

## N.D.A.G. Letter to Slorby (Oct. 19, 1987)

October 19, 1987

Mr. Tom P. Slorby  
Ward County State's Attorney  
Ward County Courthouse  
Minot, ND 58701

Dear Mr. Slorby:

Thank you for your letter of August 19, 1987. I apologize for the delay in responding to you.

Your letter asks for an Attorney General's opinion on the question of whether Ward County may hold an employee financially responsible and accountable for the loss of county funds.

As the attachment to your letter indicates, N.D.C.C. § 34-02-16 addresses the question of an employee's liability to his employer. N.D.C.C. § 34-02-16 provides: "[a]n employee who is guilty of a culpable degree of negligence is liable to his employer for the damage caused to the latter thereby." The North Dakota Supreme Court has not interpreted this statute. However, the United States District Court for the District of North Dakota has interpreted N.D.C.C. § 34-02-16 and concluded that it requires more than ordinary negligence. See, United States ex rel. Western Steel Erectors, Inc. v. Woerfel Corp., 337 F.Supp. 895, 898 (D.N.D. 1972).

In Woerful Corp., the district court stated: "[t]he statute [N.D.C.C. § 34-02-16] appears to require something more than ordinary negligence or lack of skill. As applied to employer-employee relationships, this court would hold that the statute contemplates an element of willfulness [sic] or recklessness." Id.

It is unclear, however, whether the North Dakota Supreme Court would interpret N.D.C.C. § 34-02-16 as requiring willfulness or recklessness. The North Dakota statute was derived from the California Civil Code, see N.D.C.C. § 34-02-16 note on derivation (1987), and the California courts have interpreted their statute differently, see Dahl-Beck Electric Co., Inc. v. Rogge, 275 Cal. App. 2d 893, \_\_\_\_\_, 80 Cal. Rptr. 440, 448 (1969).

The California statute provides: "[a]n employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer." Cal. Labor Code § 2865 (West 1971). The California Court of Appeal has interpreted the language "culpable degree of negligence" to mean "the violation or disregard of the duty which an employee owes to his employer pursuant to the obligations imposed by the provisions of the Labor Code." Dahl-Beck Electric Co., 275 Cal. App. 2d at \_\_\_\_\_, 80 Cal. Rptr. at 448. The court of appeal held that under the California Labor Code a gratuitous

employee is guilty of a "culpable degree of negligence" when he is guilty of gross negligence and an employee for consideration is guilty of a "culpable degree of negligence" when she "fails to use ordinary care consistent with the degree of skill required." Id.

The statutes interpreted by the court in Dahl-Beck Electric Co., provided that "[o]ne who, for a good consideration, agrees to serve another, shall perform the service, and shall use ordinary care and diligence therein, so long as he is thus employed," Cal. Labor Code § 2854 (West 1971). The statutes also stated that "[o]ne who, without consideration, undertakes to do a service for another, is not bound to perform the same but if he actually enters upon its performance, he shall use at least slight care and diligence therein," Cal. Labor Code § 2850 (West 1971). The North Dakota statutes provide that a gratuitous employee "shall use at least slight care and diligence" in performing a service, N.D.C.C. § 34-02-04 (1987), and that "[o]ne who, for a good consideration, agrees to serve another shall perform the service and shall use ordinary care and diligence as long as he is thus employed," N.D.C.C. § 34-02-06 (1987). Because the North Dakota and California statutes are so similar, the North Dakota courts would likely adopt the reasoning of Dahl-Beck Electric Co. and hold that a non-gratuitous employee is guilty of a "culpable degree of negligence" when he fails to use ordinary care and diligence in the performance of the service.

The conclusion that the North Dakota courts would likely adopt the California interpretation of the phrase "culpable degree of negligence" is reinforced by the fact that the North Dakota Supreme Court once quoted, with apparent approval, language defining "culpable negligence" as setting forth an ordinary prudent person standard. See McGregor v. Great Northern Railway Co., 154 N.W. 261, 264 (N.D. 1915). In McGregor, the North Dakota Supreme Court discussed contributory negligence in a personal injury suit and quoted the following language from an Eighth Circuit opinion:

A man is guilty of culpable negligence when he does or omits to do an act that an ordinarily prudent person in the same situation and with equal experience would not have done or omitted to do, or when he voluntarily exposes himself to a danger which there was no occasion to incur in the proper discharge of his duties.

McGregor, 154 N.W. at 264 (quoting Chicago, M. & St. P. Ry. Co. v. Carpenter, 56 F. 451, 453 (8th Cir. 1893)). The McGregor opinion suggests that "culpable negligence" sets forth the same standard as the term "negligence." See N.D.C.C. § 1-01-17 (1987) (ordinary negligence consists of want of ordinary care and diligence). Accord Hauck v. Crawford, 62 N.W.2d 92, 94 (S.D. 1953) (as used in civil statutes the words "culpable negligence" mean the same as actionable negligence).

The definition of "culpable negligence" quoted in McGregor is consistent with that in Black's Law Dictionary. Black's Law Dictionary defines "culpable negligence" as "[f]ailure to exercise that degree of care rendered appropriate by the particular circumstances, and which a man of ordinary prudence in the same situation and with equal experience would not have omitted." Black's Law Dictionary 931 (5th ed. 1979).

The North Dakota Supreme Court has also interpreted the term "culpable negligence" in the context of a criminal statute. See State v. Tjaden, 69 N.W.2d 272, 282 (N.D. 1955). In Tjaden, the supreme court defined the term "culpable negligence" as used in a manslaughter statute as "blameable and wanton lack of care evidenced in a reckless indifference to the safety and rights of others." *Id.* at 282. The definition of "culpable negligence" as used in a criminal statute is distinguishable from the definition of the term as used in a civil statute. See State v. Studebaker, 334 Mo. 471, \_\_\_\_\_, 66 S.W.2d 877, 881 (1933) ("culpable negligence" in a civil context means the same as actionable negligence; but a person ought not be held criminally responsible for every negligent act that would subject him to civil liability for damages).

Thus, the North Dakota courts would likely follow the construction of the phrase "culpable degree of negligence" adopted by the court in Dahl-Beck Electric Co. and reject the construction adopted by the court in Woerfel.

It is my opinion that a county may hold a non-gratuitous employee liable for the loss of county funds if the loss was the result of the employee's failure to use ordinary care and diligence. I express no opinion as to whether the conduct which caused the loss of funds in this case constituted a culpable degree of negligence.

I hope this opinion is helpful. Please contact me if you have any further questions on this matter.

Sincerely,

Nicholas J. Spaeth

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