MEMORANDUM

TO: Paul Schadewald, Game & Fish Dept., Chief of Administrative Services

FROM: Dean J. Haas, Assistant Attorney General DJH

DATE: April 30, 2007

RE: Marking Potential Dangers or Hazardous Conditions on Lakes and Rivers – Game and Fish Liability

The Game and Fish Department has asked whether it has a legal duty to mark potential dangers or hazardous conditions on lakes and rivers in North Dakota.[1] The Department also asks about its liability if it undertakes a program of warning boaters of dangerous conditions.

I. The Department's duty to mark dangers.

The first question is whether the Department has a duty to mark dangerous conditions. I conclude that in the absence of willful and malicious conduct, the answer is probably no.

A prima facie case of negligence has four elements: duty, breach, causation, and injury.[2] In plain English, a person suing for negligence alleges that the defendant owed

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[1] The Game & Fish Department is the state agency that enforces safety laws regarding the public's travel on state waterways. *See* N.D.C.C. §§ 20.1-13-14, 20.1-13-15, 20.1-13-16. The Department is required to develop and administer a comprehensive statewide boating safety program. N.D.C.C. § 20.1-13-16. And, N.D. Admin. Code § 30-05-01-07 authorizes the Department to place markers, buoys, and other warning devices near or in the waters of the state. Regarding its duty to mark hazards on public waterways, the Department stands in the position of a landowner who invites people onto his property without charging compensation—*see generally* N.D.C.C. ch. 53-08—as N.D.C.C. § 47-01-15 provides that "[a]ll navigable rivers shall remain and be deemed public highways." In fact, the state owns title to the underlying land to protect navigation. *J.P. Furlong Enterprises, Inc. v. Sun Exploration & Prouction. Co.*, 423 N.W.2d 130, 132 (N.D. 1988).

[2] "Duty" in negligence has been defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Ashbum v. Anne Arundel County*, 510 A.2d 1078, 1083 (Md. 1986) quoting *Prosser and Keeton on Torts* § 53 (W. Keeton 5th ed. 1984). There is no set formula for this determination. As Dean Prosser noted, "duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* In broad terms, these policies include: "convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, [and] the moral blame attached to the wrongdoer...." *Id.* As

her a duty of reasonable care and injured her by breaching that duty.[3] "Whether a duty exists is generally a question of law for the court, but if the existence of a duty depends upon the resolution of factual issues, the facts must be resolved by the trier of fact."[4]

Generally speaking, a "[d]uty to warn is predicated upon the understanding that individuals who have superior knowledge of dangers posed by a hazard must warn those who lack similar knowledge; when an individual is already aware of danger, a warning is not necessary."[5] Thus, the duty to warn depends, among other things, "upon the age, intelligence, and information of those to whom the warning might be due."[6]

Under the common law, a landowner is not liable for physical harm caused to invitees by any activity or condition on land (waters) whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.[7] Two enactments of the legislature modify the common law rules regarding the Department's duty to warn of dangers on state waterways.

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one court suggested, there are a number of variables to be considered in determining if a duty exists to another, such as:
"the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved."
Tarasoff v. Regents of University of California, 131 Cal.Rptr. 14, 22, 551 P.2d 334, 342 (1976).

[3] *Groleau v. Bjornson Oil Co., Inc.,* 2004 ND 55, ¶ 6, 676 N.W.2d 763; *Iglehart v. Iglehart*, 2003 ND 154, ¶11, 670 N.W.2d 343, citing *Diegel v. City of West Fargo,* 546 N.W.2d 367, 370 (N.D.1996).

[4] *Ficek v. Morken*, 2004 ND 158 ¶ 9, 685 N.W.2d 98, 101-01.

[5] *Collette v. Clausen*, 2003 ND 129 ¶ 26, 667 N.W.2d 617, citing 65 C.J.S. *Negligence* § 74 (2000).

[6] *Id.*, citing 57A Am.Jur.2d *Negligence* § 388 (1989).

[7] In *Groleau v. Bjornson Oil Co., Inc.*, 2004 ND 55 ¶ 17, 676 N.W.2d 763, the Court applied the Restatement (Second) of Torts § 343A (1965), concluding that a genuine issue of material fact existed as to whether a dangerous condition (elevated gas pump island) was open and obvious to service station customer who tripped over it, so as to impose duty of care upon service station owner, precluding summary judgment in premises liability action. Under § 343A of the Restatement, the duty to warn exists if the landowner "should anticipate that the condition will cause harm notwithstanding the known or obvious nature of the danger." For example, such reason may arise "where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, ... is not ... conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances." Restatement (Second) of Torts §

Most recently—in 2005—the legislature, reacting to modify the North Dakota Supreme Court's rejection of the public duty doctrine in *Ficek v. Morken*,[8] amended N.D.C.C. § 32-12.2-02, providing that:

> [n]either the state nor a state employee may be held liable ... [for a] claim relating to injury directly or indirectly caused by performance or nonperformance of a public duty, including: [i]nspecting, licensing, approving, mitigating, warning, abating, of failing to so act regarding ... health or safety."[9]

But, if the parties are in a "special relationship," this liability limitation doesn't apply.[10] The special relationship exception will be discussed in part II, *infra*.

The second relative legislative enactment—known as the recreational use statute, chapter 52-08—generally absolves landowners of any affirmative duty to entering recreational users.[11] The intent of the legislature, in enacting Chapter 53-08 "was to grant the same rights and privileges to governmental and private landowners alike."[12]

343A , Comment f (1965); *see also Johanson v. Nash Finch Co.*, 216 N.W.2d 271, 277 (N.D.1974). "The determination whether a particular dangerous condition upon land is 'obvious' is governed by an objective standard," and "is generally a fact for the trier of fact. ... 'Obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." *Groleau* ¶¶ 21-22. The Court has similarly applied the Restatement (Second) of Torts § 388 (Chattel known to be dangerous for intended use (negligent failure to warn)) in *Collette v. Clausen*, 2003 ND 129 ¶ 31, 667 N.W.2d 617, holding that dismissal of the action was warranted because the plaintiff failed to meet her burden to show that the defendant (owner of the snowmobile) knew or had reason to believe that the plaintiff would not recognize the dangers of snowmobiling on the Red River.

[8] 2004 ND 158, 685 N.W.2d 98 (holding that the City of Fargo owed a duty to properly inspect building construction).

[9] N.D.C.C. § 32-12.2-02(3)(f)(1).

[10] N.D.C.C. § 32-12.2-02(g).

[11] *Cudworth v. Midcontinent Communs.*, 380 F.3d 375, 383 (8th Cir. 2004).

[12] *Fastow v. Burleigh County Water Res. Dist.*, 415 N.W.2d 505, 508 (N.D. 1987), citing N.D.C.C. § 32-12.1-03(1) (political subdivisions liable for injuries in same manner as a private person.) In 1995, the Legislature changed the definition of "[l]and" in N.D.C.C. § 53-08-01 to include "all public and private land," and amended the definition of "[r]ecreational purposes" to its present form. 1995 N.D. Sess. Laws ch. 162, § 7. The amendment to the definition of land was intended to clarify that the statutes provide "a limitation of liability for all landowners, regardless of whether they are private or public." *Hearing on S.B. 2127 Before the Senate Agriculture Comm.*, 54th N.D. Legis. Sess. (Jan. 5, 1995) (testimony of Robert Olheiser, State Land Commissioner). The Court has upheld the recreational use statutes from equal protection challenge. *Olson v. Bismarck Parks and Recreation Dist.*, 2002 ND 61, 642 N.W.2d 864. The *Olson* Court also noted the limited application of *Hovland v. City of Grand Forks,* 1997 ND 95, ¶¶ 8, 17, 563

But political subdivisions (counties, townships, park districts, school districts)[13] waive "limited governmental immunity," if liability insurance coverage is purchased.[14] A similar provision authorizes the state—like its political subdivisions—to purchase liability insurance.[15]

In the absence of potential waiver of immunity by purchase of insurance coverage,[16] the state benefits from N.D.C.C. § 53-08-02, which provides:

> Subject to the provisions of section 53-08-05, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

And N.D.C.C. § 53-08-03 provides that landowners[17] who allow people to use their property without charge for recreational purposes do not:

1. Extend any assurance that the premises are safe for any purpose;
2. Confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed; or
3 Assume responsibility for or incur liability for any injury to person or property by an act or omission.

But there is an important caveat: the recreational use statutes do not limit liability if the failure to guard or warn against a dangerous condition is "willful and malicious."[18] The first amendment to the statutes occurred in 1993, when the legislature "chang[ed] the language of N.D.C.C. § 53-08-05(1) from "[w]illful or malicious" to "[w]illful and malicious."[19] The relevance of prior case-law interpreting ch. 53-08 is not clear.[20]

N.W.2d 384 (wherein the Court had ruled that the pre-1995 version of the recreational use immunity statutes did not apply to political subdivisions). *Olson* at ¶ 8.

[13] N.D.C.C. § 32-12.2-02(6)(a).

[14] *Fastow*, 415 N.W.2d at 509.

[15] N.D.C.C. § 32-12.2-06.

[16] In contrast to N.D.C.C. § 32-12.1-05—which specifically provides that insurers of political subdivisions "may not assert the defense of governmental immunity"—N.D.C.C. § 32-12.2-06 (state immunity) does not contain this language. Nevertheless, if the Department purchases liability insurance, there may be a potential that its governmental immunity is waived.

[17] N.D.C.C. § 53-08-01(2) provides that: "'Land'" includes all public and private land, roads, *water, watercourses,* and ways and buildings, structures, and machinery or equipment thereon." (emphasis added).

[18] N.D.C.C. § 53-08-05(1).

[19] *Leet v. City of Minot*, 2006 ND 191 ¶ 14, 721 N.W.2d 398, citing 1993 N.D. Sess. Laws ch. 503, § 1.

If, as is likely, the state courts follow the Eighth Circuit, the amendment is significant. In a case interpreting the very state statutes (as amended) at issue here, the Eighth Circuit held that "[t]he term 'malicious' typically means ... 'arising from malice,' and 'malice' most commonly connotes an 'intention or desire to harm another.'"[21] The court, rejecting the plaintiff's assertion that the term encompasses presumed malice, concluded that the legislature did not intend to allow liability for presumed malice or reckless disregard; therefore the term malicious does not encompass presumed malice, which exists where a defendant's conduct amounts to a reckless disregard of the rights of others.[22] In other words, even reckless disregard or wanton negligence isn't sufficient to find liability; rather, the defendant must have intended injury—which is similar to the law regarding employer immunity from civil suit due to work injury.[23]

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[20] *See generally Umpleby ex rel. Umpleby v. U.S. ex rel. Dept. of Army*, 806 F.2d 812, 813 (8th Cir. 1986). *See Van Ornum v. Otter Tail Power Co.*, 210 N.W.2d 188, 202 (N.D. 1973), which established a three prong test for "willful *or* wanton" infliction of injury:
"[1.] show knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another;
[2.] ability to avoid resulting harm by ordinary care and diligence in the use of the means at hand; and
[3.] the omission of such care and diligence to avert threatened danger when to an ordinary person it must be apparent that the result likely would prove disastrous to another."

[21] *Cudworth*, 380 F.3d at 381.

[22] *Id.*

[23] N.D.C.C. § 65-01-01.1 provides that "[t]he sole exception to an employer's immunity from civil liability under this title ... is an action for an injury to an employee caused by an employer's intentional act done with the conscious purpose of inflicting the injury." While North Dakota law is clear on this point, other courts have struggled to determine when an employer has committed an intentional injury, losing the worker's compensation act as shield to civil suit. Some courts have defined an intentional injury not merely as "the true intended tort" but also an injury "substantially certain" to follow. 6 Larson, *Workmen's Compensation Law*, §§ 103.03, 103.05. Under the "true intended tort theory," the actor must have intended both the act itself and the injurious consequences of the act. *Id.* § 103.03. Under the latter, the actor must have intended the act, but it is enough that he or she knew that injury was substantially certain to occur from the act. *Serna v. Statewide Contractors*, 429 P.2d 504, 507 (Ariz. Ct. App. 1967) discusses the meaning of the "substantially certain" test to determine whether conduct amounts to an intentional tort. In that case, "two men [were] killed when a 25-foot ditch caved in burying them alive." *Id.* at 505. During the preceding five months, there had been one cave-in, burying a man up to his waist, and inspectors had warned the employer that "the sides of the ditch were not sloped properly, the side was sandy, more shoveling was needed, and escape ladders should be placed every 25 feet." *Id.* at 506. The warnings were ignored. *Id.* The Arizona court disallowed the tort action, finding that the act was not done knowingly and purposely, with the direct object of injuring another. *Id.* at 508. It is not enough then, to know that an injury may be likely; rather, the

Under the prior version of ch. 53-08, in *Stokka v. Cass County Elec. Coop*,[24] the court said that the recreational immunity statute precluded liability on the part of the defendant for ordinary negligence when a snowmobiler was killed while snowmobiling when he struck an unmarked guy wire of defendant's on the side of a county road. But the court reversed summary judgment for the defendant on the grounds that there was competent admissible evidence upon which a jury could have based an inference of willful conduct and thus that there were genuine issues of material fact.[25] While it is likely that the North Dakota Supreme Court will follow the Eighth Circuit, and hold that a factual finding of "willful and malicious" conduct requires proof akin to intent to injure, this is not completely certain. If the law is applied much as it was prior to the amendment—as in *Stokka*—then it is likely that lawsuits for failure to warn will not be disposed of by summary judgment, but will proceed to a factual determination by the trier of fact.

Finally, the discretionary function exception may limit liability for failure to warn. Immunity under the exception is afforded to the State and its employees "based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty."[26] In determining whether the exception applies, the court first

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employer must intend the injury. The recreational use statute is somewhat similar—the rule appears to be that the Department is not liable simply because it is aware that an injury to boaters could result from a known hazard, but it must maliciously intend or desire to harm another. *Cudworth*, 380 F.3d at 381.

[24] 373 N.W.2d 911 (N.D. 1985) (interpreting the term "willful *or* malicious.").

[25] The Court focused on willful conduct, stating:

"In our view, the information available to the trial court contained evidence which, when viewed in the light most favorable to Stokka, indicated that CCEC knew that unmarked guy wires posed a risk to snowmobilers; that the guy wire struck by Milton Stokka was known by CCEC to pose a risk to snowmobilers; that on February 9, 1972, a guy guard was installed on the guy wire struck by Stokka, but was not present on December 19, 1981; that CCEC could avert harm to snowmobilers by installing guy guards; and that CCEC did not have an effective policy for determining where to install guy guards or to assure their continued presence if once installed. Thus, there is evidence from which a jury could infer that CCEC willfully failed to guard or warn against a dangerous condition, use, structure, or activity." *Id.* at 916.

[26] N.D.C.C. § 32-12.2-02(3)(b). The court summarized the exception in *Perry Center, Inc. v. Heitkamp*, 1998 ND 78 ¶ 29, 576 N.W.2d 505:

"The test we apply when determining governmental liability and discretionary acts distinguishes between immune discretionary acts and non-immune ministerial acts. The distinction between discretionary and ministerial acts is often one of degree and is determined by a consideration and evaluation of a number of competing factors under the particular circumstances of each case.... [T]he relevant factors for making the distinction [are]:

(1) The nature and importance of the function that the officer is performing.

(2) The extent to which passing judgment on the exercise of discretion by the officer will

examines whether the action is a matter of choice for the acting employee or whether a statute, regulation, or policy specifically prescribed a course of action for the employee to follow. The second inquiry, assuming the challenged conduct involves an element of judgment or choice, is whether the judgment or choice is of the kind the discretionary immunity exception was designed to shield, i.e., whether the decision or action is grounded in social, economic, or policy considerations.[27]

"The focus of the inquiry is not on the [g]overnment's subjective intent in exercising the discretion conferred . . . but on the nature of the actions taken and whether they are susceptible to policy analysis."[28] Since there is no legal requirement that warning signs be placed in a certain locations marking certain types of hazards on waterways, the decision to place such a sign may be left to the State's discretion. Arguably then, N.D.C.C. § 32-12.2-02(3)(b) provides immunity to the State in the exercise of this discretionary function—whether to mark potential boating hazards.[29]

For example, the court in *Shansky v. United States*,[30] held that the United States was immune from liability under the discretionary function exception to the government's waiver of sovereign immunity under the Federal Tort Claims Act[31] in a suit brought by a visitor who sustained serious injury when she tripped over an antique wooden threshold at the exit to the Hubbell Trading Post, a national historic site administered by the National Park Service (NPS), and fell down a flight of stairs. The visitor alleged that when the NPS refurbished the trading post, it should have installed a handrail at the exit where she was injured. The issue before the court was framed as encompassing two questions—whether the conduct of the NPS during rehabilitation of the trading post was discretionary and, if so, whether that discretion was susceptible to policy-related judgments. The Court held that "[a]s long as the eschewal of handrails and warning signs was a component of the initial overall policy decision-and everything in this case suggests that it was-the discretionary function exception protects the Park Service's conduct."[32]

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amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government.
(3) The extent to which the imposition of liability would impair the free exercise of his discretion by the officer.
(4) The extent to which the ultimate financial responsibility will fall on the officer.
(5) The likelihood that harm will result to members of the public if the action is taken.
(6) The nature and seriousness of the type of harm that may be produced.
(7) The availability to the injured party of other remedies and other forms of relief."
Id. at ¶ 29, citing *Loran v. Iszler,* 373 N.W.2d 870, 873 (N.D.1985).

[27] *Olson v. City of Garrison*, 539 N.W.2d 663, 667 (N.D. 1995).

[28] *Id.*

[29] The discretionary function exception would likely be a defense, but its application is notoriously fickle.

[30] 164 F.3d 688, (1st Cir. 1999).

[31] 28 U.S.C.A. § 2680(a).

[32] *Id.* at 695.

Similarly, in *Cassagnol-Figueroa v. Unites States*,[33] the court held that the discretionary function exception to the Federal Tort Claims Act immunized the United States and precluded an action under the Act brought by a tour guide to recover damages for injuries she sustained when she fell over a low wall at a site administered by the National Park Service. The court said that the superintendent of the site had discretion to follow or disregard a safety committee's recommendation to construct a pipe and cyclone fence railing surrounding part of El Moro that was identified as a hazard. The court found that the exercise of discretion resulting in deciding not to build the fence was a policy decision to the extent it was based on a decision to preserve the historical significance of the original design of El Moro.[34]

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[33] 755 F. Supp. 514 (D.P.R. 1991).

[34] *Id.* at 518-19. *See also Brotman v. United States*, 111 F. Supp. 2d 418 (S.D.N.Y. 2000) (granting the government's motion to dismiss, the court held that the government was protected from liability under the discretionary function exception to the FTCA's waiver of sovereign immunity because the government's decision as to the lighting in the area where the visitor was injured was clearly discretionary, and because lighting within the monument was not controlled by mandatory statutes or regulations. The court concluded that the government's determinations as to the design of the lighting scheme in the Statue of Liberty National Monument and as to the placement of warning signs were susceptible to a policy analysis, including the weighing of safety, aesthetic, and historical accuracy concerns.); *Chantal v. United States*, 104 F.3d 207 (8th Cir. 1997) (finding that the failure of the National Park Service (NPS) to mark the edge of the steps at the memorial or to replace the steps with a ramp involved discretionary functions for which the government was immune from liability.); *Fahl v. U.S., Dept. of Interior*, 792 F. Supp. 80 (D. Ariz. 1992) (holding that the discretionary function exception to the waiver of sovereign immunity barred a claim alleging that the death of the plaintiff's decedent in a fall at night from a walkway at the south rim of Grand Canyon National Park was caused by inadequate lighting, inadequate fencing, and inadequate warnings in the area from which the decedent fell. The court concluded that the decisions of the National Park Service regarding such matters were discretionary, contending that once the NPS made the policy decision to warn and safeguard visitors, the government was liable if that duty were breached. The court, pointing out that the plaintiff failed to present any evidence to show that NPS personnel adopted a safety policy that they did not carry out, found it perfectly feasible that the NPS would make a policy judgment that certain areas were in need of warnings and guardrails and others were not. As to the argument that such actions were operational, rather than policymaking decisions, and not shielded by the discretionary function exception, the court remarked that the plaintiff failed to demonstrate a negligent performance of any duty the NPS set out to undertake or that the NPS itself created the hazard that caused the decedent's death. The court declared that requiring the NPS to place guardrails and warnings at every conceivably dangerous place in the park would certainly conflict with the avowed policy of attempting to interfere as little as possible with nature and would be an extremely costly undertaking.)

In sum, the discretionary function exception may limit liability. If not, liability for failure to warn exists if the state's failure to warn is deemed "willful and malicious," or if the parties are found to be in a "special relationship." The special relationship exception is the subject of part II.

II. Liability if a Marking Program Commences

The second question is whether, once the Department starts marking hazards, does it have a continuing obligation? I conclude that if the Department assumes the duty, it must be done in a non-negligent manner.

In 1976, the Attorney General's office addressed an inquiry concerning personal liability of groups that make an effort to mark hazards in Devils Lake.[35] The memo states:

> [T]he mere undertaking of such a project would appear to be some form of representation to the public that all hazards are marked accordingly. Relying upon such an apparent representation, it may be that a person not otherwise inclined to boat upon the lake would thereby persuaded to engage in such activity and possibly, in the event of existing hazard not marked, suffer property damage or injury."

The special relationship exception to the public duty doctrine sets out this principle in detail. N.D.C.C. § 32-12.2-02(g) provides that a special relationship between the state and the injured party is the exception to the general rule that there is no liability for performing a public duty:

> A special relationship is demonstrated if all of the following elements exist:
> (1) Direct contact between the state and the injured party.
> (2) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.
> (3) Knowledge on the part of the state that inaction of the state could lead to harm.
> (4) The injured party's justifiable reliance on the state's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the state, or the state action increases the risk of harm.

If the state gratuitously assumes the duty to mark dangers, and knows that boaters are likely to rely on this marking, the parties are likely to be found to be in a special relationship, in which liability attaches for failure to properly maintain the warning signs and buoys. Thus, "[f]ollowing the Restatement Second, Torts rule governing liability for gratuitously undertaking to perform services, a person who gratuitously undertakes to warn someone of a dangerous condition must use reasonable care in making the warning. In such a case, however, a person is not subject to liability unless a failure to

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[35] Letter from Lynn E. Erickson, A.A.G., to Russell W. Stuart, Game and Fish Dept. Comm'r.

exercise reasonable care increases the risk of harm to those he or she is trying to aid, or if harm is suffered because of another's reliance on the undertaking."[36]

In sum, the Department assumes a duty to maintain warning markers once it undertakes a program to mark boating hazards. The Eighth Circuit, again, in *Mandel v. United States*,[37] made this clear:

> As a general proposition, there is no duty to warn of hazards on another's property. Under Arkansas law, however, '[o]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.' We agree with the district court that once the Park Service chose to furnish its patrons with information about the entire Buffalo River, it had a concomitant duty to exercise reasonable care in doing so notwithstanding the private ownership of portions of the adjoining land.[38]

In *Mandel*, the court agreed with the district court "that reasonable care in this case included the duty of warning of submerged rocks in the river. The Park Service was on notice that submerged rocks posed a threat to those diving in the river."[39]

Conclusion

Generally, under ch. 53-08, there is no duty to warn of hazards for nonpaying recreational users. But the Department has liability if its conduct (failure to warn) is construed to be "willful and malicious," under N.D.C.C. § 53-08-05(1). The courts are likely to construe the statute as requiring proof akin to intent to injure, but this is not completely certain. Finally, the Department may offer the discretionary function exception as a defense in failure to warn litigation.

If the Department decides to warn or mark hazardous areas it must exercise reasonable care in doing so. Failure to do so may constitute negligence.

It may seem odd that the law does not seem to encourage the Department to undertake a program to mark hazards (because such program would require maintenance). But, if the Department is interested, we could seek legislative change—that is, amendments to a few statutes could address this 'good Samaritan syndrome.'

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[36] 57A AmJur 2d, Negligence, § 358.
[37] 793 F.2d 964, 968 (8th Cir. 1986).
[38] *Id.* at 968.
[39] *Id.*