

Nos. A05-1377 and A05-1378

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State of Minnesota  
**In Supreme Court**

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David Granville and Marlyss Granville as parents and natural guardians of Kailynn Granville, a minor, and Jacqueline Johnson as parent and natural guardian of Shanel Andrews, a minor,  
*Appellants,*

vs.

Minneapolis Public Schools,  
Special School District No. 1,  
*Respondent.*

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**APPELLANTS' BRIEF AND APPENDIX**

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## STATEMENT OF ISSUES

1. **Is a statute that immunizes schools from liability if they cannot buy insurance for a certain price unconstitutionally arbitrary and thus discriminatory, if that price has not been changed in 37 years such that instead of being a narrow exception as was obviously originally intended by the legislature, the statute now confers blanket immunity on every school for any injury to the children our schools are legally responsible for protecting?**

This issue has twice been presented to the court of appeals in this case, and a brief procedural history is necessary to explain the court of appeal's differing approaches to answering this question. This case was first before the court of appeals after a dismissal on the pleadings by the district court. Although the court of appeals had no factual record, it rejected Appellants' claim that this statute should be reviewed under a "strict scrutiny" standard because it deprived them of their Minnesota constitutional right to a remedy for wrongs against them and because of the disparate impact upon them as African-American students. Finding that the "rational basis" standard should instead be applied, the court of appeals remanded these consolidated cases for discovery and for the district court's consideration of whether Minnesota Statute Section 466.12 subd. 3a, (which grants sovereign immunity to school districts that cannot obtain liability insurance for \$1.50 per student per year, a figure set in 1969 and unchanged since) was "arbitrary" under "current market conditions." Granville I<sup>1</sup>. Upon remand, the district court concluded this figure was indeed

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

arbitrary because it had long failed to have any relationship to “market conditions.” Appellants’ uncontradicted expert testimony established that not a single school district in the state had been able to obtain insurance at this rate for decades. Because this rate was arbitrary and no longer had any connection with the statute’s purpose, it failed the rational relationship test and the district court denied the Respondent’s motion for summary judgment, finding Section 466.12 subd. 3a unconstitutional. (A.A. 017)<sup>2</sup>

Upon the Respondent school district’s appeal, a different court of appeals panel took a completely different approach. While the focus of the parties and all prior courts had been on the application of the appropriate equal protection standards to this statute, the court of appeals in Granville II<sup>3</sup> never even addressed whether the 1969 rate of \$1.50 was arbitrary. Rather, it focused exclusively on whether this rate currently separated student into two classes. Even though Appellants, two 5<sup>th</sup> grade girls, had been treated dissimilarly under this statute, the court of appeals concluded that because all public schools in Minnesota could now claim sovereign immunity under this outdated rate, no violation of equal protection was possible regardless of the arbitrariness of the rate<sup>4</sup>. This panel never analyzed this statute

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<sup>2</sup> In this brief, the designation of A.A. refers to Appellants’ Appendix.

<sup>3</sup>Granville v. Minneapolis Pub. Sch., 716 N.W.2d 387 (Minn. Ct. App 2006)

<sup>4</sup>The Respondent Minneapolis School District did not raise the argument that no constitutional analysis is necessary because a statutory classification no longer exists in any of its principal briefing. It made this argument for the first time in its reply brief in Granville II. Prior to that point, the school district’s arguments had all focused on why the classes created by the statute met the rational basis test.

under either the federal or state rational basis standards, but nevertheless reversed the district court's denial of summary judgment.

**Apposite authorities:**

United States Const. amend XIV - Equal Protection Clause

Minnesota Const., art. 1 § 8 - Remedies Clause

Minnesota Const. art. 1 § 2 - Equal Protection Clause

Minn. Stat. § 466.12 subd. 3a

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

Lienhard v. State,  
431 N.W.2d 861 (Minn. 1988)

Randall v. Sorell,  
126 S.Ct. 2479 (2006)

## STATEMENT OF THE CASE

The procedural history of this case is particularly important when looking to the questions of what constitutional issues were presented to the district court and court of appeals, and the factual context in which each court, at different times, addressed these issues. Two key points stand out in this procedural history that are particularly important to this Court's review; First, the record demonstrates clearly and without contradiction that the \$1.50 statutory rate set in 1969 is today an arbitrary figure, and second, Appellants have preserved for this Court's review all constitutional infirmities that arise from this arbitrary rate.

The circumstances in which Appellants, 5<sup>th</sup> graders Shanel Andrews and Kailynn Granville, were injured by the Respondent Minneapolis School District's negligence was simple enough; their substitute physical education teacher had the class play a game called "flashlight tag." The children were to run around the gymnasium in total darkness until they were "tagged" by a flashlight beam. (A.A. 003-004.) As would be expected from a game in which 5<sup>th</sup> graders were running in total darkness, these two children ran headlong into one another in the pitch black gymnasium, and both received serious injuries.<sup>5</sup>

As noted earlier, these cases were twice before the court of appeals, the first time upon

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<sup>5</sup> Shanel Andrews and Kailynn Granville were both 10 years old when injured, and their claims were brought by their parents as natural guardians. Appellant Jacqueline Johnson is Shanel Andrews' mother, and David Granville and Marlyss Granville are the parents of Kailynn Granville.

the district court's dismissal on the pleadings<sup>6</sup>, and the second time after the district court had found the statute unconstitutional.<sup>7</sup> At the heart of both appeals was Minnesota Statute Section 466.12. Under subdivision 3a of this statute, enacted in 1969, if a school district cannot obtain insurance at the rate of \$1.50 per student per year, it regains by subdivision 2 the sovereign immunity that was abolished by this Court's landmark 1962 decision, Spanel v. Mounds Views School District, 118 N.W.2d 795<sup>8</sup>.

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<sup>6</sup> The dismissal on the pleadings was granted by Hennepin County District Court Judge Peter Albrecht on November 21, 2002.

<sup>7</sup> The order denying Respondent's motion for summary judgement was issued by Hennepin County Court Judge Heidi Schellhas on May 13, 2005.

<sup>8</sup> Section 466.12 currently reads in full:

**Subdivision 1. Not applicable; exception.** Sections 466.01 to 466.11, except as otherwise provided for in this section, do not apply to any school district, however organized, or to a town not exercising the powers of a statutory city under the provisions of Minnesota Statutes 1961, section 368.01, as amended.

**Subd. 2. Pre-12/13/1962 immunity enacted, defined.** The doctrine of "governmental immunity from tort liability" as a rule of the decisions of the courts of this state is hereby enacted as a rule of statutory law applicable to all school districts and towns not exercising powers of statutory cities in the same manner and to the same extent as it was applied in this state to school districts and such towns on and prior to December 13, 1962.

As used in this subdivision the doctrine of "governmental immunity from tort liability" means the doctrine as part of the common law of England as adopted by the courts of this state as a rule of law exempting from tort liability school districts and towns not exercising the powers of statutory cities regardless of whether they are engaged in either governmental or proprietary activities, subject however, to such modifications thereof made by statutory enactments heretofore enacted, and subject to the other provisions of this section.

**Subd. 3. Towns may insure, be liable.** A town not exercising the powers of a statutory city may procure insurance as provided for in section 466.06, and if a town not exercising

Appellants commenced separate personal injury actions in Hennepin County District Court (A.A.001-005.)<sup>9</sup>, and in each, the Respondent school district filed pre-answer motions to dismiss, claiming immunity under Section 466.12 subd. 3a. This statute requires nothing more than a letter from the Department of Commerce indicating that the school district cannot obtain insurance for \$1.50 per pupil. Upon this record and over Appellants' constitutional objections, the district court dismissed Appellants' claims.

Appellants 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 Remedies Clause of Minnesota's Constitution. Although it had no factual record, the court of appeals nevertheless found that (1) the statute did not deprive Appellants of a fundamental

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the powers of a statutory city procures such insurance it shall otherwise be subject to all the terms and provisions of sections 466.02 to 466.09 to the extent of the liability coverage afforded. Cancellation or expiration of any liability policy shall restore immunity as herein provided as of the date of such cancellation or expiration.

**Subd. 3a. Schools shall insure, be liable; conditions.** A school district shall procure insurance as provided in section 466.06, meeting the requirements of section 466.04, if it is able to obtain insurance and the cost thereof does not exceed \$1.50 per pupil per year for the average number of pupils. If, after a good faith attempt to procure such insurance, a school district is unable to do so, and the commissioner of insurance certifies that such insurance is unobtainable, it shall be subject to the provisions of subdivisions 1 and 2. If the school district fails to make a good faith attempt to procure such insurance and the commissioner of insurance does not certify that such insurance is unobtainable, then in that event section 466.12 shall not apply to such a school district and it shall be subject to all of the other applicable provisions of chapter 466.

<sup>9</sup> The Complaint in Appellant's index is that of Appellant Kailynn Granville. The Complaint of Appellant Shanel Andrews is identical in all material respects.

right because it viewed the right to sue a school district as grounded not in the common law but solely as the product of legislation, and (2) even if these African-American students could establish a disparate racial impact, their equal protection claim should be reviewed under Minnesota's stricter "rational basis" standard and not a "strict scrutiny" standard<sup>10</sup>.

Finally, recognizing that it could not decide in a vacuum the determinative question of whether a dollar rate unchanged for over 30 years was now arbitrary or had any connection with the purpose of the statute, both critical considerations to an equal protection analysis, the court of appeals remanded these cases to the district court with the following directive:

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.

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

On remand, the parties conducted discovery limited to this "rational basis" test. Once again, the school district sought immunity under this statute, this time by a motion for

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<sup>10</sup>Appellants petitioned this Court for review of these aspects of the court of appeal's decision in Granville I, which was denied by this Court on November 18, 2003. (A.A. 120)

summary judgment. In analyzing this statute, the district court did exactly as directed by the court of appeals in Granville I 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 Appellants’ expert on the cost of school insurance over the past decades, David Lanigan. Mr. Lanigan 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. 042.)

Discovery also revealed two key points concerning the Minneapolis School District’s use of this statute. First, the school district in fact used its claimed immunity under this statute in an arbitrary way. During this period in which it asserted sovereign immunity against the claims of 5<sup>th</sup> graders Shanel Andrews and Kailynn Granville, injured by their teacher’s game of “flashlight tag,” the school district in fact paid damages on other claims, using reserves it had established for this purpose. In essence, the school district was using its assertion of “sovereign immunity” solely as a means to avoid responding to claims it deemed “frivolous,” among them the claims of these two 5<sup>th</sup> grade girls. (A.A. 100)

Second, the school district was well aware that this \$1.50 rate was long outdated. However, it purposely “laid low,” hoping to avoid the attention of the Minnesota Legislature in order to use this immunity for as long as possible.(A.A. 100)

Rather than addressing the arbitrariness of the statute’s \$1.50 rate under current market conditions, or making any attempt to rebut Mr. Lanigan’s expert opinions, the school

district instead argued to the district court that the focus should be on school funding issues. In support of this argument, the school district provided an affidavit of Gary Olsen, which addressed nothing other than school funding issues. The school district presented no evidence related to the \$1.50 rate.

With this factual record, the district court found the \$1.50 rate in Minnesota Statute Section 466.12 subd. 3a arbitrary under current market conditions, and that the statute therefore violated Appellants' State and Federal Equal Protection rights. (A.A. 017) The district court 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 a 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. 016-17.) Therefore, the district court concluded Appellants "proved beyond a reasonable doubt that the immunity triggered by the \$1.50 per pupil rate does not permit constitutional operation of the statute." (A.A. 017.)

As noted, upon the Respondent school district's appeal, a different court of appeals panel took a completely different approach to reviewing this issue. This panel never even looked to the question of whether the 1969 rate of \$1.50 was arbitrary, nor did it conduct any analysis under either the federal or state rational basis standards. Rather, the court of appeals in Granville II focused exclusively on whether this 1969 rate currently separated students into two classes. Because it determined that all public schools in Minnesota can now claim

sovereign immunity under this outdated rate, the court of appeals found no violation of equal protection was possible and reversed the district court's grant of summary judgment.

We conclude that we do not need to decide if the \$1.50 classification is arbitrary in light of current market conditions because arbitrary classifications in statutes have been ruled unconstitutional only when such classifications result in similarly situated individuals being treated differently. . . .

Because the \$1.50 classification does not result in the unequal treatment of any individual or group, Minn.Stat. § 466.12, subd. 3a, does not violate the Equal Protection Clause of either the United States or Minnesota Constitution.

Granville II, 716 N.W. 2d at 393.

Appellants' Petition for Review was granted by this Court on September 19, 2006 (A.A. 143-44.) As is evident from the single issue stated in Appellants' petition, Appellants view the arbitrariness of this rate as laying at the heart of a constitutional analysis, because governmental action premised on an arbitrary classification cannot rationally relate to any legitimate purpose, nor can such an arbitrary rate further the purpose for which the statute was enacted.<sup>11</sup>

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<sup>11</sup> Appellants have argued throughout this case, and continue to believe, that because of the obvious arbitrariness of this rate under current market conditions and because it cannot be seriously disputed that Appellants have been treated dissimilarly, the federal and state Equal Protection clauses provide the most appropriate framework for a constitutional analysis of this statute. However, both the federal and state Due Process Clauses, U.S. Const. amend. 5 (applied to the states through U.S. Const. amend XIV) and Minn Const. art. 1 § 7, provide additional protection from arbitrary governmental action. When Appellants responded to the school district's motion for summary judgment after the matter was remanded back to the district court in Granville I, Appellants noted for the district court that the factual record (which had not existed at the time the school district moved to dismiss on the pleadings) supported a Substantive Due Process analysis in addition to that of Equal Protection. Appellants stated in their responsive brief to the

## STANDARD OF REVIEW

This appeal addresses the validity of Respondent's immunity-based defense, 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)). Respondent 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))

This appeal also addresses state and federal constitutional issues that are likewise reviewed *de novo*. Deegan v. State, 711 N.W.2d 89, 92 (Minn 2006). Under the rational basis standard for constitutional analysis, Appellants in this matter bear the burden of establishing beyond a reasonable doubt that the statute operates in an unconstitutional manner. Snyder v. City of Minneapolis, 441 N.W.2d 781, 788 (Minn. 1989). However, because the statute at issue impinges upon a fundamental right, strict scrutiny applies "and

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district court:

By the same rationale, Minn. Stat. § 466.12 subd. 3(a) fails to meet a rational basis standard under Substantive Due Process. The statute, in its current form, is no longer rationally related to the legislature's legitimate objective of protecting only "hardship" schools faced with insurance rates that are far out of line with current market conditions. The \$1.50 rate bears no rational relationship to current market conditions." (A.A. 030)

The district court did not need to reach or apply a Due Process analysis, finding the statute unconstitutional solely on Equal Protection grounds. Regardless of any Equal Protection analysis, a Substantive Due Process analysis always remains available to this Court to protect injured schoolchildren from arbitrary governmental actions.

the [Respondent] will have to prove that the statute is necessary to a compelling government interest.” Skeen v. State, 505 N.W.2d 299, 312 (Minn. 1993).

### **STATEMENT OF FACTS**

On November 1, 2001 Appellants Shanel Andrews and Kailynn Granville, both ten year-old 5th graders at Loring Elementary School, were injured in their physical education class. A substitute teacher had the class play a game called “flashlight tag” in which the students ran around the gymnasium in total darkness until they were “tagged” by a flashlight beam. (A.A. 003.) Not surprisingly, two of the children running in total darkness ran headlong into one another, and both received serious injuries.

Pursuant to Minnesota’s statutory requirements, Minnesota Statute Section 466.05, Appellants each notified the school district of their potential claims. In response, the school district advised Appellants that it was completely immune from liability and had no intention of addressing their personal injury claims. With no other option available, Appellants filed suit in Hennepin County District Court seeking damages for their injuries. (A.A. 003-05.) Prior to answering Appellants’ complaints, Respondent moved for dismissal of both claims under Minnesota Rule of Civil Procedure 12.02(e), claiming immunity under Section 466.12 subd. 3a. Based solely upon the fact that the school district demonstrated that it could not obtain insurance at the statutory \$1.50 rate set in 1969, the district court rejected Appellants’ constitutional arguments and dismissed Appellants’ claims.

Appellants appealed the dismissal on the basis that Section 466.12 subd. 3a violated

their state and federal equal protection rights and deprived them of a fundamental right in violation of the Minnesota Constitution's "Remedies" Clause. The court of appeals, although it had no factual record, found that the statute did not deprive Appellants of a fundamental right. With respect to their equal protection claims, the court of appeals rejected Appellants' position that the statute must be reviewed under the "strict scrutiny" standard because of the disparate racial impact upon Appellants, both African-Americans. Instead, the court of appeals ruled the "rational basis" standard was to be used. The court of appeals reversed the district court's dismissal and specifically directed the district court to determine if the "legislature's choice of a rate of \$1.50 per student is arbitrary under current market conditions." Granville I, 668 N.W.2d at 235. This Court denied the petitions of the Appellants and Respondent for further review. (A.A. 120.)

The court of appeals gave very specific and precise directions to the district court on remand as to the analysis it needed to conduct. Because of the length of time that had passed since the \$1.50 per pupil figure was enacted in 1969, the court of appeals was concerned "whether the legislature's choice of a rate of \$1.50 per student is arbitrary under current market conditions." 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 I, 668 N.W.2d at 235 (emphasis added)

On remand, the parties conducted discovery solely on the insurance and immunity

issue to provide the district court with this evidence.<sup>12</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 (A.A. 118.))<sup>13</sup>, Appellants obtained documents in discovery and from the public record bearing on this decision, and deposed Respondent'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," Appellants also consulted with David Lanigan, an independent insurance agent who spent over 30 years working with school districts to provide their insurance coverages. 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 Appellants for his deposition. All of the above ultimately painted a complete and unflattering picture of the circumstances surrounding the Minneapolis School District's decision to seek immunity under Section 466.12 subd. 3a, and use it in an arbitrary manner. This discovery also confirmed the common sense expectation that the 1969 rate of \$1.50 was long since outdated.

Depositions of school officials revealed that the school's decision to seek immunity

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<sup>12</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>13</sup> The affidavit of Paula Jossart is part of the record from Appellants' initial opposition to the motion to dismiss brought by Minneapolis Public Schools on August 15, 2002.

under this statute was the result of both happenstance and the school district's complete lack of knowledge or understanding of the history and public policy underlying Minnesota's abolition of sovereign immunity. 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. (A.A. 131.)

As part of the decision to self-insure, the school district set aside self-insurance reserves sufficient to satisfy general liability claims. (A.A. 104.) Then Director of Risk Management, Kenneth Meyer, and his assistant Bob Zenz, were also charged with making sure that the Respondent complied with all of the requirements for becoming a self-insured entity. (A.A. 094.) While undertaking this task, Mr. Zenz "stumbled" upon Minnesota Statute Section 466.12 subd. 3a. (A.A. 095-95.) 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. (A.A. 095.) After conferring with these parties,<sup>14</sup> Mr. Meyer, on August

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<sup>14</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 Respondent) to seek approval of this proposed change in school district policy. (A.A. 099.) 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 Board gave authority to Mr. Meyer to seek immunity from the Department of Commerce and never ratified Mr. Meyer's acts after the fact, Appellants' argued below that Mr. Meyer's action in seeking to obtain certification from the Department of Commerce under Minnesota

28, 2001, wrote to the Department of Commerce for confirmation that the school could not obtain insurance at the rate specified in Section 466.12 subd. 3a. (A.A.051.) The only information the school district supplied to the Department of Commerce was a quote comparison table from its insurance broker. (A.A. 052.) (At no time did Mr. Meyer inform the Department of Commerce that Respondent was actually self-insured and maintained a self-insurance fund.) The Department, by return letter dated September 14, 2001, certified that the Respondent was unable to obtain insurance at a rate below \$1.50 per pupil per year. (A.A. 044.)

Although Mr. Meyer did not possess even a cursory knowledge of the history of sovereign immunity in Minnesota, most importantly its abolition on public policy grounds in Spanel v. Mounds Views School District, 118 N.W.2d 795 (Minn. 1962)<sup>15</sup>, he was well

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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 Respondent's claim of immunity fails here. (A.A. 023-26, 037-40.)

<sup>15</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.

aware that this scheme for the Minneapolis School District to save 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

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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.

(A.A. 098.)

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.

Q: 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.

(A.A. 100, 102.)(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.

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.

(A.A. 100.) (emphasis added)

Not only did Respondent not bother to "look at" its negligence in the instant cases, it is trying to use its claimed immunity to prevent this state's courts of justice from examining its negligence.

Respondent produced no evidence below as to when, how, why or if the immunity defense would be raised against any particular child. Ultimately, without any stated guidelines, the school district paid the claims of some children and used this statute to deny the claims of others.

The fact that the Minneapolis School District was willing to pay damages on some claims 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.

(A.A. 104.)

The conduct of the Minneapolis School District obviously left much to be desired for public officials, particularly those entrusted with responsibility for schoolchildren. While this conduct was, by itself, a sufficient basis for the district court to conclude that the school district could not rely on its arbitrary use of Section 466.12 subd. 3a, Appellants (as directed by the court of appeals in Granville I) focused below on providing the district court with evidence regarding current insurance market conditions.

To address the issue of “current market conditions,” Appellants provided the district court with the expertise of a long time insurance professional, David Lanigan. Mr. Lanigan spent his entire career addressing the insurance needs and risk assessments for schools, both public and private. (A.A.057.) 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. 058.) Further, he was aware of the various types and forms of coverages as well as rates for those coverages. (A.A. 058-61.)

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. 042-43.) To further substantiate his opinion that the rate is outdated, Mr. Lanigan provided 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>16</sup> (A.A. 070-71, 112-17.) These ISO tables establish conclusively that insurance rates at current market conditions are well above \$1.50 per student. (A.A. 112-17.)

At the end of discovery, Respondent again moved for summary judgment based upon a claimed immunity under Section 466.12 subd. 3a. On May 13, 2005, the district court

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<sup>16</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. (A.A. 112-17.) 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. 070-72.) 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. 070-72.) Pure loss cost is simply the amount, per student, that is expected to be paid out on claims. (A.A. 070-72.) For primary schools in the state, the pure loss cost is \$3.11 per student. (A.A. 071.) For secondary schools in the state, the pure loss cost is \$4.30 per student. (A.A. 071.) These pure loss cost figures are calculated based on a policy limit of \$100,000. (A.A. 071.) 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, 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.

denied Respondent'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. 016); (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. 016); (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. 016); 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 Appellants' claims in this case to trigger immunity from liability of the Respondent. (A.A. 017.)

Respondent school district appealed the denials of summary judgment to the court of appeals where the cases were consolidated. (A.A. 121-22.) Upon the second appeal, a different panel of the court of appeals disregarded the first panels "arbitrary under current market conditions" test and reversed the district court's ruling, finding the statute at issue is not unconstitutional. In reaching this conclusion, the Granville II panel determined that because every public school in the state qualifies for immunity at the \$1.50 rate and therefore every public school child runs the same risk of being deprived of a recovery for injuries, the statute treats all public schoolchildren alike. Consequently, it never even applied the federal or state Equal Protection rational basis standards to the statute, and reversed the district court.

Granville II, 716 N.W.2d 387 (Minn Ct. App. 2006)<sup>17</sup>.

### ARGUMENT

The notion that school districts deserve immunity when they injure schoolchildren because the “King can do no wrong” was, fortunately, long ago laid to rest by this Court’s landmark 1962 decision, Spanel v. Mounds Views School District. While a school district’s fiscal stability is a legitimate concern, it is not rationally furthered by an outdated and arbitrary insurance rate in an unchanged 1969 statute, much less one that school districts may apply in a completely arbitrary manner. The legislature found many ways other than sovereign immunity to protect the fiscal stability of school districts, including caps on damages, notice requirements, and many other procedural safeguards. For over thirty years, the \$1.50 rate at issue was never once used by a school district to reclaim sovereign immunity. Now, in the 21<sup>st</sup> Century, when this rate is undisputably arbitrary and cannot

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<sup>17</sup>The court of appeals’ conclusion that it need not even engage in an equal protection rational basis analysis because the \$1.50 rate did not create separate classes, was, of course, a failure to recognize the obvious. These 5<sup>th</sup> grade girls are, because of the school district’s use of this rate, now in a small and limited class of Minnesota schoolchildren who have lost their right to recover for their injuries. This court of appeals panel was the first court in the long history of this case to even suggest that separate classes did not exist, and it also ignores another obvious class distinction. Even if the court of appeals is correct that all public school students now make up a single, indistinguishable class that have lost their right to recover for injuries at school, these students find themselves in a class separate from private school students, who do have such a remedy. This Court has long recognized that an equal protection analysis is indeed required when a statute limits injured victims’ rights against a governmental entity, while leaving the rights of victims of private tortfeasors unaffected. See, Lienhard v. State of Minnesota, 431 N.W. 2d. 861 (Minn 1988).

remotely reflect the legislature's intent in enacting this provision,<sup>18</sup> the Minneapolis School District seeks to reclaim the throne properly taken away by this Court in Spanel.

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

Minnesota Statute Section 466.12 is best understood by examining the context in which it was enacted in the first legislative session after this Court's decision in Spanel. This Court in Spanel prospectively abolished the doctrine of sovereign immunity for schools in order to give the legislature an opportunity in its next session to craft the specific manner in which claims would be handled, including, among others, notice provisions, damage caps, and the possible continuation of certain immunities for a "limited or indefinite" time. 118 N.W.2d at 804.

However, in as strong of language as ever used by this Court, its disagreement with

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<sup>18</sup>As discussed further below, the legislative history of the statutory provision at issue is unfortunately sparse, and nowhere in this history is there any explanation of why \$1.50 was chosen, or where precisely it stood with respect to then current market rates. While the legislature presumably was concerned about the circumstance where a school district's insurance rates were so dramatically high as to interfere with its ability to function, Appellants have never conceded that a return to pre-Spanel sovereign immunity was a legitimate manner of protecting school districts. When this Court applied Spanel's reasoning to state sovereign immunity in Nieting v. Blondell, 235 N.W.2d 597, 601 (Minn. 1975)(*emphasis added*) it recognized that "[t]he rule of governmental immunity is an anachronism, without rational basis." However, as reflected in the procedural history of this case, the constitutional focus has been on the statute as it existed when these matter were commenced, not when it was enacted, and the focus was narrowed even more by the court of appeals in Granville I. This Court, of course, is free to look at the statute in its entirety and back to the time of its enactment. Appellants also understand the Amicus Brief of the Minnesota Trial Lawyers Association will be providing this Court with a broader perspective on the proper constitutional analysis to be applied to a statute such as this.

the very notion of sovereign immunity was clear, pronounced and unanimous. “School children,” it recognized, “have a special status in the eyes of the law, and in view of compulsory attendance statute deserve more than ordinary protection.” *Id.* at 802 (footnote omitted). This Court found the doctrine of sovereign immunity out of touch with modern society, nothing more than poor public policy, and based on neither “justice nor reason.” *Id.* at 799. It viewed the defense of sovereign immunity in the United States as “one of the mysteries of legal evolution” and long 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)). Noting the injustice of adhering to this doctrine because of stare decisis, this 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.” *Id.* at 799.

Thirteen years later, when the same issue arose with respect to the state’s sovereign immunity, this Court reinforced its strong belief that “[t]he 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.

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 Section 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. Although the legislative history of Section 466.12 subd. 3a is particularly sparse, the rate of \$1.50 per pupil per year was presumably far beyond the then market rate for school liability insurance. However, the legislature never once revisited this rate. Nor, until Respondent did so, did any school in the state of Minnesota ever seek sovereign immunity under this statute. Ultimately, by way of the passage of over 30 years, every public school in the state became eligible under this statute to claim complete sovereign immunity. (A.A. 042.)

**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**

The district court, after remand and now armed with a record, found that Section 466.12 subd. 3a, both as written by the legislature and applied by the Minneapolis School District in this case, violates the Equal Protection Clauses of both the Minnesota Constitution and the United States Constitution<sup>19</sup>. The statute, the district court ruled, fails to pursue or

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<sup>19</sup>MINN. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 1.

advance a legitimate government interest through a well-reasoned and rational means.

The Minnesota courts have recognized two tests for determining if a classification is rationally related to a legitimate government interest. See Granville I, 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 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.(emphasis added)(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. Because the Minnesota Equal Protection test provides a more substantive and stringent test, the following discussion will focus on the Minnesota standard.

**A. The distinction between school districts drawn by Section 466.12 subd.3a is neither genuine nor substantial, but is manifestly arbitrary and provides no basis to justify the legislation.**

The first prong of the Minnesota rational basis test requires that any legislation

intended to create classifications must not be arbitrary and must create a genuine distinction between those intended to be in the class and those intended to fall outside of the class. See Russell, 477 N.W.2d at 888 (Minn. 1991). Further, there needs to be a “natural and reasonable basis to justify legislation adapted to the peculiar condition of the class.” Id.

By enacting the \$1.50 rate in subd 3a, the legislature presumably intended the vast majority of school districts in Minnesota to be liable for their negligence. The number of public schools qualified for immunity at the \$1.50 rate in 1969 is unknown, but it is undisputed that over time, inflation and the natural increase of insurance rates undid what the legislature had intended to accomplish. This unchanged rate, once intended to separate out school districts facing insurance costs far beyond market rates, morphed into a single class leaving all students in the state at risk of being deprived of a remedy.

As stated in Granville I, it is vital to the constitutional validity of Section 466.12 subd. 3a that the \$1.50 rate be in line with “current market conditions.” Granville I, 668 N.W.2d at 234-35. Otherwise, the statute fails to further the legislative objective. Failure of the rate to fit within current market parameters for insurance makes the rate arbitrary and without any rational basis in economic reality. Without any grounding in economic reality the aim of the legislation is divorced from its actual result. Complete and absolute sovereign immunity for any public school in Minnesota that writes to the Department of Commerce cannot be what the legislature intended when it enacted Section 466.12 sub. 3a in 1969.

The only evidence introduced in the district court relating to current market conditions

was provided by David Lanigan (and un-rebutted by Respondent). 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,” and that it has “likely not been possible for any school in the state to obtain insurance at that rate since the mid-1970's.” (A.A. 042.) Mr. Lanigan further stated that in the decades 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. 042-43.)

Given that every single public school in the state now qualifies for immunity, thus placing us in the exact spot this Court in Spanel decried, Respondent cannot credibly argue that the statute is rationally aimed to meet the legislative goals of providing protections for schoolchildren and the general public. 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, nor is the classification relevant to the purpose of the law.**

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. (A.A. 042, 016.) Because of time, inflation and changing markets, there is no longer any set of distinctive classes, and 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. An exception to the general rule of liability once intended as protection for only a few (if any) school districts can now be applied to all, to the detriment of the state’s children. While the school district argues that today’s schools face budget concerns, schools have never had unlimited budgets and the same argument was previously rejected by this Court when it abolished sovereign immunity for schools in Spanel. 118 N.W.2d 795, 802-03.

**C. While financial stability is a legitimate purpose for the state to pursue, it cannot be met by an outdated statutory rate that undermines the primary objective of Subdivision 3a.**

Protecting the fiscal condition of school districts is a legitimate objective of the state. However, the manner in which the legislature seeks to achieve that objective undermines the primary purpose of Section 466.12 subd 3a, namely, providing a remedy for injured school children. Subdivision 3a is entitled “Schools shall insure, be liable; conditions.” MINN. STAT. § 466.12 subd. 3a. This is consistent with the legislature’s broader intent to make governmental bodies liable for their torts. See MINN STAT. § 466.02. Courts, with this clear legislative intent in mind, construe immunity very narrowly because it is an exception to the general rule of liability. See Larson v. Independent School Dist. No. 314, 289 N.W.2d 112

(Minn. 1979). The legislature never intended the exception of sovereign immunity to swallow the general rule of liability. See Holmquist v. State, 425 N.W.2d 230 (Minn. 1988). Through the passage of time, inflation and increasing insurance rates have subverted the primary purpose of the statute by allowing the exception to consume the rule.

Respondent has previously pointed to the statutory caps on municipal torts, Minnesota Statutes Section 466.04, and argues that because those caps were found to be constitutional<sup>20</sup>, so too should Section 466.12 subd. 3a. As recognized by the district court, Respondent's argument fails for two reasons. First, municipal tort caps do not provide absolute immunity to suit, as Section 466.12 subd. 3a purports to do. The caps simply limit the remedy, they do not eliminate the underlying right. Second, unlike the \$1.50 insurance rate, the municipal tort caps have been periodically increased over time by the legislature to reflect increases in the cost of living, and stay current with economic and market realities. In Lienhard v. State, a critical factor in this Court's conclusion that the caps did not violate equal protection guarantees was "the legislature's periodic review and revision of the limitations." 431 N.W.2d 861, 867-68 (Minn. 1988)(emphasis added)<sup>21</sup>. Indeed, in the most recent legislative

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<sup>20</sup> See Lienhard v. State 431 N.W.2d 861 (Minn. 1988).

<sup>21</sup> This Court's recognition of changing market conditions in Lienhard is consistent with the Granville I 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

session, the legislature continued its practice of periodically updating the caps. It raised the limits, in steps, from their current \$300,000 per claimant, \$1,000,000 per occurrence to \$500,000 per claimant, \$1,500,000 per occurrence. MINN. STAT. 466.04, Minnesota Session Laws, Chapter 232 (2006).

Similarly, the United States Supreme Court in the most recent term addressed the possibility of a statute with a set dollar figure becoming unconstitutional simply by the passage of time. In Randall v. Sorrell, 126 S.Ct. 2479 (2006), the Court found that a Vermont campaign contribution statute ran afoul of federal constitutional parameters in part because the statute failed to adjust for inflation. While Randall dealt with First Amendment issues, the underlying rationale remains; set statutory numbers and rates that fail to take into account changing economic realities run the risk of becoming unreasonable, and therefore unconstitutional simply through the passage of time.

### **III. Applying Section 466.12 subdivision 3a as Written Leads to an Absurd Result.**

As noted above, the court of appeal in Granville II began and ended its query with its erroneous conclusion that “the \$1.50 classification does not result in the unequal treatment of any individual or group” and that, therefore, it need not conduct any constitutional analysis. Granville II, 716 N.W. 2d at 393. In light of the absolute requirement under

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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.

Minnesota's rational basis standard that a "classification" within a statute " must be genuine or relevant to the purpose of the law", the purpose of the law cannot be ignored. To apply this \$1.50 rate today would turn the obvious intent of this legislation on its head and lead to an absurd result.

It is a basic principle of statutory construction that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable. . ." MINN. STAT. § 645.17. This principle requires courts to look beyond the literal words of the statute to ascertain the purpose of the statute if the application of the literal words depart from purpose of the statute. See Wegener v. Commissioner of Revenue, 505 N.W.2d 612, 617 (Minn. 1993)("While we recognize our obligation to follow the plain meaning of the words of a statute when they 'are sufficient in and of themselves to determine the purpose of the legislation,' we are equally obliged to reject a construction that leads to absurd results or unreasonable results which utterly depart from the purpose of the statute.")(citing United States v. Am. Trucking Ass'n, 60 S.Ct. 1059 (1940))

While the Respondent school district has never suggested that the legislature intended to grant blanket immunity to all public schools in Minnesota, it argues for a result that does just that. The intent of the legislature should not be subverted merely through the passage of time, nor should the mere passage of time be used as justification for an absurd result.

#### **IV. Section 466.12 Violates the Remedies Clause of the Minnesota Constitution.**

As it is written and now applied, Section 466.12 violates the Remedies Clause of the

Minnesota Constitution, Minn. Const. art. I, § 8, which provides:

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Writing for the Court in Allen v. Pioneer Press Co., Justice Mitchell stated that “[t]here is unquestionably a limit” in matters relating to the Remedies Clause “beyond which, if the legislature should go, the courts could and would declare their action invalid.” 40 Minn. 117, 41 N.W. 936, 938 (1889). The Remedies Clause “only assures remedies for rights that vested at common law. The purpose of the section is to protect common law rights and remedies for which the legislature has not provided a reasonable substitute.” Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 14 (Minn. 1986).

The court of appeals in Granville I held – incorrectly – that the Remedies Clause was inapplicable to Subdivision 3a “because liability is imposed on the school district by statutory law and not common law.” Granville I, 668 N.W.2d at 234. While claims against school districts are governed by statutory law, the right to bring a claim originated with the common law, namely this Court’s Spanel decision.

In Spanel, this Court prospectively overruled the common law doctrine of sovereign immunity for school districts, thereby articulating a new rule of common law. 118 N.W.2d at 803. The decision was prospective to prevent injustice for those who relied on sovereign immunity in the time preceding the decision.

We recognize that by denying recovery in the case at bar the remainder of the

decision becomes dictum. However, the court is unanimous in expressing its intention to overrule the doctrine of sovereign tort immunity as a defense with respect to tort claims against school districts . . . arising after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims. *Id.* at 804.

The Spanel court cited Justice Cardozo's opinion in Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S. Ct 145 (1932) in which the United States Supreme Court upheld the constitutionality of prospective overruling. *Id.* Justice Cardozo wrote that when a court renders a prospective overruling, the court "is declaring common law" and the decision is accompanied by "the recognition [that it] is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule." 287 U.S. 358, 364, 365-66 (1932). According to Cardozo, the "prophecy" in a prospective overruling creates common law. As one commentator recognized,

Even the staunchest advocates of the doctrine of stare decisis will concede that, as to future decisions, a holding itself is but a prophecy. The objection to calling such pronouncements dicta lies in the fact that, as prophecies, they are unquestionably entitled to be given more significance than remarks made in passing.

Note, Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions, 60 Harv. L. Rev. 437, 440 (1947) (emphasis in original). The Court quoted Cardozo's remarks in an article endorsing prospective overruling: "'We apply [the old rule] to this case because the repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril.'" Spanel, 118 N.W.2d at 804 (*quoting* Address by Chief Judge Cardozo, New York State Bar

Association, Jan. 22, 1932, in Beryl H. Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Penn. L. Rev. 1, 13 (1960)). The Spanel Court's reference to these authorities manifest its intent to create a new common law rule permitting actions against school districts.

This intent is exhibited in later Minnesota Supreme Court decisions. In Nieting, this Court stated:

Similarly, in this case, we have concluded that we will abolish immunity prospectively . . . . We therefore abolish the tort immunity of the State of Minnesota with respect to tort claims arising on or after August 1, 1976, subject to any appropriate action taken by the legislature. . . . [W]e affirm as to this case, but establish a new rule of law in Minnesota for cases arising on and after August 1, 1976.

Id. at 598, 603. In 1994, this Court referenced the common law origin of a right to sue school districts when it stated that, "this court withdrew its recognition of the judicially created defense of sovereign immunity with respect to various governmental units, including municipalities . . . ." Doyle v. City of Roseville, 524 N.W.2d 461, 462 (Minn. 1994) (citing Spanel) (emphasis added). These cases establish that the courts, and not the legislature, first declared a common law right to bring an action against a school district.

The Remedies Clause permits statutory abrogation of common law rights only when: (1) they are replaced by a reasonable substitute, or (2) the legislature pursues a permissible legislative objective. Schweich v. Ziegler, Inc., 463 N.W.2d 722, 733 (Minn. 1990). The legislature therefore must provide either: (1) a reasonable substitute for the abrogation of the common law right to sue a school district, or (2) a showing that the it has pursued a

permissible legislative objective by granting immunity to school districts unable to obtain insurance at a rate of a \$1.50 per pupil per year. Neither Section 466 nor any other section of the Minnesota Statutes offers a reasonable substitute to replace any abrogation of a common law right to bring an action against a school district. The legislature cannot condition constitutional rights on outdated insurance rates. Subdivision 3a fails to properly pursue any legitimate legislative objective and therefore violates the Remedies Clause of the Minnesota Constitution

**V. Respondent is not Entitled to Have a Finding of Unconstitutionality Applied Prospectively Only**

Respondent has asked below, and is anticipated to request again, in the event this Court finds Section 466.12 subd. 3a unconstitutional, that any ruling be applied prospectively. This request implies that Respondent had a justified right to rely on this statute. In Nieting v. Blondell, this 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 respective defendants had some form of good faith reliance on the availability of the defense. In this matter, nothing could be further from the truth; Respondent had no illusions that this statute was sound.

Respondent'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.

(A.A. 100.)

In the event that this Court finds Section 466.12 subd. 3a unconstitutional, Appellants must receive the benefits of that finding. Under the current set of facts, prospective application is neither required nor appropriate. Additionally, because Respondent set aside money to pay claims, any awards in these matters will not affect Respondent's educational budget.

**VI. Addressing Tort Claims Will Not Undermine Respondent's Educational Budget**

Another fallacy in Respondent'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, and this 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 Respondent had already budgeted for both educational expenses and claims/litigation expenses. (A.A. 104.) These two types of funds were already

separated out and very much distinct. Further, if Respondent 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. (A.A. 104.) 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 Respondent's implication that liability claims would drain the school's educational budget, Lisa Strombeck, the Respondent's current risk manager, indicated that even if the Respondent paid out on claims, it would be a relatively small part of the budget. (A.A. 084.) 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." (A.A. 084.) While few people would question the notion that public schools could benefit from additional funding, Respondent's cries of budgetary crisis because of liability claims are a far cry from the realities of the matter.

**VII. 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.”)

### CONCLUSION

This Court has the unique opportunity to effectuate the intent of the legislature by declaring an act of the legislature unconstitutional. No argument can be made with a straight face that the \$1.50 figure contained in Section 466.12 subd. 3a is a reasonable rate for insurance in this day and age. There can also be no argument that the legislature, by enacting Section 466.12 subd 3a in 1969 intended to grant blanket immunity to every school in the state. It is evident that the classifications intended by the legislature in 1969 have long ceased to exist, to the detriment of school children across the state.

Twice the court of appeals has addressed this issue: Once remanding and requesting additional information about the reasonableness of the \$1.50 rate; and a second time in which it disregarded it’s own dictates and found Section 466.12 subd. 3a constitutionally permissive in spite of all the evidence presented in regard to the \$1.50 rate. Appellant has shown conclusively that the \$1.50 rate bears no relation to today’s insurance market and is therefore arbitrary and in violation of the State and Federal guarantees of Equal Protection.

Likewise, Section 466.12 deprives Appellants of a fundamental common law right to

seek redress from a negligent school district in violation of the State Remedies Clause. For this reason as well, this Court should find the immunity granted in Section 466.12 unconstitutional.

Because Minnesota Statute Section 466.12 subd. 3(a) fails to meet the rational basis standard required of all constitutionally sound statutes, and because it violates the State Remedies Clause Appellants request that this Court reserve the court of appeals and affirm the district court's denial of Respondent's motion for summary judgment.

Respectfully submitted,

**YAEGER, JUNGBAUER & BARCZAK, PLC**

**Dated:**

10-19-06



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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 12,365 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).