STATE OF IDAHO)
County of KOOTENAI)ss

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STEPHEN G. ABERCROMBIE, ET AL, *Plaintiff*,

vs.

COEUR D'ALENE SCHOOL DISTRICT NO. 271, *Defendant*.

Case No. **CV 2012 979**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DENYING AS TO PREMISES CLAIMS IF AN INVITEE), AND GRANTING DEFENDANT'S MOTION TO EXCLUDE AFFIDAVIT OF JOELLEN GILL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Coeur d'Alene School District's (the District) motion for summary judgment.

The facts of this case come solely from the District's supporting memorandum, as plaintiff Stephen Abercrombie (Abercrombie) by and through his mother Lynn Abercrombie (Lynn) did not provide a fact section in his opposition memorandum.

In 2008, Abercrombie was a ten-year-old child attending fourth grade at Atlas Elementary School. Defendant's Memorandum in Support of Motion for Summary Judgment (Memo in Support), p. 2. During morning recess on January 8, 2008, Abercrombie was playing on top of a snow berm, along with two other boys, Tyler and Chase. *Id*. Ron Reid (Reid), a paraprofessional, was supervising the playground and standing approximately 100 feet away from the snow berm when he noticed the

children playing on the berm. *Id*. Reid began to approach the berm to tell the children to get off the berm when he saw Mason Smith (Smith), another student, climb the berm and bump into Abercrombie, and Abercrombie fell off the berm onto his left hip. *Id*. One of the students ran to Reid and informed Reid Abercrombie was injured. Memo in Support, p. 3. Upon arriving and determining Abercrombie was injured, Reid contacted the office secretary Robin Broesch, at which point Lynn was called as well as the paramedics. *Id*. Abercrombie was transported to Kootenai Medical Center (KMC) initially, then transferred to Shriner's Hospital after doctors determined Abercrombie had suffered a fracture to the femoral head and pins would be required to stabilize the injury. *Id*. On February 1, 2012, Abercrombie filed this lawsuit against the District.

On April 1, 2013, the District filed its "Defendant's Motion for Summary Judgment", "Defendant's Memorandum in Support of Motion for Summary Judgment", "Affidavit of Counsel in Support of Defendant's Motion for Summary Judgment", "Affidavit of Ron Reid in Support of Defendant's Motion for Summary Judgment" and "Affidavit of Principal Scott Freeby in Support of Defendant's Motion for Summary Judgment". In its memorandum, the District argues Abercrombie is precluded from bringing suit for failure to satisfy the three stages of analysis for a plaintiff bringing suit against a governmental entity under the Idaho Tort Claims Act (ITCA). Memo in Support, p. 5. Specifically, the District claims it falls under the I.C. § 6-904A(2) exception to government liability, as it claims Abercrombie's injury was due to the conduct of another student under the school's supervision. Memo in Support, pp. 7-8.

On April 16, 2013, Abercrombie filed his "Memorandum in Opposition to Defendant's Motion for Summary Judgment", "Affidavit of Counsel", "Affidavit of James R. Kopp, M.D." and "Affidavit of Joellen Gill". In his memorandum, Abercrombie argues the ITCA does not completely insulate a school district from negligent supervision

claims, that a school district owes a duty to "anticipate reasonably foreseeable dangers and take precautions protecting the children in its custody from such dangers." Memo in Opposition, pp. 1-2. Abercrombie also argues he can recover on an ordinary negligence theory as well, claiming the District's creation of the berms and then failing to take reasonable measures to keep children off the berms was negligence for which Abercrombie can recover. Memo in Opposition, pp. 4-5.

On April 26, 2013, the District untimely filed "Defendant's Reply Memorandum in Support of Motion for Summary Judgment", "Defendant's Motion to Exclude Affidavit and Report of Joellen Gill", and "Affidavit of Counsel in Support of Defendant's Motion to Exclude Affidavit and Report of Joellen Gill." These filings were all dated April 23, 2013, which would have been the last day such documents would have been timely filed under I.R.C.P. 56(c); however, they were not filed until three days later (two working days before oral argument) on April 26, 2013. Also filed on April 26, 2013, was Abercrombie's "Memorandum in Opposition to Defendant's Motion to Exclude Affidavit and Report of Joellen Gill."

Oral argument was held on April 30, 2013. The motions are at issue.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach

different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

III. ANALYSIS.

A. The District's Motion for Summary Judgment Must be Granted as to all Negligence Claims (Except Premises Liability if Abercrombie is an Invitee) and Negligent Supervision Claims.

The Idaho Tort Claims Act (I.C. § 6-901 et seq.) allows state governmental entities that commit torts to be held liable for money damages to the same extent a private person would be held liable under the circumstances. I.C. § 6-901. However, a plaintiff seeking to recover on a tort claim against a governmental entity must meet three requirements. *Sherer v. Pocatello School Dist. No. 25*, 143 Idaho 486, 490, 148 P.3d 1232, 1236 (2006). **First**, the plaintiff must state a cause of action for which tort recovery would be allowed under the laws of Idaho; that is, "whether there is such a tort under Idaho law." *Id*. (quoting *Carrier v. Lake Pend Oreille Sch. Dist. No. 84*, 142 Idaho 804, 806-07, 134 P.3d 655, 657-58 (2006)). **Second**, the plaintiff must show that "[no] exception to liability under the ITCA shields the alleged misconduct from liability." *Id*.

(quoting *Coonse v. Boise Sch. Dist.*, 132 Idaho 803, 805, 979 P.2d 1161, 1163 (1999)). **Third**, if no exception applies, the plaintiff must still meet its burden of showing that it is entitled to recovery based on the merits of its claim. *Id*. On a motion for summary judgment, the court must determine whether the plaintiff has satisfied the first two stages before it considers "whether the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to [judgment]." *Coonse*, 132 Idaho 803, 805, 979 P.2d 1161, 1163.

The first prong is whether Abercrombie has stated a recoverable cause of action under Idaho law. Here, the District acknowledges Abercrombie has stated a viable cause of action under tort law in Idaho and so satisfies the first stage of the ITCA analysis.

The second prong is whether there exists an exception under the ITCA which shields the District from liability. It is this prong on which the District rests its case, specifically, the exception stated in I.C. § 6-904A(2), which states:

> Exceptions to governmental liability –
> A governmental entity and its employees while acting in the course and scope of their employment and without malice or criminal intent and without reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
> . . .
> 2. Arises out of injury to a person or property by a person under supervision, custody or care of a governmental entity or by or to a person who is on probation, or parole, or who is being supervised as part of a court imposed drug court program, or any work-release program, or by or to a person receiving services from a mental health center, hospital or similar facility.

I.C. § 6-904A(2).

Idaho Code § 6-904A(2) has been applied to school districts in a number of ways. In *Mickelsen v. School Dist. No. 25*, 127 Idaho 401, 901 P.2d 508 (1995), a high school student sustained head injuries in a fight involving two other students, which

took place in the school hallway during the school day. 127 Idaho 401, 402, 901 P.2d 508, 509. The student and her parents filed suit against the school district on a negligence theory. *Id*. The Idaho Supreme Court affirmed the district court's ruling that I.C. § 6-904A(2) barred recovery. The Idaho Supreme Court agreed with the district court that while I.C. § 33-512(4) specifies school districts have a duty to protect the morals and health of the pupils, Mickelsen's claims in that case were based upon a failure to supervise, so the district was immune. *Id.* The Idaho Supreme Court expressly held an extensive supervisory relationship exists between schools and students (127 Idaho 401, 403, 901 P.2d 508, 510), but when negligence is based upon failure to supervise a student, the district is granted immunity. *Id.* The Idaho Supreme Court also noted that failing to provide adequate hallway monitoring is also a supervisory activity, just as in failing to supervise the particular student that caused the harm. *Id.*

In *Brooks v. Logan*, 130 Idaho 574, 944 P.2d 709 (1997) (*Brooks II)*, a student committed suicide, and his parents alleged his teacher had read passages in an assigned journal which they claimed should have alerted the teacher something was wrong. 130 Idaho 574, 575, 944 P.2d 709, 710. The Idaho Supreme Court affirmed the district court's ruling that I.C. § 6-904A(2) barred recovery and adopted the district court's reasoning:

> If, under *Mickelsen*, the school is immune from a claim for failure to supervise and prevent two students from injuring a third, then under the same rationale, the school in this case should be immune for its failure to supervise and prevent one student from harming himself.

Brooks, 130 Idaho 574, 577, 944 P.2d 709, 712.

In *Coonse*, a third grade student was assaulted by a group of older boys while at recess on the playground. 132 Idaho 803, 804, 979 P.2d 1161, 1162. The student and

her parents sued the school district on a claim of negligent supervision. *Id*. The Idaho Supreme Court, in taking the case, addressed the issue of "whether a school district is immune from suit under I.C. § 6-904A when the complaint alleges negligent supervision of a student who was consequently harmed as opposed to negligent supervision of third parties who harmed the student." *Id*. The Idaho Supreme Court held a school district has "simply a duty to exercise reasonable care in supervising students while they are attending school." *Coonse*, 132 Idaho 803, 805, 979 P.2d 1161, 1163 (quoting *Brooks v. Logan*, 127 Idaho 484, 490, 803 P.2d 73, 79 (1995) (*Brooks I*). The Court went on to hold the immunity of I.C. § 6-904A arises from the status of the person(s) causing the injury, not the status of the person injured. *Coonse*, 132 Idaho 803, 806, 979 P.2d 1161, 1164. In comparing the case of *Coonse* to *Mickelsen*, the Court stated the injuries in both cases were *inflicted by other students while at school*. *Id*. (emphasis added). As such, the Court held because the students who assaulted the girl were also students at the school, *Mickelsen* controlled and recovery was barred by I.C. § 6-904A(2). *Coonse*, 132 Idaho 803, 807, 979 P.2d 1161, 1165.

In *Sherer*, a junior high student participated in a "bungee run" and was injured. 143 Idaho 486, 489, 148 P.3d 1232, 1235. The bungee run was an activity provided by Cliffhanger Recreation, a local business hired by the school to provide activities for the students' end of year carnival. *Id*. The student and her mother filed suit against the school district on a theory of negligence. *Id*. In rendering its decision, the Idaho Supreme Court discussed at length the duty owed to students by the school district and stated the duty "is not an absolute mandate to prevent all harm; rather, schools are obligated to exercise due care and take reasonable precautions to protect their students." *Sherer*, 143 Idaho 486, 491, 148 P.3d 1232, 1237. The Idaho Supreme

Court added "the fact that [a plaintiff's] injuries were caused by a third party does not absolve [a] school district from liability for its negligence" if the third party's actions were the foreseeable result of the school's negligence. *Id*. (quoting *Doe v. Durtschi*, 110 Idaho 466, 472-73, 716 P.2d 1238, 1244-45 (1989)). In analyzing I.C. § 6-904A, the Idaho Supreme Court held the effect of the statute is to require a "heightened showing or recklessness, as opposed to mere negligence, for such claims." *Sherer*, 143 Idaho 486, 491, 148 P.3d 1232, 1237. The Idaho Supreme Court stated: "…the legislative history and the language of the statute make it clear that the intent of the statute was to prevent recovery for negligence based upon a particular theory of recovery, i.e., that the government negligently failed to prevent *third persons under its care* from causing injury to the public." *Id*. (emphasis added). The Idaho Supreme Court went on to explain I.C. § 6-904A(2) limits from negligence liability the causal pathway that the school failed to exercise reasonable care in preventing a person under its supervision from causing injury, but such limitation does not extend to *other negligence claims*. *Id*. (emphasis added). The Idaho Supreme Court noted the child's status as a student would limit her claims that the school failed to prevent her from harming herself, but would not limit claims she injured herself as a consequence of the school's negligence in conducting a dangerous activity and failing to provide or ensure adequate supervision. *Sherer*, 143 Idaho 486, 492, 148 P.3d 1232, 1238.

In *Mareci v. Coeur d'Alene School Dist. No. 271*, 150 Idaho 740, 250 P.3d 791 (2011), a sixth-grade student was injured when he was pushed by a student and hit his head on the ground, and again later when he was hit by the same student with a backpack on the bus ride home. 150 Idaho 740, 742, 250 P.3d 791, 793. The Idaho Supreme Court held the other child was a student in the custody of the school district at

the time, so I.C. § 6-904A applies. Thus, the plaintiffs were required to show the school district employees acted with malice or criminal intent or that their conduct was reckless, willful and wanton. *Mareci*, 150 Idaho 740, 743, 250 P.3d 791, 794. The Idaho Supreme Court defined "reckless, willful and wanton conduct", for purposes of the ITCA, as being present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result. *Id*. The plaintiffs argued they could still proceed on a theory of ordinary negligence under *Sherer*; however, the Idaho Supreme Court held *Sherer* was distinguishable because in *Sherer* it held the school district was not entitled to immunity on a claim it failed to properly supervise a contractor because an independent contractor was not under the "supervision" of the school as required by I.C. § 6-904A, whereas in *Mareci*, the other child was a student, under the clear supervision of the school. *Mareci*, 150 Idaho 740, 744, 250 P.3d 791, 795. The Idaho Supreme Court held I.C. § 6-904A(2) applied "if a person who caused the injury was under the supervision, custody, or care of the School District, regardless of how the Plaintiffs seek to characterize their cause of action." *Mareci*, 150 Idaho 740, 744-45, 250 P.3d 791, 795-96.

Abercrombie cites as support *Bauer v. Minidoka School Dist. No. 331*, 116 Idaho 586, 778 P.2d 336 (1989). In that case, a student suffered a broken leg when he tripped over sprinkler pipes while playing football on the grounds of the junior high school he attended, prior to classes beginning. 116 Idaho 586, 587, 778 P.2d 336, 337. Among other things, the student, through his parents, sued the school on the grounds of negligent supervision. *Bauer*, 116 Idaho 586, 589, 778 P.2d 336, 339. The Idaho Supreme Court held summary judgment was not appropriate as the affidavits

submitted by the plaintiffs raised genuine issues of material fact concerning the claim of negligent supervision, specifically regarding: 1) the knowledge the principal and other members of the faculty of the school had that the football game was being played, 2) the scope of supervision that the school provided for students by at least 8:00 a.m. on school mornings and 3) the degree of supervision the principal had exercised over the football game by directing that the students should play football on the football field and not any other place on the school grounds. *Id*. The Idaho Supreme Court went on to state the duty a school district owes to its students, "[to] anticipate reasonably foreseeable dangers and to take precautions protecting the children in its custody from such dangers. The child may sue the school district for injuries resulting from its failure to protect the child." *Bauer*, 116 Idaho 586, 590, 778 P.2d 336, 340. The Idaho Supreme Court closed by stating "if the district had a duty to supervise the students involved in the football game, and if the district should reasonably have foreseen the dangers that existed when Tregg and his classmates played football on the field where the sprinkler pipes were stored, but failed to take precautions to protect him, the district breached its duty to supervise the students there." *Id.* The District is correct in noting in its reply memorandum that Idaho Supreme Court in *Bauer* did not discuss whether that school district was immunized under the Idaho Tort Claims Act. Reply Memorandum, p. 3. As such, the analysis in *Bauer* is only pertinent to the first requirement in a tort claims analysis, the requirement that the plaintiff must state a cause of action for which tort recovery would be allowed under the laws of Idaho, that is, "whether there is such a tort under Idaho law." Thus, *Bauer* is of little analytical help here because the District has conceded that Abercrombie has established this point.

The case law set forth above is clear that injuries to a student caused by the student themselves or by another person under the supervision of a school, are not recoverable under I.C. § 6-904A(2). What makes this case a little more difficult is 1) the setting in which the injury took place and 2) the fact the injury was not as directly "caused" by Smith as some of the other injuries listed in the cases above were. In this case, Abercrombie was playing on a snow berm which was about five feet high, with two other boys when another boy (Smith) came and while climbing/playing on the berm "bumped" into Abercrombie. Walther Affidavit, Exhibit 1, Abercrombie Depo, pp. 22-24. There has been reference to a medical report stating Abercrombie was "tackled" by Smith, but that report has not been submitted to this Court. Walther Affidavit, Exhibit 1, Abercrombie Depo, pp. 32-33. Abercrombie testified in his deposition many times that Smith merely "bumped" him, that he was not tackled and that he believes Smith did not intend to bump him or hurt him. *Id*. When Abercrombie fell, he testified he fell onto an iced-over sewer drain, a fact not disputed by the District. Walther Affidavit, Exhibit 1, Abercrombie Depo, pp. 22-23. The result of the fall was a broken leg.

In the cases discussed above, the injury more directly follows the action. For example, in *Mickelsen*, the student sustained injuries directly resulting from a fight between other students. In *Brooks*, the student harmed himself by committing suicide. In *Coonse* a group of older students directly assaulted the plaintiff student. In *Mareci*, the student was directly injured as a result of another student hitting him on the head with a backpack. All of these injuries were direct results of the student's or another student's intentional conduct. As stated in *Coonse*, the injuries were *inflicted by other students while at school*. In this case, it appears Abercrombie fell when Smith unintentionally bumped into him, causing Abercrombie to lose his balance and fall.

However, this case is not exactly like *Bauer* or *Sherer* either. In *Bauer* the student plaintiff tripped over a sprinkler pipe, with no interference by any other student and in *Sherer* the student was doing the bungee run without assistance by any other student or faculty member.

While no case is clearly dispositive here, the final holding in *Mareci* is instructive: Idaho Code § 6-904A(2) applies "if a person who caused the injury was under supervision, custody or care of the School District, regardless of how the Plaintiffs seek to characterize their cause of action." *Mareci*, 150 Idaho 704, 744-45, 250 P.3d 791, 795-96. It is undisputed among the parties that Abercrombie fell as a result of being bumped by Smith. While the height of the berm may have been a significant contributing factor to his resulting injury, the fact remains Smith caused, albeit unintentionally, the injury by bumping Abercrombie, causing him to fall. It is also undisputed Smith was a student under the care and custody of the School District at the time of the accident. As the Idaho Supreme Court has made it clear the dispositive actor is the injuring party, not the injured party (though in this case, both are students), this case falls within I.C. § 6-904A(2).

Abercrombie focuses on the incorrect aspects of what happened. It is not the existence of this snow berm that caused Abercrombie to fall. It is not the height of the snow berm that caused Abercrombie to fall. It is not the hard area in which Abercrombie landed that caused Abercrombie to fall. It is not the failure to fence in the berm that caused Abercrombie to fall. It is not the failure to have more supervision that would have caused Abercrombie to fall. Even if these features (allowing the existence of the berm, allowing the height of the berm, allowing the berm to be near hard ground, failure to fence and more supervision) were the cause, they all relate to supervision by the District. Abercrombie acknowledges this is a supervision case, writing: "In addition

to Plaintiff's claim that Defendant failed to exercise proper supervision over students at recess, Plaintiff further contends that the Defendant is directly liable for *negligent conduct*." Memorandum in Opposition, pp. 4-5. (italics added). This is simply a misplaced argument. Because Abercrombie's claims are due to the District's supervision, the District is immune unless it was "reckless, willful and wanton". There is no allegation or proof of such conduct in this case. "Negligent conduct" is really the third prong or element Abercrombie must prove under I.C. § 6-901 et seq. and *Sherer*. "Negligent conduct" is an *additional* aspect Abercrombie must prove; "negligent conduct" it is not an *alternative* way of proving the District liable.

Abercrombie's injuries were caused by the fall. Abercrombie fell either by the actions of Smith (who ran into Abercrombie) or by the actions Abercrombie himself, or by both together. Abercrombie's injuries were not caused by the existence of the snow berm. Abercrombie did not fall due to the snow berm. Both Mason and Abercrombie were under the supervision of the District. Thus, the District is immune under I.C. § 6-904A(2), and the only way the District would not have immunity is if Abercrombie can prove the District was "reckless, willful and wanton" under I.C. § 6-904C

As such, it is necessary for Abercrombie to show the District's conduct was done with malice or criminal intent, or that it was reckless, willful and wanton. Abercrombie fails because he has not made such an allegation in his complaint. Were the Court to overlook that fatal fact, Abercrombie has not submitted any evidence of malice or criminal intent on the part of the District.

Similarly, Abercrombie has neither alleged nor argued the District's conduct was reckless, willful and wanton. As stated above, the ITCA defines "reckless, willful and wanton conduct" as occurring when a person intentionally and knowingly does or fails to

do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result. It is possible to argue the District intentionally both acted (piling the snow where it did) and failed to act (failing to erect barriers, as suggested by Abercrombie, to deter children from the berms) creating an unreasonable risk (slipping on compacted ice and falling). However, even combining the District's act (creating snow berm) and omission (failure to deter students from climbing on it), they simply do not create a situation where a high degree of probability harm will result. This is a four to six foot high snow berm. The District has set forth via affidavits, undisputed by Abercrombie, that other than Abercrombie's injury, no other injuries have taken place due to the children playing on the berms, either before or after the accident. Affidavit of Scott Freeby in Support of Motion for Summary Judgment, p. 3, ¶ 6. One injury in years does not equate to a "high degree of probability" required for reckless, willful and wanton conduct. Therefore, Abercrombie has not met the second prong of the ITCA analysis and is barred from recovery.

Because the second prong has not been met, it is not necessary to address the third prong. As mentioned above, Abercrombie has argued the District is "…directly liable for negligent conduct." However, this Court agrees with the District's argument that Abercrombie has put forth no credible evidence to support the claim that the District breached its duty of care. Defendant's Reply Memorandum in Support of Motion for Summary Judgment, pp. 9-16. In other words, there is no credible evidence that the District was negligent.

Abercrombie argues he also has a claim that the District is directly liable for negligent conduct by allowing the berms to exist where they did and not doing more to prevent children from playing on them. Memorandum in Opposition, pp. 4-5. However, as stated above, *Mareci* makes it clear I.C. § 6-904A, if found to be applicable, applies

to *all* claims, including ordinary negligence claims. As it has been determined I.C. § 6-904A applies here, it applies to *all* of Abercrombie's negligence claims.

The motion for summary judgment as to all supervision claims must be granted in favor of the District. However, this does not grant summary judgment to all of Abercrombie's claims.

It is fair to say that the focus of Abercrombie's sparsely-pled Complaint is negligent supervision by the District. Complaint, pp. 1-3, ¶¶ IV-VI. Not surprisingly, the District's Memorandum in Support of Motion for Summary Judgment also focused on Abercrombie's negligent supervision claims.

However, Abercrombie did allege "…[Abercrombie] was allowed to play on a large berm/mountain of snow during recess" (*Id.,* ¶ IV), and "…[the District] breached this duty [to act affirmatively] to prevent the danger the snow berm presented and by failing to take appropriate precautions to protect students form such danger." *Id.,* ¶ VI. And the District did discuss Abercrombie's "dangerous condition" claims. Defendant's Memorandum in Support of Motion for Summary Judgment, pp. 14-16. The District wrote: "It is anticipated that Plaintiff will argue that the District was negligent in allowing a dangerous condition to exist on the District premises." *Id.,* p. 14. The District's argument is there is no evidence that a snow berm on school property is a dangerous condition, snow berms are common throughout the area in the winter, the height of this berm (4-6 feet) did not create a dangerous condition, the height of the berm was less than the height of other playground equipment, and there were no prior reports of a student at Atlas Elementary being injured while playing on a snow berm. *Id.,* pp. 15-16. Not surprisingly, Abercrombie's brief primarily discusses his negligent supervision claims. Memorandum in Opposition, pp. 1-5. It is only at the end of Abercrombie's

brief where he writes: "This obligation [of ordinary care of all students on its premises] includes a duty to avoid exposing students to unreasonable risks of harm and to fix or warn of any dangerous or defective condition." *Id.,* p. 5, citing IDJI 3.03 and 3.11. In his brief, Abercrombie then discussed the opinions of his expert, Joellen Gill. *Id.,* pp. 5-6. Abercrombie provided no case law in support of his "dangerous condition" claims. On the other hand, the District in response chose to complain about the opinions of Abercrombie's expert (and those complaints have merit, as discussed below), but gave no case law either, except by way of a footnote. The District wrote:

> The "attractive nuisance" doctrine which applies under circumstances where a child trespasses on property and is injured by a particularly tempting item on the property (i.e., a pool or a trampoline) has no relevance to the instant claim which occurred on school property during school hours. See *Ambrose,* 126 Idaho at 585-586.

Defendant's Reply Memorandum in Support of Motion for Summary Judgment, p. 14, n. 8. The District is correct that attractive nuisance applies only to the situation where the child is a trespasser and "has application only to cases where children have been injured while on premises where they would be trespassers except for an implied invitation by something thereon which has attracted them." *Ambrose v. Buhl Joint School Dist. # 412,* 126 Idaho 581, 585, 887 P.2d 1088, 1092 (Ct.App. 1994). To the extent Abercrombie's Complaint alleges "attractive nuisance", summary judgment must be granted. Abercrombie is not a trespasser on the District's property.

However, "attractive nuisance" and "dangerous condition" are two different concepts in the tort arena of premises liability.

A governmental entity such as the District is liable for negligent or wrongful acts just as a private person or entity would be liable. Comment to IDJI § 3.00, Premises Liability. The District, as owner of the property, owes a duty not to cause intentional or

reckless harm to person or property on the premises. IDJI 3.01. There is no evidence in this case of intentional or reckless harm caused by the District. As far the premises itself, the District owes a duty to exercise ordinary care to avoid exposing persons on the premises to an unreasonable risk of harm. IDJI 3.03. The District owes a duty to fix or warn of any dangerous or defective condition known to the District, or which, in the exercise of ordinary care, should be discovered. IDJI 3.05. There is no dispute that the District knew of the snow berm. If Abercrombie is an "invitee", then the District owes a duty of ordinary care toward Abercrombie. IDJI 3.09. Idaho case law expands that duty: "A landowner owes an invitee the duty to keep the premises in a reasonably safe condition or to warn of hidden or concealed dangers." *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393, 179 P.3d 352, 356 (Ct.App. 2008), *citing Holzheimer v. Johannesen,* 125 Idaho 397, 400, 871 P.2d 814, 817 (1994). If Abercrombie is a "licensee", then the District owes a duty to warn Abercrombie only of dangerous existing hazards on the land that were known to the District and unknown and not reasonably discoverable by Abercrombie. IDJI 3.15. There is no possible way the snow berm was unknown to Abercrombie.

Thus, the District is entitled to summary judgment on any premises liability claim to the extent that Abercrombie is a licensee. A licensee is a person who goes upon the premises of another person in pursuit of the visitor's [Abercrombie's] purpose, with the consent of the owner [the District]. IDJI 3.15.1. It would appear that Abercrombie meets the definition of licensee.

An invitee is a person [Abercrombie] who enters upon the premises of another [the District] for a purpose connected with the business there conducted [a school], or whose visit may reasonably said to confer or anticipate a business, commercial, monetary or other tangible benefit to the owner [the District]. IDJI 3.13. The question

of whether a student is an invitee or a licensee of a school district does not appear to have been decided by the Idaho appellate courts. This Court then looks to case law from other states.

> The degree of care owed by a school to an injured person depends upon the legal relationship of the parties. Ordinarily, a pupil or student is an invitee[1] [1 *Martin v. City of Washington*, 848 S.W.2d 487, 81 Ed. Law Rep. 1152 (Mo. 1993); *Eberle v. Benedictine Sisters of Mt. Angel,* 235 Or. 496, 385 P.2d 765 (1963).] to whom the school owes a duty of ordinary care; that is, the school must act as would a careful prudent person under all of the circumstances.[2] [2 *Perbost v. San Marino Hall-School for Girls*, 88 Cal. App. 2d 796, 199 P.2d 701 (2d Dist. 1948)].

Am.Jur., Schools § 489 Duty owed to students.

There is also a planning-versus-operational analysis to determine whether the District's decision where and how to place the snow was a discretionary function or not under I.C. § 9-904(1). The District's policy-making or planning activities are exempt from liability under that section, while operational activities, those involving the implementation of discretionary statutory and regulatory policy, are not immunized, and accordingly, must be done with due care. *Lewis v. Estate of Smith,* 111 Idaho 755, 757, 727 P.2d 1183, 1185 (1986); *Bingham v. Franklin County,* 118 Idaho 318, 320-21, 796 P.2d 527, 529-531 (1990); *Jones v. City of St. Maries,* 111 Idaho 733, 734-36, 727 P.2d 1161, 1162-64 (1986); all interpreting and citing *Sterling v. Bloom,* 111 Idaho 211, 723 P.2d 755 (1986). There is no evidence in the present case before the Court at this time on this issue. In *Fear v. Independent School Dist. 911*, 634 N.W.2d 204, 212-216 (Minn.App. 2001), a student was injured when he fell from a snow pile onto a piece of ice during recess on the school playground. The Minnesota Court of Appeals held it was error for the trial court do determine, as a matter of law, that the school district employees who were in charge of supervising were not entitled to official immunity. *Id.* The reason for that decision was because there was no evidence showing that

employees actually made any decisions regarding recess and children playing on the snow piles, and there was insufficient evidence that the employees made discretionary decisions on these matters. *Id.* That case also analyzed whether Minnesota's Recreational Use statute provided the school district with immunity. 634 N.W.2d 204, 212-14. Idaho's Recreational Use statute is I.C. § 36-1604. Because Abercrombie's injuries occurred during school hours, that statute does not apply in the present case. *Ambrose,* 126 Idaho 581, 584-85, 887 P.2d 1088, 1091-92; *Bauer v. Minidoka School Dist. No. 331*, 116 Idaho 586, 587-88, 778 P.2d 336, 337-38.

The District is entitled to summary judgment as to "attractive nuisance" because Abercrombie was not a trespasser, and even if Abercrombie somehow was a trespasser (due to his violation of school rules not to play on the snow berm), *Ambrose* insulates the District because under Idaho law, "…the 'attractive nuisance' must be enticement that draws the child onto the defendant's premises." *Ambrose,* 126 Idaho 581, 586, 887 P.2d 1088, 1093. Abercrombie was on the District's premises not because of the snow berm, but because he had a legal obligation to attend school.

The District, as owner of the property, owes a duty not to cause intentional or reckless harm to person or property on the premises. IDJI 3.01. Because there is no evidence in this case of intentional or reckless harm caused by the District, the District is entitled to summary judgment on that issue.

If Abercrombie is a "licensee", then the District owes a duty to warn Abercrombie only of dangerous existing hazards on the land that were known to the District and unknown and not reasonably discoverable by Abercrombie. IDJI 3.15. There is no possible way the snow berm was unknown to Abercrombie. Thus, the District is entitled

to summary judgment on any premises liability claim to the extent that Abercrombie is a licensee.

The only remaining theory of negligence, specifically premises liability, is if Abercrombie is an invitee, and entitled to ordinary care from the District. Ordinary care was the standard set forth in *Albers v. Independent School Dist. No. 302 of Lewis County,* 94 Idaho 342, 487 P.2d 936 (1971). This Court, even though it "excludes" the affidavit of Abercrombie's expert, Joellen Gill, does not at the present time have before it sufficient evidence at summary judgment to decide this premises liability claim if Abercrombie is an invitee.

B. The District's Motion to Exclude the Affidavit of Joellen Gill Must be Granted.

As mentioned above, on April 26, 2013, the District filed "Defendant's Motion to Exclude Affidavit and Report of Joellen Gill", and "Affidavit of Counsel in Support of Defendant's Motion to Exclude Affidavit and Report of Joellen Gill." Also filed on April 26, 2013, was Abercrombie's "Memorandum in Opposition to Defendant's Motion to Exclude Affidavit and Report of Joellen Gill."

The affidavit of Joellen Gill lacks foundation. Her opinions, as an engineer, are:

> 1. The subject 4 to 6 foot tall snow berm was an attractive nuisance to children including young Stephen Abercrombie playing on the playground during recess and as such created a defective and hazardous condition.
> 2. The reason this hazard was initially created, as well as why it was not mitigated in a timely manner was the failure of Coeur d'Alene School District to have a proper and effective safety and risk management program.
> 3. Young Stephen Abercrombie's actions and/or inactions were not a significant contributing factor to his fall and subsequent injuries and were clearly foreseeable to Coeur d'Alene School District.

Affidavit of Joellen Gill, p.2, ¶ 2, Exhibit B, p. 2. Opinion number three goes to the comparative fault of Abercrombie. Thus, that opinion has absolutely no relevance at

this summary judgment juncture. Opinion number one (attractive nuisance creating a hazardous condition) and opinion number two (failure of the district to have a proper and effective safety and risk management program) are essentially premises liability claims. There are four glaring problems with these two opinions of Gill. The first two are fatal. **First,** there is no support for Gill's opinions. There is no factual or scientific basis for Gill's opinion that the District should have had a "safety and risk management program", that the berm was a defective and hazardous condition, and that Abercrombie's injuries were "clearly foreseeable." The Court agrees with the District, "Gill has no qualifications in school risk management and procedures, nor has she provided or identified any recognized data, treatises, studies, etc. to support her conclusions that the condition was dangerous, that a 'risk management' plan was required, or that the injury was 'clearly foreseeable.'" Defendant's Reply Memorandum in Support of Motion for Summary Judgment, p. 14. In *Sidwell v. William Prym, Inc.,* 112 Idaho 76, 730 P.2d 996 (1986), the Idaho Supreme Court upheld the trail court's refusal to let a professor of metallurgy testify about how the product (a dress pin manufactured by Prym which broke into pieces when it entered Sidwell's knee) was manufactured or used, as he had no knowledge or experience in the manufacture or use of the product, and no expertise in the garment industry. 112 Idaho 76, 80, 730 P.2d 996, 1000. Lacking in foundation makes Gills opinions inadmissible. *Sidwell,* 112 Idaho 76, 81, 730 P.2d 996, 1001. While Gill has experience in risk management, she does not explain how her experience in other businesses might relate to schools, and she does not disclose any specific past experience with schools. Gill states "…it is unequivocal that Coeur d'Alene School District's safety and risk management program and practices were grossly inadequate." Affidavit of Gill, Exhibit B, p. 2. However, no where in her report does she state what the District's "safety and risk management

program and practices" were. Without stating what the District's program and practices were, her opinion critical of what the District had in place is of no import to this Court. **Second,** to the extent they render opinions on snow berms, her opinions invade the province of the jury and are inappropriate expert testimony. Idaho Rules of Evidence 702 requires: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." However, "expert testimony that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the juror's common sense and normal experience is inadmissible." *Chapman v. Chapman*, 147 Idaho 756, 760-61, 215 P.3d 476, 480-81 (2009), *citing Jones v. Crawforth,* 147 Idaho 11, 17, 205 P.3d 660, 666 (2009); *Athay v. Stacey,* 142 Idaho 360, 367, 128 P.3d 897, 904 (2005), *in turn citing Rockefeller v Grabow,* 136 Idaho 637, 647, 39 P.3d 577, 587 (2001). Just as the trial court found and the Idaho Supreme Court affirmed in *Chapman* "…whether the bathroom presented a hazard or danger was 'within the competence of the average layman or juror'" (147 Idaho 756, 760-61, 215 P.3d 476, 480-81), in the present case whether the presence of this berm of 4-6 feet in height presented a hazard or a danger is within the competence of the average juror. The Court exercises its discretion and finds as a matter of law that whether a pile of snow next to a playground is a hazard or danger is within the competence of the average juror, and thus, Gill's testimony on this issue will not assist the trier of fact. **Third,** to the extent Gill's opinions go to the above theories upon which the Court grants summary judgment, Gill's opinions are not relevant. Specifically, Gill's opinion that the snow berm was an attractive nuisance is not relevant, given the Court's

ruling above. Thus, Gill's opinions, if they can be supported by proper foundation and not invade the province of the jury, would only be admissible to the situation where Abercrombie is an invitee. **Fourth,** her opinions have supervision components to them. As the analysis of this opinion shows, there is no liability of the District for supervision claims by Abercrombie, under I.C. § 6-901 et seq. and *Sherer.*

Even though the Affidavit of Joellen Gill is excluded at this time, the fact remains that Abercrombie, under the liberal pleading standards, has alleged a claim of premises liability. I.R.C.P. 15; *Raugh v. Oliver*, 10 Idaho 3, 77 P. 20 (1904). As stated in the preceding section of this opinion, under that premises liability theory, there is a factual dispute at this time as to whether the District acted reasonably, *if* Abercrombie was an invitee.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED summary judgment is GRANTED in favor of the District against Abercrombie's claims of negligent supervision in his Complaint.

IT IS FURTHER ORDERED the District, as owner of the property, is entitled to summary judgment as to the breach of any duty not to cause intentional or reckless harm to person or property on the premises under IDJI 3.01, as there is no evidence of such intentional or reckless harm, and as such, summary judgment is GRANTED in favor of the District.

IT IS FURTHER ORDERED the District is entitled to summary judgment as to any "attractive nuisance" theory, and as such, summary judgment is GRANTED in favor of the District.

IT IS FURTHER ORDERED the District is entitled to summary judgment on any premises liability claim to the extent that Abercrombie is a licensee, and as such,

summary judgment is GRANTED in favor of the District.

IT IS FURTHER ORDERED the District is not entitled to summary judgment on any premises liability claim to the extent that Abercrombie is a invitee, and as such, on that theory alone, summary judgment is DENIED.

IT IS FURTHER ORDERED the District's Motion to Exclude the Affidavit of Joellen Gill is GRANTED.

Entered this 9th day of May, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
R. Bruce Owens	667-1939	Brian K. Julian	208-344-5510

_____
Jeanne Clausen, Deputy Clerk