 466.12 subd. 3a, there is no written policy anywhere that this is in fact the actual policy of the School Board. Because there is no evidence that the School gave authority to Mr. Meyer to seek immunity from the Department of Commerce and never ratified Mr. Meyer’s acts after the fact, Respondents argued below that Mr. Meyer’s action in seeking to obtain certification from the Department of Commerce under Minnesota Statute Section 466.12 subd. 3a was *ultra vires* and without effect. In light of its finding that Section 466.12 subd. 3a is unconstitutional, the district court did not need to address this issue. Nevertheless, it provides another reason why Appellant’s claim of immunity fails here. (A.A. 22-25, 36-39.)

Views School District, 118 N.W.2d 795 (Minn. 1962)<sup>8</sup>, then Director of Risk Management, Kenneth Meyer was well aware that this scheme for the Minneapolis School District to save

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<sup>8</sup> Mr. Meyer testified he had never heard of Spanel and was completely unfamiliar with the history and the public policy rationale involved. In deposition testimony, Mr. Meyer responded to questions as follows:

Q: . . .Were you aware that in 1962 the Minnesota Supreme Court in the Spanel decision prospectively abolished sovereign immunity as it applied to school districts and other municipalities? Did you know that?

A: I wasn't aware of that, no.

Q: Until I told you this moment, you weren't aware of that?

A: Correct.

Q: And it obviously didn't come up in any of your discussions with anybody at that time, correct?

A: Correct.

Q: Were you aware that the reason that the Minnesota Supreme Court abolished sovereign immunity was on public policy grounds, that is the public was to be served by the abolition of sovereign immunity? Were you aware of that point?

A: No.

Q: And that didn't come up in any of your discussions?

A: No.

Q: Were you aware that the reason that they determined it was against public policy is that it was anachronistic and archaic and was based on the notion that the king can do no wrong? Were you aware of that?

A: No.

Q: And you're just hearing that now for the first time?

A: Correct.

Q: And that obviously never came up in any of your discussions, correct?

A: Correct.

Q: And were you aware that it was determined to be the public policy of the State of Minnesota as determined by the Minnesota Supreme Court that the public would be served by injured persons having a claim against a school district or municipality for their injuries? I take it you were not aware of that either?

A: Correct.

Q: And those issues simply never came up in any of your discussions with Carol Johnson or anybody else at that time, correct?

A: Correct.

(R.A. 13.)

money would not be well received should it be publicized, and further, that the \$1.50 figure was surely outdated. Asked whether he had discussed the ability to seek immunity under this statute with his counterparts in other school districts, he responded:

A. [W]e looked at this statute as something that was probably going to be short-lived, you know, that, you know, if the word got out on this and other school districts started participating in it and saying that - - you know, using the same defense and getting the immunity from the commerce department, that the statute would probably be overturned. So our intent was not to go out there and actively solicit or provide information to other school districts. Ours was more probably even somewhat selfish in trying to make sure that it was in place for us and that's why we sought the certification, but our intent was is that this statute would probably change.... And so we didn't go out and contact St. Paul and Anoka-Hennepin and, you know, the large school districts and say, 'Hey, we found this statute. This is good for you,' you know. We didn't do that.

Q: And so you basically laid low?

A: We laid low, right.

....

Q: . . . at the time you were making the decision to send your letter to the commissioner, did you have any knowledge of how the rest of the state would fare under this \$1.50?

A: I guess my gut feeling was is that they would all benefit from it.

Q: In other words, the whole state of Minnesota likely could have become immune from suit had they known of the statute that you found?

A: I think so. It realistically could be looked at that way, yes.

: Do you know for what period of time that would have been the case, I mean, going back how many years?

A: I don't know as far as the, you know -- where the \$1.50 would be a break-even point or whatever.

Q: Yeah, I take it it was your view that this was an old number that wasn't realistic in today's dollars and with inflation, true?

A: I think it was -- our whole idea -- or our -- I guess that would be correct. I guess my opinion was is that this was a figure that was in place and it hadn't changed in the statute, but at the same time, like I said, our thing was to look at this being a tool to help reduce our cost.

(R.A. 15, 17.)(emphasis added)

These depositions also revealed that the Minneapolis School District attempted to use the immunity given by the Department of Commerce's letter in an entirely arbitrary way, using it selectively as a defense to claims that it deemed "frivolous." Mr. Meyer further testified:

Q. Okay. That is, you did not intend to apply it blanketly [sic], but on a case-by-case basis, true?

A: I think our intent was to get rid of our frivolous claims, and if we had negligence and it could be proven, that that would be something that, you know, would have to be looked at.

Q: My statement is accurate, that you intended to apply it on a case-by-case basis, true?

A: I guess you could say that.

(R.A. 15.)

The fact that the Minneapolis School District was willing to pay damages on some claims (though not those it apparently deemed "frivolous", such as those to 5th graders Shanel Andrews and Kailynn Granville) was, of course, consistent with the fact that the

School Board had voted to become self-insured and the school district set aside reserves to pay any claims that may arise.

Q. And after the fiscal - - or following the start of the fiscal year in July of 2001, it was the intent of the Minneapolis School District to again become self-insured and go through the process of estimating claims, setting aside reserves for those claims, correct?

A. Correct.

Q. And in fact, that was done, and . . . there were reserves set aside for claims that would be brought after the expiration of the coverage from an outside source, correct?

A. There were some dollars that were set aside, correct, transportation-related claims, etc.

Q. And general liability claims as well, correct?

A. Correct.

(R.A.19.)

While the conduct of the Minneapolis School District obviously left much to be desired for public officials, particularly those entrusted with responsibility for schoolchildren, and by itself was a basis for the district court to conclude that the school district could not rely on Section 466.12 subd. 3a, Respondents directed their primary focus below on providing the district court with evidence regarding current insurance market conditions.

To address the issue of "current market conditions," Respondents provided the district court with the expertise of a long time insurance professional, David Lanigan. Mr. Lanigan spent an entire career addressing the insurance needs and risk assessments for schools, both

public and private. (A.A. 51.) In the capacity of servicing the insurance needs of schools, Mr. Lanigan developed a solid understanding of insurance needs unique to schools. He was heavily involved in risk issues and with school personnel. (A.A. 52.) He met regularly with business managers, the superintendent, faculty, individual building principals and the athletic director to discuss issues relevant to insurance issues for the individual schools. (A.A. 52.) Further, he was aware of the various types and forms of coverages as well as rates for those coverages. (A.A. 52-55).

In his affidavit, Mr. Lanigan explains that the \$1.50 per student per year rate is outdated and does not reflect current market conditions; nor has it been a reasonable number for several decades. (A.A. 41-42.) To further substantiate his opinion that the rate is outdated, Mr. Lanigan, at his deposition, provided Appellant with tables created by the Insurance Services Offices (ISO) which is a statistical pooling entity used by insurance companies nationwide to set their premium rates.<sup>9</sup> (A.A. 64-65, R.A. 39-44.) These ISO

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<sup>9</sup> The ISO tables lay out, on a per student basis, the “pure loss costs” for premium rates specific to the state of Minnesota for both primary and secondary public schools. (R.A. 39-44.) A “pure loss cost” sets the base rate for a premium and reflects the amount per student that it will cost an insurer simply for the payment of claims. (A.A. 64-66.) The pure loss cost does not take into account the commission paid to the insurance broker, the cost of paying claims agents, the profit margin the insurer wants to build into the premium or any other costs of running the insurance company. (A.A. 64-66.) Pure loss cost is simply the amount, per student, that is expected to be paid out on claims. (A.A. 64-66.) For primary schools in the state, the pure loss cost is \$3.11 per student. (A.A. 65.) For secondary schools in the state, the pure loss cost is \$4.30 per student. (A.A. 65.) These pure loss cost figures are calculated based on a policy limit of \$100,000. (A.A. 65.) Obviously, a policy that insures up to the statutory cap limits of \$300,000 would start with a higher pure loss cost basis. These numbers offer additional,

tables establish conclusively that insurance rates under current market conditions are well above \$1.50 per student. (R.A. 39-44.)

At the end of discovery with regard to immunity and insurance issues, Appellant again moved for summary judgment based upon a claimed immunity under Section 466.12 subd. 3a. On May 13, 2005, Judge Schellhas denied Appellant's motion and found the following based on the un-rebutted evidence: (a) no school district in the state can obtain insurance for \$1.50 or less as laid out in Section 466.12 subd. 3a (A.A. 15); (b) the statute at issue fails to make a distinction between school districts in the state that is genuine and substantial and that the classification as applied is not genuine or relevant to the purpose of the law (A.A. 15); (c) under the statute in its present form, all districts are immune from liability if they seek the appropriate certification and this is contrary to the statute's goals, contrary to public policy, and contrary to the law (A.A. 15); and (d) the operation of the statute violates the equal protection guarantees of the federal and state constitutions and must not be applied to the Respondents' claims in this case to trigger immunity from liability of the Appellant. (A.A. 16).

Appellant then appealed the denials of summary judgment and this Court consolidated the appeals. (R.A. 64-65.)

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un-rebutted proof that the \$1.50 figure set forth in Section 466.12. subd.3a is nowhere near current market rates for school liability insurance in this state.

## ARGUMENT

The courts of this state have long been troubled by immunity for schools that negligently injure their students. See Spanel v. Mounds Views School District, 118 N.W.2d 795 (Minn. 1962). In these consolidated cases, Appellant seeks to revert to the days when the “King could do no wrong” by relying on an antiquated statute, that by its own admission, Appellant knew to be outdated and unlikely to survive scrutiny. (R.A. 15.) Appellant also asks this Court to disregard the very standard it explicitly declared for these cases when it criticizes the “current market conditions” test. Essentially, Appellant argues for blanket immunity for public schools, even though total immunity was long ago abolished as bad public policy by our Supreme Court, and is contrary to the intent of the legislature.

### **I. A Brief History of Immunity and Minnesota Statute Section 466.12 subd. 3a.**

To properly place Minnesota Statute Section 466.12 into context, it must be understood that this section was enacted in the first legislative session after the Minnesota Supreme Court decided Spanel v. Mounds Views School District, which prospectively abolished the doctrine of sovereign immunity for schools. Spanel, 118 N.W.2d 795 (Minn. 1962). According to the Court in Spanel, the doctrine of sovereign immunity was based on neither “justice nor reason...” Id. at 799. In so finding, the Court recognized that “[s]chool children have a special status in the eyes of the law, and in view of the compulsory attendance statute deserve more than ordinary protection.” Id. at 802 (footnote omitted).

The Minnesota Supreme Court has, on numerous occasions, criticized the doctrine of

sovereign immunity as being out of touch with modern society and nothing more than poor public policy. See id., at 799 (in criticizing prior applications of sovereign immunity, the Court stated “We have been troubled for three generations by the unheeded petitions of the lame Frederick Bank, the halt Jennie Snider, and the blind Frank Mokovich.”), see also, Allen v. Indep. Sch. Dist. No 17, 216 N.W. 533, 534, 173 Minn. 5, 6 (1927)(indicating the Court’s general suspicion of immunity, but following the rule of stare decisis), Nissen v. Redelack, 74 N.W.2d 300, 304, 246 Minn. 83, 90 (1955)(stating that given the expansion of government facilities for children in the modern era, “the time may well be here when greater consideration and attention must be given to the entire question of governmental immunity in connection with the operation and supervision of such places.”). “The rule of governmental immunity for tort is an anachronism, without rational basis...” Nieting v. Blondell, 235 N.W.2d 597, 601 (Minn. 1975)(*emphasis added*)(citing Justice Traynor’s opinion in Muskopf v. Corning Hospital Dist., 359 P.2d 457, 460 (Cal. 1961)).

If the state is properly to serve the public interest, it must strive, through its laws, to achieve the goals of protecting the people and of providing them with adequate remedies for injuries wrongfully inflicted upon them. So long as the state fails to do so, it will be functioning in conflict with the public interest and the public good.

Id. at 603. The application of the defense of sovereign immunity in this country “is one of the mysteries of legal evolution” and has long been disfavored by Minnesota courts. Spanel 118 N.W.2d at 799 (citing Justice Traynor’s use of Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924)). “The injustice of the immunity doctrine to injured individuals in

this era of rapidly expanding governmental functions and services is apparent.” Spanel, 118 N.W.2d at 285 (citing Hahn v. City of Ortonville, 47 N.W.2d 254, 259, 138 Minn. 428, 434 (1953)).

Thus, the Minnesota legislature crafted the early enactments of Section 466 with the recent Spanel decision, and its clear renunciation of sovereign immunity, in mind. In 1969, the legislature amended 466.12 to add subdivision 3a providing for immunity if a school could not obtain the mandatory insurance at a rate of \$1.50 per pupil per year. MINN. STAT. § 466.12 subd. 3a. Although the legislative history of Section 466.12 subd. 3a is particularly sparse, the rate of \$1.50 per pupil per year was presumably deemed an appropriate market rate for general liability insurance in 1969 and was added to protect the financial resources of schools forced to pay for insurance at rates far beyond the going market rate for other schools in the state. However, the rate, which was once presumably considered above market and intended to exempt only a few hardship case schools, has not been updated since its original enactment in 1969. In addition, as previously noted, until Appellant did so in 2001, no school in the state of Minnesota has ever sought protection under the \$1.50 figure even though all of the schools in the state have qualified for immunity for decades. (R.A.61, A.A. 41.)

**II. The \$1.50 Figure in Minnesota Statute Section 466.12 subd. 3a Bears No Rational Relationship to Current Market Conditions and is Therefore Arbitrary**

Section 466.12 subd. 3a, as written and applied in this case, violates the Equal

Protection Clauses of the Minnesota Constitution and the United States Constitution because it fails to pursue or advance a legitimate government interest through a well-reasoned and rational means.<sup>10</sup>

The statute at issue fails to pass constitutional muster under rational basis analysis for either the Minnesota Equal Protection Clause or the United States Equal Protection Clause. See MINN. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 1; Granville v. Minneapolis Pub. Sch., 668 N.W.2d 227 (Minn. App. 2003)(setting out the tests used to determine whether a statute meets the rational basis standard). The Minnesota courts have recognized two tests for determining if a classification is rationally related to a legitimate government interest. See Granville, 668 N.W.2d at 234.

The first test is based on the Federal Courts' treatment of the Equal Protection Clause of the United States Constitution's 14th Amendment. Id. Under the Federal test, the court must determine if the "challenged classification has a legitimate purpose and whether it was reasonable to believe that the use of the challenged classification would promote that purpose." Id. The second test is based on the Minnesota Equal Protection clause. That test requires:

- (1) The distinctions which separate those included within the classification

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<sup>10</sup> This Court initially addressed Respondents' strict scrutiny argument and ruled against Respondents. Because the Minnesota Supreme Court denied review, this Court's decision was never reviewed. Respondents incorporate by reference all of the prior claims and arguments in order to preserve those claims and arguments should this matter ultimately be reviewed by the Supreme Court.

from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

*Id.* (citing State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991)). Under either formulation or test, Section 466.12 subd. 3a fails to pass constitutional muster.

**A. The distinction between school districts drawn by section 466.12 subd.3a is neither genuine nor substantial, but is manifestly arbitrary**

As this Court previously indicated, it is important to the constitutional validity of Section 466.12 subd. 3a that the \$1.50 rate be in line with current market conditions. Granville, 668 N.W.2d at 234-35. All of the facts before the district court lead to a single conclusion; the \$1.50 rate is not in line with current market condition and the statute is therefore unconstitutional. (A.A. 15-16.) The statute at issue, which once presumably served to protect the coffers of high risk schools facing abnormally high insurance premiums, has devolved into a mechanism allowing for blanket immunity for any district in the state that writes a letter to the Department of Commerce; this cannot be what the legislature intended back in 1969 when it enacted subdivision 3a.

The only evidence introduced in the district court relating to current market conditions was provided by David Lanigan (and un-rebutted by Appellant). Mr Lanigan stated that “it is not possible for any school in the state of Minnesota to obtain general liability insurance at the rate of \$1.50 per pupil per year.” (A.A. 41.) Furthermore, “[i]t has likely not been

possible for any school in the state to obtain insurance at that rate since the mid-1970's.”

(A.A. 41). Mr. Lanigan further states that in the 36 years since Section 466.12 subd. 3a was passed

“the insurance market has changed dramatically. As a result of the changes in the insurance market in the last thirty-six years the \$1.50 per pupil per year rate for insurance is outdated...

“The \$1.50 per pupil per year rate reflected in Minnesota Statute Section 466.12 subdiv. 3a is outdated and no longer reflects the current market conditions for school insurance in this state. The \$1.50 per pupil per year rate was also outdated at the time of the accident complained of in plaintiff's complaint and at the time defendant applied to the state for immunity.”

(A.A. 41-42.)

Given that (1) the \$1.50 rate stated in the statute has not changed in 36 years, (2) insurance rates have changed dramatically in the last 36 years, and (3) every single school in the state now qualifies for immunity, thus placing us in the exact spot that the Court in Spanel decried, it simply cannot be credibly argued that the statute, in its current form, is rationally aimed to meet the desired goal of protecting schools that cannot get insurance at reasonable market rates.

Within the context of Spanel, Section 466.12 subd. 3a was obviously intended to permit immunity only when a school district was unable to procure insurance coverage within reasonable market parameters. To the extent that was a legitimate purpose, Section 466.12 subd. 3a now fails to meet that purpose. The intent that only hardship school districts be immune from liability for their torts cannot be legitimately achieved by immunizing all

schools with a rate now outdated by 36 years of inflation and a drastically changed insurance market. The legislature's choice of \$1.50 per pupil per year in 1969 is untenable and arbitrary under current market conditions. This statute further creates an unconstitutional classification under both the federal and state constitutions. As written and now applied, Section 466.12 subd. 3a fails to further any intended legislative objective and is therefore unconstitutional.

**B. There is No Evident Connection Between the Distinctive Needs Peculiar to the Class and the Prescribed Remedy**

Under the second prong of the Minnesota test, the statute fails as well. As stated above, the classification between schools that qualify for immunity and those that do not has become a nullity. Every school district in the state now qualifies for immunity under the current rate plan. (A.A. 41, A.A. 15.) Because of time, inflation and changing markets, there is no longer any set of distinctive classes. Accordingly, there can be no set of needs peculiar to any one class. Henceforth, there is no longer an "evident connection between the distinctive needs peculiar to the class and the prescribed remedy." Russell, 477 N.W.2d at 888. A remedy once intended as a shield only for the worst off of schools can now be applied to all schools to the detriment of this State's children.

**C. While Financial Stability is a Legitimate Purpose for the State to Pursue, it Cannot be Met by an Outdated Statutory Rate**

While protecting the fiscal condition of school districts is a legitimate objective of the state, the objective is not achieved by use of the outdated rate of \$1.50 per pupil per year.

If this Court were to find that the \$1.50 per pupil per year rate is reasonable under current market conditions, then every single school in the State would be eligible for immunity and students in this State would be left in the same undesirable position they were in prior to the Supreme Court's Spanel decision. Spanel v. Mounds View Sch. Dist., 118 N.W.2d 795 (Minn. 1962). Namely, they would be left with no source of recovery for injuries negligently inflicted upon them by employees of the public schools. This is exactly the situation the Court in Spanel found so reprehensible.

Appellant points to the statutory caps on torts as an analogy to the present cases and argues that because those caps have been found to be constitutional, so too should Section 466.12 subd. 3a. Appellant's argument in this respect fails for two reasons. First, the municipal tort caps are not an absolute immunity to suit as Section 466.12 subd. 3a is. Second, the municipal tort caps have been periodically updated to reflect the increased cost of living that is inherent with decades of inflation.

The first, and most notable, difference between the absolute immunity of Section 466.12 subd. 3a and the tort caps is the nature of the limits imposed by each. An injured party faced with the limits of a statutory cap, while potentially limited in the amount recoverable, still has an avenue to recover for the damages sustained. Alternatively, an injured child who gets hurt at school would have absolutely no source of recovery and could be left without any means to pay for basic medical needs occasioned by the negligently inflicted injury. Caps limit the remedy, they do not eliminate the underlying right.

Second, the municipal tort caps have been updated periodically to stay relatively current with economic and market realities. See Lienhard v. State, 431 N.W.2d 861, 867-68 (Minn. 1988)(finding the liability cap limitations did not violate equal protection guarantees “particularly in light of the legislature’s *periodic review and revision* of the limitations.”)(emphasis added)<sup>11</sup>. The tort caps arguably still serve their intended purpose of both protecting a municipality’s fiscal integrity while providing for injured persons through updated and revised damage limits. Alternatively, Section 466.12 subd. 3a has not changed since 1969 and is now so outdated as to no longer be rationally related to its intended purpose. The immunity granted by Section 466.12 subd. 3a is of a different nature than the municipal tort caps. Thus, Appellant’s analogy is totally faulty and should be rejected.

### **III. Appellant is not Entitled to Have a Finding of Unconstitutionality Applied Prospectively Only**

Appellant asks, in the event this Court finds Section 466.12 subd. 3a unconstitutional,

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<sup>11</sup> The Minnesota Supreme Court’s recognition of changing market conditions in Lienhard is consistent with this Court’s use of the “current market conditions” as a test to determine arbitrariness and is consistent with other areas of constitutional analysis. For example, the Federal Takings Clause. U.S. CONST. amend. V. Under the Takings Clause, the government cannot take private property without just compensation. Id. Just compensation has regularly been defined as “fair market value.” See Olson v. United States, 292 U.S. 246, 255 (1934). Fair market value, like current market conditions, is simply an economic guidepost by which courts can gauge the reasonableness of certain government actions. Current market conditions is a reasonable standard to use when addressing questions of economic considerations. Courts cannot address economic questions in a vacuum and need some foundation upon which to begin any economic analysis.

that any ruling be applied prospectively. This request implies that the Appellant had a justified right to rely on this statute. In Nieting v. Blondell, the Court prospectively abolished sovereign immunity for the State much like Spanel had previously abolished sovereign immunity for school districts and municipalities. See Nieting, 235 N.W.2d 597, 603, 306 Minn. 122, 132 (1975). While Nieting and Spanel both abolished various forms of immunity prospectively, they both grounded their decisions on the requirement that the defendant have some form of good faith reliance on the availability of the defense. In this matter, nothing could be further from the truth; Appellant had no illusions that this statute was sound.

Appellant's own officials never believed that Section 466.12 subd. 3a would survive scrutiny. As noted earlier, Kenneth Meyer, former Director of Risk Management testified:

A. [W]e looked at this statute as something that was probably going to be short-lived, you know, that, you know, if the word got out on this and other school districts started participating in it and saying that - - you know, using the same defense and getting the immunity from the commerce department, that the statute would probably be overturned.

...

Q: And so you basically laid low?

A: We laid low, right.

(R.A. 15.)

Appellant never viewed this statute as reasonable in light of the current market conditions. Equally important, Appellant itself never viewed Section 466.12 subd. 3a as a blanket defense, but only as a means to weed out "frivolous" claims. (R.A. 15.)

In the event that this Court affirms the district court's order finding Section 466.12

subd. 3a unconstitutional, Respondents must receive the benefits of that finding. Under the current set of facts, prospective application is neither required nor appropriate.

#### **IV. Addressing Tort Claims Will Not Undermine Appellant's Educational Budget**

Another fallacy in Appellant's argument is the assertion that "[e]very dollar given to a tort claimant is a dollar taken away from educational opportunities." This is simply not true. Further, the same argument was rejected by the Court in Spanel. Spanel, 118 N.W.2d 802-03 (in addressing financial concerns regarding schools facing liability, the Court stated "...it is absurd to say that schools cannot today expeditiously plan for and dispose of tort claims....").

At the time of this accident, the Appellant had already budgeted for both educational expenses and claims/litigation expenses. (R.A. 19.) These two types of funds were already separated out and very much distinct. Further, if Appellant is found negligent for an injury with substantial damages, it has the right to rely on the statutory damage caps and also to levy for any judgments against it. (R.A. 19.) There would henceforth be no need to take money from the educational budget and divert it to the costs of a judgment.

As a final dagger to Appellant's implication that liability claims would drain the school's educational budget, Lisa Strombeck, the Appellant's current risk manager, indicated that even if the Appellant paid out on claims, it would be a relatively small part of the budget. (R.A. 37.) Ms. Strombeck further stated: "The school district, to my knowledge, has not had many liability claims. They've had very few incidents since I've been there and historically

not many claims.” (R.A. 37.) While few people would question the notion that public schools could benefit from additional funding, Appellant’s cries of budgetary crisis because of liability claims are a far cry from the realities of the matter.

**V. Upholding Section 466.12 subd. 3a Will Create A Statutory Scheme That Tells Schools They Have No Responsibility For Safety**

In light of Minnesota’s compulsory attendance law, the questions before this Court are vitally important. Children in this state are required to attend school. See MINN. STAT. § 120A.22. If this Court finds that Section 466.12 subd. 3a is viable under the state’s constitutional framework, every public school in the state becomes eligible for immunity for even the most egregious acts of its agents and we are left with a statutory scheme that tells schools they have no responsibility for safety. With immunity comes a decreased financial incentive for school districts to ensure that every child is educated in a reasonably safe environment. Other courts have considered this question and have come to similar conclusions. See e.g., Butler v. Jordan, 750 N.E.2d 554, 571 (Ohio 2001)([A]pplying such broad immunity to governmental wrongdoers gives no encouragement to do right, and no liability or penalty for doing wrong. When there is no accountability for failure, failure is sure to follow.”)

While no one would argue that a teacher or recess attendant would intentionally injure a student, it is axiomatic that spending on safety related issues would necessarily decrease when district would not be responsible for injuries, thereby increasing the likelihood of injuries at school. A quote often attributed to Benjamin Franklin is highly relevant here: “An

ounce of prevention is worth a pound of cure.” Sadly, if Appellant prevails, school districts will not be responsible for providing that “pound of cure” for negligently inflicted injuries to students, and any financial incentive to even spend for “an ounce of prevention” disappears.

**CONCLUSION**

This Court previously remanded these cases, asking the district court to determine if the \$1.50 figure found in Minnesota Statute Section 466.12 subd 3a is arbitrary under current market conditions. The district court faithfully carried out that directive and correctly concluded that the \$1.50 figure is arbitrary under current market conditions and had not been a reasonable rate in this state for school liability insurance for many years and therefore violated the State and Federal guarantees of Equal Protection.

Because Minnesota Statute Section 466.12 subd. 3(a) fails to meet the rational basis standard required of all constitutionally sound statutes, Respondents request that this Court affirm the district court’s denial of Appellant’s motion for summary judgment.

Respectfully submitted,

**YAEGER, JUNGBAUER & BARCZAK, PLC**

Dated: 10-31-05



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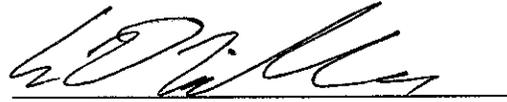
## CERTIFICATE OF COMPLIANCE

I certify that the above brief complies with the requirements of Minn. R. App. P.

132.01, in that:

The font is of 13-point font or larger;

The length of the brief is 7,822 words and was prepared using WordPerfect 9.



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).