

JUDICIAL REMEDIES

CHAPTER 283

HOUSE BILL NO. 1211

(Representatives Wald, Price, Hawken)
(Senators Krebsbach, Nalewaja)

VOLUNTEER CIVIL IMMUNITY

AN ACT to amend and reenact subsection 1 of section 32-03-45 and subdivision a of subsection 1 of section 32-03-46 of the North Dakota Century Code, relating to civil immunity for certain volunteers.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 1 of section 32-03-45 of the North Dakota Century Code is amended and reenacted as follows:

1. The person who caused the damage or injury was acting in good faith; ~~in the exercise of reasonable and ordinary care~~, and in the scope of that person's duties as a volunteer for the nonprofit organization.

SECTION 2. AMENDMENT. Subdivision a of subsection 1 of section 32-03-46 of the North Dakota Century Code is amended and reenacted as follows:

- a. The person who caused the damage or injury was acting in good faith; ~~in the exercise of reasonable and ordinary care~~, and in the scope of that person's duties for the sports team.

Approved March 5, 1997

Filed March 6, 1997

CHAPTER 284

SENATE BILL NO. 2037 (Legislative Council) (Government Organization Committee)

RAILROAD OWNER LIABILITY LIMITED

AN ACT to create and enact a new section to chapter 32-03 and a new section to chapter 49-10.1 of the North Dakota Century Code, relating to the liability of the owner or operator of a railroad for injury of an individual riding on a locomotive or railroad car without authority from the owner or operator and to the determination of train speeds; to amend and reenact sections 49-05-06, 49-06-01, 49-09-04.2, 49-09-04.4, and 49-11-21 of the North Dakota Century Code, relating to the regulation of railroads; and to repeal sections 49-09-04.1, 49-09-05, 49-09-08, 49-09-09, 49-09-11.1, 49-09-11.2, 49-09-11.3, 49-09-11.4, 49-09-11.5, 49-09-11.6, 49-09-11.7, 49-10.1-04, 49-10.1-06, 49-10.1-09, 49-11-10, 49-11-11, 49-11-12, 49-16-11, and 49-17.2-31 of the North Dakota Century Code, relating to the regulation of railroads.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 32-03 of the North Dakota Century Code is created and enacted as follows:

Limited liability of owner or operator of railroad. An individual who is injured while boarding or attempting to board a moving locomotive or railroad car, without authority from the owner or operator of the railroad, or who having boarded a locomotive or railroad car without authority from the owner or operator of the railroad, is injured while riding or getting off the locomotive or railroad car, may not recover any damages from the owner or operator of the railroad for that injury unless the injury is proximately caused by an intentional act of the railroad owner or operator and the railroad owner or operator knew that serious injury was the probable result of the act, or that the owner or operator of the railroad acted with wanton and reckless disregard of the probable result of the act. This section does not exempt a railroad corporation from any liability created under chapter 49-16 or the federal Employer's Liability Act [45 U.S.C. 51 et seq.] for injuries to its employees or agents.

SECTION 2. AMENDMENT. Section 49-05-06 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

49-05-06. Hearing by commission on proposed change of rates. Whenever a notice or any schedule stating an individual or joint rate, classification, contract, practice, or rule, or regulation, increasing or decreasing, or resulting in an increase or decrease in any rate, ~~shall be~~ is filed with the commission, the commission may suspend by motion ~~such the~~ the rate, classification, contract, practice, or rule, or regulation, but the period of suspension ~~thereof shall~~ may not extend more than seven months ~~for common carriers by rail and motor vehicle and for other public utilities~~ beyond the time when it otherwise would go into effect. Upon complaint or upon its own initiative without complaint the commission may order a hearing, upon due notice, concerning the propriety of ~~such the~~ the rate, classification, contract, practice, or rule, or regulation. On such hearing, the commission shall establish the rates, classifications, contracts, practices, or rules, or regulations proposed, in whole

or in part, or others in lieu thereof, which it ~~shall find~~ finds to be just and reasonable. At any such hearing, the burden to show that the increased rate or proposed change of rate, classification, ~~regulation~~, rule, or practice is just and reasonable ~~shall be~~ is upon the public utility ~~making application therefor~~ applying for the increase. All such rates, classifications, contracts, practices, or rules, ~~or regulations~~ not ~~so~~ suspended, on the expiration of thirty days from the time of filing ~~the same~~ with the commission, or of such lesser time as the commission may grant, ~~shall go into effect and be the established and become~~ become effective rates, classifications, contracts, practices, or rules, ~~and regulations~~, subject to the power of the commission, after a hearing had on its own motion or upon complaint, to alter or modify the same.

SECTION 3. AMENDMENT. Section 49-06-01 of the North Dakota Century Code is amended and reenacted as follows:

49-06-01. Valuation of property as basis for determining reasonableness of rates - Railroads and motor carriers may be exempted. The commission, for the purpose of ascertaining just and reasonable rates and charges of public utilities, or for any other purpose authorized by law, shall investigate and determine the value of the property of every public utility, except railroads and motor carriers, used and useful for the service and convenience of the public, excluding therefrom the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state as a consideration for the grant of ~~such~~ the franchise or right, and exclusive of any value of the right by reason of a monopoly or merger. ~~The value of the property of railroads and motor carriers may, in the discretion of the commission, be required in establishing just and reasonable rates and charges. However, unless the commission determines that the value of the property of railroads and motor carriers is pertinent and essential in the establishment of just and reasonable rates and charges, such valuation shall not be made.~~ The commission shall prescribe the details of the inventory of the property of each public utility to be valued.

SECTION 4. AMENDMENT. Section 49-09-04.2 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

49-09-04.2. Abandoned railroad right of way - Sale.

1. When service is discontinued on any railroad right of way in the state and the property is offered for sale, lease, exchange, or other disposal by the railroad or an affiliated entity, the property must first be offered for public purposes.
2. If right-of-way property along abandoned rail lines is first offered for public purposes and refused, the lessee operators of grain and potato warehouses located on the property must be given the next option to purchase, lease, exchange, or otherwise acquire the property described in their lease. Adjoining agricultural landowners must thereafter be given the next option to acquire the property adjoining their land.
3. When abandoned railroad right of way is offered for wildlife programs or projects, the proposed acquisitions must first be approved by the board of county commissioners of the county or counties in which the right of way is located under section 20.1-02-17.1 if offered to the state game and fish department or under section 20.1-02-18.1 if offered to the United States department of the interior.

4. This section is subservient to the right of the public service commission to receive rail property in trust under section 49-09-04.1.

SECTION 5. AMENDMENT. Section 49-09-04.4 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

49-09-04.4. Railroad abandonment - Records to be open to commission. A railway corporation or railroad holding company having identified a railroad line in North Dakota for abandonment pursuant to 49 U.S.C. 10904(e)(2)(B) shall provide the commission or its designated representatives with access to all records directly relating to the railroad line to be abandoned and to the railway corporation or railroad holding company so an accurate assessment can be made of the line's revenues, profits, and losses. After notice of intent to abandon is given to the governor by the railway corporation or railroad holding company, the commission or its representatives may examine the railway corporation's or railroad holding company's records that are directly related to the railroad line to be abandoned to determine the accuracy of the claims concerning the railway line and to determine whether an abandonment protest should be filed with the ~~interstate commerce commission~~ surface transportation board.

SECTION 6. A new section to chapter 49-10.1 of the North Dakota Century Code is created and enacted as follows:

Determination of train speeds. If the governing body of a city proposes to establish a speed limit on trains passing through its corporate limits and an agreement cannot be reached with the railway company operating the railroad, the governing body of the city may file with the commission a petition that sets forth the facts and requests the commission's assistance in resolving the matter.

SECTION 7. AMENDMENT. Section 49-11-21 of the North Dakota Century Code is amended and reenacted as follows:

49-11-21. ~~Bell, horn, or whistle~~ Warning device sounded at crossing by locomotive. A bell of at least thirty pounds [13.61 kilograms] in weight or a steam whistle or an air horn shall warning device must be placed on each locomotive engine and ~~shall must~~ be ~~rung or whistled or~~ sounded at a distance of at least eighty rods [402.34 meters] from the place where the ~~said~~ railroad ~~shall cross~~ crosses any other road or street and ~~shall must~~ continue to be kept ringing or whistling or sounded until it ~~shall have~~ has crossed ~~said~~ the road or street.

SECTION 8. REPEAL. Sections 49-09-05, 49-09-08, 49-10.1-04, 49-10.1-06, 49-10.1-09, 49-11-10, 49-11-11, and 49-11-12 of the North Dakota Century Code and sections 49-09-04.1, 49-09-09, 49-09-11.1, 49-09-11.2, 49-09-11.3, 49-09-11.4, 49-09-11.5, 49-09-11.6, 49-09-11.7, 49-16-11, and 49-17.2-31 of the 1995 Supplement to the North Dakota Century Code are repealed.

Approved April 9, 1997
Filed April 10, 1997

CHAPTER 285

HOUSE BILL NO. 1297

(Representatives Kretschmar, Rennerfeldt, Kilzer)
(Senators Lips, Traynor)

CIVIL ACTION EXEMPLARY DAMAGES

AN ACT to amend and reenact subsection 1 of section 32-03.2-11 of the North Dakota Century Code, relating to exemplary damages; and to provide for application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 1 of section 32-03.2-11 of the North Dakota Century Code is amended and reenacted as follows:

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. ~~At the hearing on the motion, if~~ The party opposing the motion may respond with affidavit or deposition testimony. If the court finds prima facie evidence in support of the motion, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

SECTION 2. APPLICATION. This Act applies only to actions commenced after the effective date of this Act.

Approved April 11, 1997
Filed April 11, 1997

CHAPTER 286

HOUSE BILL NO. 1153

(Government and Veterans Affairs Committee)
(At the request of the Office of Management and Budget)

RISK MANAGEMENT FUND RECORDS AND CLAIMS

AN ACT to create and enact three new sections to chapter 32-12.2 of the North Dakota Century Code, relating to confidentiality of risk management liability reserve and fund records, meetings and records of agency loss control committees, and contracts between the state and political subdivisions; to amend and reenact sections 32-12.2-01, 32-12.2-02, 32-12.2-03, 32-12.2-04, 32-12.2-07, 32-12.2-08, and 32-12.2-09 of the North Dakota Century Code, relating to definitions, damage limitations, exclusions from liability, employee defense, settlement of claims, payment of claims, and the relationship to insurance coverage of the risk management fund; and to repeal sections 26.1-21-10.1 and 26.1-21-10.2 of the North Dakota Century Code, relating to defense of state employees in tort liability cases and expenses paid from the state bonding fund.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-12.2-01 of the North Dakota Century Code is amended and reenacted as follows:

32-12.2-01. (Contingent expiration date - see Note) Definitions. As used in this chapter, unless the context otherwise requires:

1. "Claim" means any claim for relief money damages brought against the state or a state employee for an injury caused by the state or a state employee acting within the scope of the employee's employment whether in the state or outside the state.
2. "Injury" means personal injury, death, or property damage.
3. "Occurrence" means an accident, including continuous or repeated exposure to a condition, which results in an injury.
4. "Personal injury" includes bodily injury, mental injury, sickness or disease sustained by a person and injury to a person's rights or reputation.
5. "Property damage" includes injury to or destruction of tangible or intangible property.
6. "Scope of employment" ~~has the same meaning as defined in section 26.1-21-10.1~~ means the state employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned to the employee by competent authority. Actions of a state employee that constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct are not within the scope of the employee's employment for purposes of this chapter.

7. "State" includes an agency, authority, board, body, branch, bureau, commission, committee, council, department, division, industry, institution, instrumentality, and office of the state.
8. "State employee" means a state employee as defined in section 26.1-21-10.4 every present or former officer or employee of the state or any person acting on behalf of the state in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor.
9. "State institution" means the state hospital, the developmental center at westwood park, Grafton, the state penitentiary, the Missouri River correctional center, the North Dakota youth correctional center, the school for the blind, ~~and~~ the school for the deaf, and similar facilities providing care, custody, or treatment for individuals.

SECTION 2. AMENDMENT. Section 32-12.2-02 of the North Dakota Century Code is amended and reenacted as follows:

32-12.2-02. (Contingent expiration date - see Note) Liability of the state - Limitations - Statute of limitations.

1. The state may only be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a state employee acting within the employee's scope of employment under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable to the claimant. No claim may be brought against the state or a state employee acting within the employee's scope of employment except a claim authorized under this chapter or otherwise authorized by the legislative assembly.
2. The liability of the state under this chapter is limited to a total of two hundred fifty thousand dollars per person and ~~seven hundred fifty thousand~~ one million dollars for any number of claims arising from any single occurrence. The state may not be held liable, or be ordered to indemnify a state employee held liable, for punitive or exemplary damages. Any amount of a judgment against the state in excess of the ~~seven hundred fifty thousand~~ one million dollar limit imposed under this subsection may be paid only if the legislative assembly adopts an appropriation authorizing payment of all or a portion of that amount. A claimant may present proof of the judgment to the director of the office of management and budget who shall include within the proposed budget for the office of management and budget a request for payment for the portion of the judgment in excess of the limit under this section at the next regular session of the legislative assembly after the judgment is rendered.
3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:
 - a. A claim based upon an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule.

- b. A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the state or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the discretionary function or duty is performed is valid or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.
- c. A claim resulting from the decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, order, rule, or resolution.
- d. A claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.
- e. A claim resulting from the assessment and collection of taxes.
- f. A claim resulting from snow or ice conditions, water, or debris on a highway or on a public sidewalk that does not abut a state-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a state employee.
- g. A claim resulting from any injury caused by a wild animal in its natural state.
- h. A claim resulting from the condition of unimproved real property owned or leased by the state.
- i. A claim resulting from the loss of benefits or compensation due under a program of public assistance.
- j. A claim resulting from the reasonable care and treatment, or lack of care and treatment, of a person at a state institution where reasonable use of available appropriations has been made to provide care.
- k. A claim resulting from damage to the property of a patient or inmate of a state institution.
- l. A claim resulting from any injury to a resident or an inmate of a state institution if the injury is caused by another resident or inmate of that institution.
- m. A claim resulting from environmental contamination, except to the extent that federal environmental law permits the claim.
- n. A claim resulting from a natural disaster, an act of God, a military action, or an act or omission taken as part of a disaster relief effort.
- o. A claim for damage to property owned by the state.

- p. A claim for liability assumed under contract, except this exclusion does not apply to liability arising from a state employee's operation of a rental vehicle if the vehicle is rented for a period of thirty days or less and the loss is not covered by the state employee's personal insurance or by the vehicle rental company.
4. An action brought under this chapter must be commenced within the period provided in section 28-01-22.1.
 5. This chapter does not create or allow any claim that does not exist at common law or has not otherwise been created by law as of April 48 22, 1995.

SECTION 3. AMENDMENT. Section 32-12.2-03 of the North Dakota Century Code is amended and reenacted as follows:

32-12.2-03. (Contingent expiration date - see Note) State to be named in action - Personal liability and defense of employees - Indemnification of claims and final judgments.

1. An action for an injury proximately caused by the alleged negligence, wrongful act, or omission of a state employee occurring within the scope of the employee's employment must be brought against the state.
2. A state employee is not personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of employment.
3. A state employee may not be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment. A state employee may be personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment. The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was acting outside the scope of the employee's employment. The extent to which an employee may be personally liable under this section and whether the employee was acting within the scope of employment must be specifically stated in a final judgment.
4. Except for claims or judgments for punitive damages, the state shall indemnify and save harmless a state employee for any claim, whether groundless or not, and final judgment for any act or omission occurring within the scope of employment of the employee if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee has given written notice of the claim or demand to the head of the state entity that employs the state employee and to the attorney general within ten days after being served with a summons, complaint, or other legal pleading asserting that claim or demand against the state employee.
5. A judgment in a claim against the state is a complete bar to any claim by the claimant, resulting from the same injury, against the employee whose act or omission gave rise to the claim.

6. The state shall defend any state employee in connection with any civil claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of the employee's employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee requests such defense in writing within ten days after being served with a summons, complaint, or other legal pleading asserting a cause of action against the state employee arising out of a civil claim or demand. The request for defense must be in writing and provided to the head of the state entity that employs the state employee and the attorney general. The head of the state entity that employs the state employee shall advise the attorney general as to whether that person deems the employee's actions that are the subject of the action to have been within the scope of the employee's employment. The determination of whether a state employee was acting within the scope of employment must be made by the attorney general. If the attorney general determines that the employee was acting within the scope of the employee's employment, the state shall provide the employee with a defense by or under the control of the attorney general or the attorney general's appointee. This section is not a waiver, limitation, or modification of any immunity or other defenses of the state or any of its employees, nor does it create any causes of action against the state or any of its employees.
7. For any claim brought under this chapter, a state employee may choose to hire the employee's own separate defense counsel to represent the state employee in the litigation. If the state employee chooses to hire separate defense counsel, subsections 4 and 6 do not apply to the state employee in that litigation and the state will not indemnify, save harmless, or defend the state employee nor pay for the state employee's defense or any judgment against the state employee.

SECTION 4. AMENDMENT. Section 32-12.2-04 of the North Dakota Century Code is amended and reenacted as follows:

32-12.2-04. (Contingent expiration date - see Note) Notice required - Payment of claims.

1. A person bringing a claim against the state or a state employee for an injury shall present to the director of the office of management and budget within one hundred eighty days after the alleged injury is discovered or reasonably should have been discovered a written notice stating the time, place, and circumstances of the injury, the names of any state employees known to be involved, and the amount of compensation or other relief demanded. The time for giving the notice does not include the time during which a person injured is incapacitated by the injury from giving the notice. If the claim is one for death, the notice may be presented by the personal representative, surviving spouse, or next of kin within one year after the alleged injury resulting in the death.
2. ~~Within two working days after~~ After receipt of notice of a claim, the director of the office of management and budget shall ~~forward the notice of a claim to,~~ in a timely manner, notify the head of the state entity involved, the attorney general, and any ~~other~~ insurer or self-insurance pool providing coverage for that state entity. ~~The~~ For claims over five thousand dollars, the director, in consultation with the head of the state entity involved and the attorney general, may settle claims covered by

the state risk management fund: ~~For all claims, a settlement made under this section is not valid unless it is supported by a~~ if the claim is made in writing and settlement is approved and signed by the attorney general. The director of the office of management and budget may independently settle any claim covered by the state risk management fund if the claim is made in writing and the settlement is for not more than five thousand dollars.

3. A claim shall be paid out of the risk management fund unless that claim is covered by insurance or participation in a government self-insurance pool. All necessary loss adjustment expenses must be included as a component of the claim and be paid out of the fund. Loss adjustment expenses include investigation costs and attorney fees associated with a claim.
4. The acceptance by the claimant of a settlement is final and conclusive on the claimant and constitutes a complete release of any claim against the state and the state employee whose act or omission gave rise to the claim.
5. A person bringing a legal action against the state or a state employee for a claim shall deliver a copy of the summons, complaint, or other legal pleading in which the claim is first asserted in the action to the director of the office of management and budget at the time the summons, complaint, or other legal pleading is served in the action. This provision is in addition to any applicable rule of civil procedure.

SECTION 5. AMENDMENT. Section 32-12.2-07 of the North Dakota Century Code is amended and reenacted as follows:

32-12.2-07. (Contingent expiration date - see Note) Risk management fund - Appropriation.

1. The director of the office of management and budget shall implement and administer a program of ~~self-insurance~~ self-retention against liability for the state through the establishment of a risk management fund. Each entity of the state shall participate in the program by contributing the appropriate share of its costs as determined by the director.
2. The state risk management fund is a special fund in the state treasury administered by the director of the office of management and budget. The fund is a revolving fund consisting of contributions from participating state entities and other appropriations by the legislative assembly. The state investment board shall invest the fund in accordance with chapter 21-10. Funds received as contributions from state entities and interest and income received on investments are hereby appropriated for the purposes of the fund. Section 54-44.1-11 does not apply to the fund.
3. The director of the office of management and budget shall:
 - a. Review the state's exposure to various types of potential risks in consultation with affected state entities and advise state entities as to the reduction of risk and fiscal management of those losses.

- b. Be responsible for statewide risk management coordination, evaluation of funding and insuring alternatives, and the approval of all liability insurance purchases or government self-insurance pool participation in consultation with affected state entities.
 - c. Identify methods to eliminate redundant efforts in the management of state risk management and insurance programs.
 - d. Administer the state risk management fund or contract for a third-party administrator.
4. The director of the office of management and budget may request bids from insurance carriers or government self-insurance pools or negotiate with insurance carriers and government self-insurance pools and may enter into contracts of insurance with carriers or memorandums of coverage with government self-insurance pools that are best qualified to underwrite and service insurance or coverage programs for the state through the risk management fund.

SECTION 6. AMENDMENT. Section 32-12.2-08 of the North Dakota Century Code is amended and reenacted as follows:

32-12.2-08. (Contingent expiration date - see Note) Duties of director of the office of management and budget. The director of the office of management and budget is responsible for determining the specifications for liability insurance or coverage for the state. The director shall require an insurance company or government self-insurance pool providing coverage for the state to guarantee that its policy or memorandum of coverage provides minimum coverages pursuant to required specifications and is primary coverage to any coverage under the risk management fund.

SECTION 7. AMENDMENT. Section 32-12.2-09 of the North Dakota Century Code is amended and reenacted as follows:

32-12.2-09. (Contingent expiration date - see Note) Insurance no waiver of immunity. No purchase of insurance or participation in a government self-insurance pool or self-retention fund by the state may be construed as a waiver of any immunity to suit.

SECTION 8. A new section to chapter 32-12.2 of the North Dakota Century Code is created and enacted as follows:

Certain records relating to claims against the state or state employees privileged and exempt from open records law.

1. The following records are privileged and are not subject to section 44-04-18 or section 6 of article XI of the Constitution of North Dakota:
 - a. Records containing information relating to that portion of the funds or liability reserves of the risk management fund established for the purpose of satisfying a specific pending or reasonably predictable claim against the state or a state employee; and
 - b. Incident reports, investigation reports, or other risk management fund records of a pending or reasonably predictable claim against the state or a state employee.

2. The office of management and budget shall make available for public disclosure records identified in subsection 1 when disclosure of the record will not prejudice any outstanding claim or reasonably predictable claim against the state or a state employee, all civil litigation or adversarial administrative proceedings, including the exhaustion of all appellate remedies, have been completed, and, in the case of reasonably predictable claims, the applicable statute of limitations has expired.

SECTION 9. A new section to chapter 32-12.2 of the North Dakota Century Code is created and enacted as follows:

State agency loss control committee records and meetings privileged and exempt from open records and open meetings law. The portions of the records and meetings of any state agency loss control committee dealing with confidential records are not public records or public meetings subject to sections 44-04-18 and 44-04-19 and sections 5 and 6 of article XI of the Constitution of North Dakota. Those records and meetings of the committee are privileged and are not subject to subpoena or discovery or introduction into evidence in any civil action. The records of the committee include all information, data, reports, or records created by or made available to the committee. Any information, data, report, or record otherwise available from original sources is not confidential or immune from discovery or use in any civil action merely because it was presented or considered during the proceedings of the committee. A person who testified before the committee or who is a member of the committee may testify as to matters within that person's knowledge but may not be asked about the records of, the testimony before, or the discussions of the committee. This section does not relieve any person of any liability incurred as a result of actions reviewed by the committee.

SECTION 10. A new section to chapter 32-12.2 of the North Dakota Century Code is created and enacted as follows:

Contract between the state and a political subdivision. A contract between the state and a political subdivision may not contain a provision that requires one party to assume the liability of the other or the liability of a third party or to bear the costs of defense of actions against the other or against a third party, unless the agreement is entered into in good faith and is set forth in a separate writing signed by both parties and supported by adequate consideration which must be stated in the agreement.

SECTION 11. REPEAL. Sections 26.1-21-10.1 and 26.1-21-10.2 of the North Dakota Century Code are repealed.

Approved April 4, 1997
Filed April 4, 1997

CHAPTER 287**HOUSE BILL NO. 1399**
(Representatives Oban, Mahoney)
(Senator Watne)**WRONGFUL DEATH ACTION PARTIES**

AN ACT to amend and reenact section 32-21-03 of the North Dakota Century Code, relating to persons who may bring a wrongful death action.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-21-03 of the North Dakota Century Code is amended and reenacted as follows:

32-21-03. Who may bring action. The action shall be brought by the following persons in the order named:

1. The surviving husband or wife, if any.
2. The surviving children, if any.
3. The surviving mother or father.
4. A surviving grandparent.
5. The personal representative.
6. A person who has had primary physical custody of the decedent before the wrongful act.

If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, ~~such~~ that person may bring the ~~same~~ action.

Approved April 3, 1997
Filed April 3, 1997

CHAPTER 288

HOUSE BILL NO. 1176

(Representatives Nicholas, Nichols, Olson)
(Senators Nalewaja, Wanzek, Tomac)

AGRICULTURAL PRODUCT DEFAMATION

AN ACT to provide for damages for defamation of agricultural products and management practices; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act, unless the context otherwise requires:

1. "Agricultural producer" means any person engaged in growing, raising, distributing, or selling an agricultural product, or manufacturing the product for consumer use.
2. "Agricultural product" means any plant or animal, or the product of a plant or animal, grown, raised, distributed, or sold for a commercial purpose; the term also includes any agricultural practices used in the production of such products.
3. "Defamatory statement" means intentional words or conduct which reflects on the character or reputation of another or upon the quality, safety, or value of another's property in a manner which tends:
 - a. To lower another in the estimation of the community;
 - b. To deter third persons from dealing with another; or
 - c. To deter third persons from buying the products of another.
4. "Disseminate" means to publish or otherwise convey a statement to a third party but does not include repeating a false and defamatory statement made by another unless the person repeating the statement knew the statement was false.
5. "False statement" means a statement that either expressly includes a fact or implies a fact as justification for an opinion and the fact is not based upon reasonable and reliable scientific inquiry, data, or facts.
6. "Knowing the statement to be false" means the communicator knew the statement was false or acted with reckless disregard of whether the statement was false.

SECTION 2. Civil liability for defamation of agricultural producers. A person who willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding an agricultural producer or an agricultural product under circumstances in which the statement may be reasonably expected to be believed and the agricultural producer is damaged as a result, is liable to the agricultural producer for damages and other relief allowed by law in a court

of competent jurisdiction, including injunctive relief and compensatory and exemplary damages. If it is found by a court or jury that a person has maliciously disseminated a false and defamatory statement regarding an agricultural product or agricultural producer, the agricultural producer may recover up to three times the actual damages proven and the court must order that the agricultural producer recover costs, disbursements, and actual reasonable attorneys' fees incurred in the action.

SECTION 3. Persons entitled to claim for relief. In addition to the provisions of section 2 of this Act, if a false and defamatory statement is disseminated referring to an entire group or class of agricultural producers or products, a cause of action arises in favor of each producer of the group or class and any association representing an agricultural producer, regardless of the size of the group or class. Each cause of action by a producer or an association representing an agricultural producer in such case is limited to the actual damages of the producer, injunctive relief, and exemplary damages.

SECTION 4. Statute of limitations. Any civil action for damages under this Act must be commenced within two years from the date of the false and defamatory statement.

Approved March 27, 1997
Filed March 27, 1997