2011 HOUSE JUDICIARY

HB 1452

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1452
February 2, 2011
13856

☐ Conference Committee

Committee Clerk Signature DPenrose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1452.

Rep. Blair Thoreson: Sponsor, support. The bill deals with the information on line 4, 5, and 6 of page 1 that says "a possessor of land, including an owner, lessee, or other occupant, does not owe a duty of care to a trespasser and is not subject to liability for any injury". The reason for this is, as I understand it, there are certain places that are looking to do the opposite, where someone may trespass onto someone else's land or property would have the ability to sue that person. I feel that's not correct. I think if there is someone who has a piece of property, or a residence or a business and you're there without my permission, that I should not be able to be sue or have some type of action taken against me.

Rep. Delmore: I would like you to explain the difference between an adult trespasser and a child trespasser. Why is it separate? Then, the part where it says that the possessor knew or had reason to know that children were likely to trespass at the location; school bus stopped close to it, what are we talking about where they would know that children were entering there.

Rep. Thoreson: That language was crafted to look at all situations, and I don't have specific details as to why that was put in, in that manner. Perhaps others, who have worked on this in other areas, would be able to address it. I do know that it was meant as a broad way of looking at things, so that if one of those situations did occur that it would not be falling under the areas of the first part of the bill.

Rep. Onstad: What's your definition of a trespasser?

Rep. Thoreson: I don't have the legal description. I know that there is something in NDCC, a description. In the broad sense of it, it is somebody who enters into an area without being given permission. I suppose you can look at somebody like the person delivering the newspaper, I'm not certain if they are covered under any strict definition in law at this time. But I think there is perhaps someone with more of a

legal background could get into that. There are areas where they are not considered to be a trespasser because they are providing a service to you on your property.

Rep. Onstad: As a land owner, I can understand about the trespasser, but you have your section lines; 66 ft of public access. I own that property, but basically you have to allow public access on that 66 ft. How do you define that and separate the difference on something of that nature.

Rep. Thoreson: I would think that if there is a public access granted on those 66 ft. that there may already be something which covers that area.

Rep. Delmore: How many cases we have in ND where liability is brought to court in an action in a given year, under these circumstances for trespassing.

Rep. Thoreson: I do not have those statistics. I don't know if there any cases; I just don't want to see a situation arise where we do give somebody who is trespassing on someone's property that ability to go forward and make a claim against the person whose property is being invaded.

Rep. Klemin: Did I hear you say that you could explain section 2.

Rep. Thoreson: I do not have written testimony explaining it. I know that there are others here who have given some background information to me. I believe they will be testifying.

Chairman DeKrey: Thank you. Further testimony in support.

Mark Behrens, American Tort Reform Association, advisor on ALEC Civil Justice Taskforce: Support. I am here to explain the ALEC model legislation called the Trespasser Responsibility Act. One of the things that I want to make clear from outset is that this is not a tort reform bill. It's not rolling back ND law in any way, it's not changing ND law in any way. I will go through the sections and answer the questions that you have, and you'll see that the language in this bill comes word for word out of decisions from the ND Supreme Court and the ND Pattern Jury Instructions issued by the State Bar Association of ND in these cases. A trespasser is someone who is on the land without permission, either express or implied. That is a definition that goes back a hundred years or more in the case law. In the case of a school bus stop, or a public walkway in front of your house, those aren't trespassers, because they have implied permission to be there. A trespasser is somebody that doesn't have permission to be there, that you don't want to be there, and shouldn't be there in the first place. This bill does nothing to change these definitions that have been law in ND for a hundred years or more. When I was in law school, I had a good torts professor who was a plaintiff's personal injury lawyer, a very successful one. He taught us that trespassers are vermin. I still remember that. Trespassers are vermin, he did it for shock value and because it was humorous, but he was an effective teacher. I went to my 20 year law school reunion, and I still remember

when he told us that in class. Professor Smith was his name, and he didn't have anything against trespassers. The point he was making, was that trespassers generally have no rights. They don't have the right to go on your land, and if they are injured when they are there, they generally don't have the right to sue, except in a few narrow situations, that have been well-defined in ND for many decades and are incorporated into this bill. Rep. Klemin, these are the exceptions that are in Section 2, because they are right out of existing ND law. The first exception that the law recognizes, says trespassers can sue if the landowner does something intentionally to harm them. ND uses language, willful or wanton conduct. That makes sense, even though trespassers are not supposed to be on your land, if you see one there, you can't just go out and hurt them. If you see a trespasser, you can't shoot them just because they are on your land, unless they are trying to break into your home and you are doing it in self-defense. But otherwise if you just see somebody, just because you don't have a right to protect them, doesn't give you the right to do something to willfully hurt them. That's always been the law, and that's in this bill. The second, the law says that if you know a trespasser is there, then you have to use reasonable care to look out for their safety. Again, that makes sense. If you see someone who is about to walk into danger, that they are unaware of, landowners should have the responsibility to say hey, watch it. Don't go there, you are about to walk into something that you don't know is a danger, but it is. I think that is a fair responsibility that the law puts on landowners. It's been the law in ND going back decades and that's what this bill says. Finally, the law creates a third exception for child trespassers. It says because children, unlike adults, aren't always going to recognize the dangers that they may come into. The law appreciates that, yes children should not be there, if they trespassing, but kids do these things. As a kid, I liked to go explore. I probably went on to other people's yard all the time; technically I wasn't supposed to be there. Maybe I wouldn't have appreciated all the dangers that were there. So the law says that if I'm a child trespasser and I don't realize the dangers on somebody's land from a man-made condition, then the landowner has a responsibility to protect me in that situation. Absent those very narrow exceptions that have always been in ND law going back decades that are in this bill trespassers are vermin. They don't have the right to sue. The reason why we're here today is there is an influential legal group, called the American Law Institute. You may have heard of it, it's called the ALI. It's comprised of judges, practitioners, etc. A sort of elite group within the legal community, very influential. One of the things that the ALI does from time to time is publish what they call re-statements, which are supposed to be where they look at the law and they restate or summarize the way the law is. They boil it down into some clear principles. The judges then look to them for guidance. In 1965, in the restatement on product liability, they came up with something called strict products liability and within 10 years it was law of the land across the U.S. A new publication from the ALI is suggesting that the law on trespasser duties, the way it's always been here in the state, should be flipped completely upside down. Instead of saying that a landowner has no duty to a trespasser except in these very narrow circumstances, known trespassers, child trespassers or intentional injuries. The new restatement flips that around and says that the landowner now has a responsibility to anybody that comes

on the land, whether they are invited or trespassing. The only exception in the new restatement is for a flagrant trespasser. Any trespasser that comes on to the land would be able to sue you unless they are deemed to be a flagrant trespasser, which does not exist in any state in the United States. That is a place where they did not restate the law, but the person who worked on writing this, came up with it. Our concern is that if states look at this, that they are going to go down a path that is simply unwise and unsound. There are three problems with the restatement approach and three reasons why I think it would wise for ND to pass this legislation and freeze current law. Again, we're not rolling back the law in any way, shape or form. This is not a tort reform bill. The point is to freeze the bill as it exists now and codify the law before a judge could take it in a new direction that has never been law in ND going back for decades.

One of the problems with the restatement approach is that there is no support for it in ND. ND law is exactly what is in this bill, and I've studied it. In fact, the approach that is in this restatement was rejected by the ND Supreme Court in 1977. They've already been asked to go down this road and they've said no. In a case called O'Leary vs. Conan, it's also the distinct minority view nationwide. Second, the idea of a flagrant trespasser concept doesn't exist anywhere. If that were to become the law, you would have all kinds of litigation over what is a flagrant trespasser, what is the meaning of a term that doesn't exist anywhere in the law. Unlike these other terms, like what is a trespasser, where there are hundreds of cases out there and a hundred years of history telling us what this is, there is no history on what a flagrant trespasser is. This new approach would spawn litigation and I think that is unnecessary and unsound. The other thing it would do is if all of a sudden, you say the landowners have broad responsibilities to protect all trespassers from all injuries, that's going to impose new burdens and costs on property owners. I looked at the cases, farmers in particular; I looked at some of the trespasser cases. Many of the cases out there are against farmers, where people go on their land to go hunting or go on to the land to ride ATV's or ride snowmobiles. The farmer doesn't know they are out there. They haven't given permission for their land to be used, but they own a lot of land and people come on to the land to do these things. If they're hurt, all of a sudden the farmer is on the hook or the farmer has to take measures to go and put up signs. If that doesn't work, put up a fence. If that doesn't work, maybe he's got to patrol his land. Going down this other road would raise burdens on farmers, ranchers and other land owners. They are totally unnecessary and unsound. Finally, imposing this new burden on people, if there are lawsuits against landowners, homeowners by trespassers, who do you think is going to pay for that? Probably the homeowner's insurance and what do you think is going to happen to your homeowner's insurance policy if they have to start paying lawsuits to trespassers. People are going to be paying more to buy protection against people that they don't even want on their land in the first place. That's why ALEX moved to draft this model legislation because we think that allowing broad new lawsuits by trespassers is the wrong way to go. The better way to go is to freeze current law exactly the way it is. The bill says that you have a duty not to willfully or wantonly injure somebody. That's the law in ND, the exact language in the law in ND going

back almost 100 years. In a case called Dubs vs. North Pacific Railway, 1923, that language was first written by ND Supreme Court, and they've repeatedly used that same language for almost a 100 years. For example, I found a case Smith vs. Kellogg, ND Supreme Court 2005, O'Leary vs. Conan, 1977. It's also the same exact language that's found in the pattern jury instruction, C-17.20 and I have all these documents if people are interested in seeing them, so you can see that this is not an invention of defense lawyers someplace to try and do something to trick trespassers or rollback the law. All we did is try to faithfully capture ND law the way it is now and freeze it there. The provision dealing with child trespassers, often called the attractive nuisance doctrine, comes right out of pattern jury instruction C-17.30. That comes from a ND Supreme Court decision over 40 years ago, called Michelson vs. Rosovy, 1966, the exact language in this bill. That came a restatement that came out in 1965. So the principles in this bill are not going to create confusion among the courts, there isn't going to be questions about what does this mean, what does that mean. Because those questions have been answered by ND courts for 100 years and that's all this bill does. The bill makes it clear at the end there is a reference to chapter 58, that's your recreational user statute, where the legislature in 1966, did something that was very similar to this bill already, that grants immunity to people who let their land be used for recreational uses and the bill simply says that we're not going to affect that statute, so it says that this bill would apply to anything that's not already covered by the recreational use.

Rep. Delmore: I asked Rep. Thoreson how many cases were actually involved in this in ND, because if not, isn't this a bill waiting for a situation to happen, that really hasn't been addressed.

Mark Behrens: I'm not exactly sure how to answer the question, because the bill is not trying to say that there is a rampant problem with trespasser lawsuits in the state that has to be addressed.

Rep. Delmore: Are there any lawsuits that you're aware of.

Mark Behrens: I'm sure that there are. I found cases on that. This bill is not making it tougher for trespassers to sue. We're not saying there is a problem with trespasser lawsuits that needs to be cut off in some way. This bill is trying to freeze the law the way it is today, so that an activist court couldn't say we're going to take the law in ND, the way it's been for 100 years and flip it on its head and go down this new road that's proposed in the restatement.

Rep. Delmore: Then I think the law probably is in a state where it needs to be now, can you tell me why it is under section a, on line 11, you talk about willful and wanton manner, and then all of the things that include use of force, use of a gun, a weapon, whatever, are not, except as permitted, if I use deadly force against somebody, I want you to explain why it is you exempted those under section a.

Mark Behrens: Those sections that are referenced there are part of what is called the castle doctrine legislation. It was passed in the state, in many states, probably a majority of the states in the country, with very strong support by the NRA. The castle doctrine legislation essentially says that a man or a woman's home is his/her castle and you have a right to defend it. Those laws say that if somebody is trying to enter your house with force, you have the right to use force to repel that person. I don't think anybody disagrees with that. I imagine that type of legislation passed with overwhelming bi-partisan support here. All this legislation is trying to do, is to make sure that when the law says you cannot use willful or wanton, you can't injure a trespasser through wanton or willful conduct. Obviously we're not meaning that you can't take measures to defend yourself if somebody is trying to break into your home. We wouldn't want a burglar to say, well yes the castle doctrine legislation would ordinarily allow somebody to use force to keep me out of your house, but now you passed a bill that says you can't use willful force against trespassers and therefore, I can break into your home and sue you. We want to make clear that this isn't affecting that castle doctrine legislation at all.

Rep. Delmore: A definition of a child, how old. If I'm 18, I'm protected by that; if I'm 18½, not so much. I would also like to know how many states have adopted this type of statute and I really would like to know how many lawsuits there have been in ND in trespassing that makes this necessary at all. I know you're saying that it has nothing to do with that, but then it's a bill speculating that maybe something might happen. I think maybe we could wait until something does try to turn it the other way.

Mark Behrens: I understand your perspective. ALEX's perspective in drafting this legislation and ATRA's supporting it, is we think it is important to codify the law before the horse gets out of the barn. Once the horse gets out of the barn, if a court were to go down this unsound path of creating trespasser lawsuits, and then you roll it back, all of a sudden you'll have people saying oh, you're affecting our access to courts, etc. We think it is important to address this issue before it becomes a problem for the state. It's only codifying what already exists, it's not changing the law on them, and it's simply codifying the law as they've known it going back at least since 1966 for child trespassers and going back to at least 1923 for every other provision of the bill. In fact, to go to that point, I have a letter here from the ND Defense Lawyers Association, Larry Boschee, who could not be here this morning. He stopped in briefly and gave me his testimony (see attached 1). That group is in support of this legislation.

Rep. Delmore: Can you tell me how many states have adopted this law. It would seem to me, that if the scenario you're talking about, another side would have to come in and introduce legislation to do that as well. I'm saying why can't we address the situation when there is a situation to address.

Mark Behrens: This is very new. The American Law Institute came out about a year ago with this proposal. It was presented at the ALEC Civil Justice Taskforce last

summer. This is the first legislation session when states have had an opportunity to consider the issue. The ALEC model legislation passed unanimously from the Civil Justice Taskforce. I have worked with ALEC for close to 18 years and other than a bill called the cheeseburger bill a few years ago that I think you passed here in ND to limit obesity related litigation. I have never seen a bill that came out with so much support from the ALEC membership, and bi-partisan support. I think there are a few reasons for that. One, people think it is crazy that trespassers should be rewarded for their behavior and the other is that this is not rolling back the law in any way. It's not a tort reform bill.

Rep. Delmore: I want to know how many states have tried to introduce, how many are in the process of doing it now. In your role with your organization, I think that you would know. This doesn't just affect farmers and ranchers. This affects any property owner as I see the legislation.

Mark Behrens: You're right. This is not just a bill that should be supported by the farmers and ranchers. Any property owner, any homeowner should support this legislation. In terms of where it is being considered, this is the first legislative session since it's been out there. I know that a similar bill has been introduced in SD. I know that in the OK state chamber has the legislation and they intend to make a serious effort to get it enacted. In TX the TX Civil Justice League is working with the leadership there, they're confident that they can get this done in TX. There are several other states that haven't begun their sessions yet that have contacted ALEC and that are interested in working on this legislation. This is a new concept, new legislation but it is going to be introduced in many states this year, and I expect that it will pass in several of those states.

Rep. Onstad: Do you consider a hunter a trespasser.

Mark Behrens: A trespasser is anybody who comes onto land without permission, whether express or implied. So, if you have asked for permission to go on somebody's land to hunt, you're not a trespasser. If you think you have permission to go on somebody's land to hunt because they've given you permission in the past, and you've gone hunting afterwards and they've seen you out there, and they haven't told you to stop, so you have reason to believe that you have permission to be there, you're not a trespasser. A trespasser is somebody who's never received permission from the land owner, has never spoken to the landowner, and who believes that the landowner would not want him there. For example, if they had signs on their land that said no hunting.

Rep. Onstad: So, if I do not post my property and a hunter enters that, you would consider him a trespasser since he's never asked for permission, I don't post the property, I don't put a sign up there, so you would classify a hunter as a trespasser in that situation.

Mark Behrens: I'd have to look at the situation, that's a very fact specific situation.

Chairman DeKrey: In ND he would have implied consent, because our posting laws are opposite of most states. If you don't post your land, hunters can go in there, so if it wasn't posted and you were hunting and went on the land, you would have implied consent to be there.

Mark Behrens: Thank you for that. Then you would not be a trespasser in that situation.

Rep. Onstad: We had an earlier bill for legislation for agribusinesses asking for immunity. Basically, under 53-08, recreational use is broad enough where if you aren't charging for that, it's covered in 53-08. So it seems to me that line 6, not subject to liability for injury to a trespasser is already covered in 53-08 and I don't see a reason why we would need to make an addition to something that is already covered in current law.

Mark Behrens: I think it's important to cover all cases that may involve trespassers and not just those in the recreational use statute. I think your point helps to answer a question that Rep. Delmore had asked, do any states have anything like this. Almost every state has some narrow or targeted legislation dealing with specific types of trespassers. Here in ND you already have the recreational use statute, which essentially does what this bill does, but as you recognized, it's limited to recreational uses. When I looked at TX, they have a law that's almost identical to this, that carves out agricultural land. A lot of states have already done things like this; this is trying to codify the law in a comprehensive fashion.

Rep. Onstad: We currently have law that covers exactly what you're asking for. In your earlier testimony, you indicated that this doesn't change ND law. If it's currently covered under our current law, why are you asking that we make a change to it? We don't have any statistics showing that it's needed.

Mark Behrens: I take issue with that. I think it is needed. There are cases in this state involving trespassers that don't fall within the recreational use statute. In particular, I mentioned in 1977, a decade after the recreational use statute was passed, where a similar proposal to this new ALI concept was presented to ND Supreme Court and they rejected it. That was a trespasser case; it wasn't a recreational use statute case. The other case I mentioned, Smith vs. Kellogg, 2005, is a trespasser case; it wasn't covered under the recreational use statute. That was somebody who was trespassing on a building and fell from the fire escape. So there are a lot of times when there are people who are trespassing on commercial property that shouldn't be there, that are definitely not there as recreational users. They are just hooligans and are some place where they shouldn't be.

Rep. Onstad: So you stated two cases in 33 years. Is that enough evidence as to why this should go forward?

Mark Behrens: Those are not the only two cases in ND. When I came out, I did research on ND law, to find the cases from the ND Supreme Court that shows that the language that's in this bill is literally word for word the law of this state. I just picked out the representative cases. I didn't pull every single case in the state. As you know, your ND Supreme Court cases are reported, but your trial court level decisions are not reported. There are many cases out there that I can't get through typical legal research.

Chairman DeKrey: Thank you. Further testimony in support.

Jeb Oehlke, ND Chamber of Commerce: Support. The business community of ND supports this bill. As landowners and possessors of land, is happy with the way the law has been formed in the state over the last 100 years and the danger of changing this law because a well-intentioned or very influential legal group says it ought to be different, is a very real threat. Those restatements are given great deference by judges and they may adopt those new standards if they are given a chance if they agree with them. Codifying current law would keep that from happening. One of the questions that Rep. Delmore asked is what is the definition of a child. Under the law, a child is an individual under 18 years of age. If the committee were to believe that a minor, somebody under 18 but over the age of 14 should be able to appreciate the dangers that might be before them, better than someone younger, you would be free to amend this bill in order to reflect that. Another question, why not wait until legislation is introduced to change a law. There doesn't need to be legislation to change the law. That's the point, those restatements are given great deference by the judges and that standard of the possessor of land owing a duty of care to a trespasser who they may not even know is on the land in the first place. You can't protect someone if you don't know they are there. The law has been this way for decades but there is the threat of change. The other question was answered by the Chairman with the hunters.

Rep. Delmore: Obviously you are representing the Chamber today as you are giving this testimony. This was probably not a local bill.

Jeb Oehlke: You're right, this wasn't our bill.

Chairman DeKrey: Thank you. Further testimony in support.

Tom Bodine, ND Farm Bureau: Support (see attached 2). One thing from the discussion that has taken place so far, it sort of reminds me of one of our landowners. They came to one of the meetings, and he is a rancher in our area who does post his land, No Trespassing. He was going by his property one day and he saw a vehicle parked on the side of the road and he looked out into the pasture and there were some grandparents and grandchildren in his pasture. He went up to them and addresses them. I'm sorry but this land is posted. You are trespassing. They were picking chokecherries during the fall of the year. I guess when he talked to them, he said I have cattle in this pasture. Cattle get a little goofy sometimes

around smaller children and he said that it's probably not safe for you to be here. Their response to him, at that time, was that they weren't trespassing because we have picked chokecherries here for a long time and that was the first time he had driven by and saw them, on his property at that time, even though his land was posted.

Rep. Delmore: Did your organization come in and testify in favor of agritourism, which also offered exceptions to liability to a whole group.

Tom Bodine: I'm not sure. I can find that information out. I know we have policy to try and get immunity for as many landowners as possible. I know that we would probably support that.

Rep. Delmore: There is no section 3 or 4 of this bill, that you allude to, it's pretty hard to know what your lawyers or people are talking about. Do you think there was a reason that the sponsors of this bill opted to choose two sections rather than 4 sections.

Tom Bodine: I'm not sure. I don't know if our attorney has visited with the drafters of this legislation. It was just a recommendation that those sections be added.

Rep. Delmore: Do you members vote as a total, or do you have an executive committee that makes decisions on what legislation you decide to support and oppose.

Tom Bodine: As a Farm Bureau, we consider ourselves a grass roots organization. Part of my duty is working with the county members and they end up passing policies that are local level, and it goes through a state process, and they are adopted by our members. Our executive committee approves them initially, but the policies that are in our book actually come from individuals out in the country.

Rep. Delmore: Specific legislation is not what you're members are voting on, correct. It's a broad policy that you are able to interpret as to what legislation to support or not.

Tom Bodine: That is correct. One thing that our members do pass is the broad policy and yes we do interpret that policy. But liability back to the landowner in this one matter, we need to have it clearly defined as the most protection for the landowners.

Rep. Onstad: All of your issues that you listed as a concern, is already covered under statute 53-08. Why would we want to duplicate our statutes.

Tom Bodine: Even though with this, we are looking at the broadest coverage. I can't refer exactly what legislation is currently, but we hope that we define it as much

as possible. There is so much uncertainty, because many landowners end up having different pieces throughout and it's hard to know who is on that land.

Rep. Onstad: That's kind of the reason for 53-08. Because we don't know who is out there.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Sheyna Strommen, ND Stockmen's Association: Opposed (see attached 3).

Rep. Koppelman: We heard testimony that this bill simply would codify case law in ND; what the courts have already said. You're saying that you don't think it goes far enough to protect landowners, you think it gives more rights to the trespasser, you'd like to see it go even further in rolling back what some of the courts have said and protecting landowners even more, am I understanding you.

Sheyna Strommen: Our Association has a long-standing policy to protect private property rights and so to ensure that I agree.

Rep. Koppelman: So the last line of the bill, this section does not create or increase the liability of any person or entity, you're just questioning whether that is sufficient to make sure that's really true.

Sheyna Strommen: Yes, that's our question.

Rep. Onstad: Currently, has the Stockmen's raised issues in a lot of cases or have cases come up in your discussion. Stockmen's is a large land holding group, have they brought any cases in the last few years that would warrant something like this.

Sheyna Strommen: The Stockmen's Association represents 2900 farmers and ranchers throughout the state, and they do own a lot of land. Specific cases haven't been brought to our attention regarding this; of course, private property rights is an overall policy that our Association deals with. Like the Farm Bureau, we use that grass roots policy to form our opinion on, as certain legislation as it comes forward. We haven't heard of any specific cases.

Rep. Klemin: You're asking us to delete the entire section 2, but really your testimony was only relating to the part about children. What is the problem that you have with the other parts of section 2.

Sheyna Strommen: I guess the problem we are focused on is the language dealing with the children.

Rep. Klemin: About the children.

Sheyna Strommen: Yes.

Ch. DeKrey: Thank you. Further testimony in opposition.

Dave Maring: Opposed. I listened to the debate and I just felt compelled to add something to the debate. Back in 1970's, we had three categories of people that were considered when there was a lawsuit brought against a landowner. Those categories were whether you are an invitee, a licensee, or a trespasser. What we have in this situation is basically the proponents of this law say that the court system has it right. The Legislature has it right, so let's pass a law to freeze for all time whatever this thing that's right at the present time. It seems like it's a solution for a problem that doesn't exist. Our law has developed to the point where all these issues have been taken into consideration and even the proponents of this bill, say we've gotten it right. Why are we changing something we have gotten right.

Rep. Klemin: I'm wondering about your last statement. Why are we changing something that we got right. As I understood the testimony, we're not changing anything. We're codifying what we got right, so that this new ALI restatement provision about flagrant trespassers and so forth, doesn't result in a future change to what we have right so far.

Dave Maring: I probably did misspoke. We're codifying what's in existence, but why are we looking forward and assuming some court system is going to apply some law that I haven't read yet, I don't even know what this law is that they are talking about. If we're going to try and freeze every bit of law that is in place right now, and say that no court system can ever change some law, that seems like improper legislative authority; rather if there is a problem, then try to resolve the problem.

Rep. Koppelman: I think we all want to solve problems and a lot of the bills that we look at during a legislative session are that, they are a reaction to something that has occurred and we come and try to fix it. The problem with that, of course, unlike the court system, we aren't necessarily there to make someone whole because it's usually after the fact, and we can't do much about those folks who may have been damaged by an oversight in our statutes or something else. Occasionally we do try to make law that looks forward and says, this is something we see around the country, or this is a potential problem, here's what we want the public policy of the state to be, we're elected to do that as legislators, so let's make it. With all due respect to the judicial branch and what they do there, we look at law a little differently. I think you talked about law evolving and the law we make here is not based on a stack of court decisions that might lead us down one path or another, instead it's debated as public policy and enacted in black and white. I guess I'm not understanding what is your problem with saying that the courts did get some of this right, we the legislators, the elected representatives of the people, happen to agree with what they did, we think it ought to be the public policy of the land, not just something floating around there in a decision somewhere subject to reinterpretation

and change over time, and we do come back every two years, if it's a problem, we can readdress it.

Dave Maring: I do not ever argue with the legislative authority to do whatever the legislature wants to do. You're saying that if you foresee a problem, the legislature can act to, in effect, freeze the current law. We have not had any indication today from the testimony that's been provided, that there is a problem. In fact, what I'm talking about is the system of laws that are in place right now to handle the very situations that are being brought up, hypothetically, because there is no statistical information that this is a problem. My point is, if in 1972, if someone had come before this committee and said, we have the law of invitee, licensee, and trespasser, pass a law that freezes that forever, we'd be back in a different state of the law. We'd be in a state of law that a lot of people would like because it was much more lenient toward those who were classified as invitees, licensees, than the law is now. My concern is that we don't have a problem right now, there is no statistical evidence why a new law is needed. The case law and common law that is in existence has worked very well to deal with these problems.

Chairman DeKrey: Thank you. Further testimony in opposition to HB 1452. We will close the hearing.

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1452
February 8, 2011
14178

☐ Conference Committee

Committee Clerk Signature D Renose

Minutes:

Chairman DeKrey: We will take a look at HB 1452.

Rep. Onstad: I move a Do Not Pass.

Rep. Kretschmar: Second the motion.

Chairman DeKrey: This bill would codify into law all the court's actions up to this point.

Rep. Koppelman: What is the objection to this bill?

Rep. Steiner: I did receive some opposing testimony that just said, one may ask what harm there is in adopting HB 1452, what it would do is tip on its head, the legal analysis about when a landowner does or does not have liability. Doing so, could well unsettle almost 100 years of settled law.

Chairman DeKrey: I don't know how it exactly would do that, because what it is doing, is putting into statutes what the courts have determined. So I don't know how it would do that. I think the argument against the bill is that you're kind of stopping it all in a moment in time, whereas everybody agrees that the courts have done a good job in ND, but we'd be stopping it in a moment of time.

Rep. Koppelman: I'll resist the motion for a do not pass, because unless I hear something more compelling, I already think that codifying what the courts have done, if we agree that it's good action and it puts us in a good position, doesn't freeze things in time, the courts can still act tomorrow, next month or next year, and they will. But it does do, it says that we in the legislature have determined that definitions have been pretty good and we want to make that into law. Court cases ebb and flow and if we need to revisit it someday we will.

Rep. Onstad: In testimony, if ND's law is exactly what we have in place. We already have that in place. If you take a snapshot right now and freeze it, and take it

going forward, it just doesn't even make sense that if we have everything in law that currently covers this. We have a recreational use that covers the landowner at that point; you don't have any statistics that bears the need for the change. You have landowner groups, stockmen's, etc. that really see a problem with that change, it just seems like if there isn't a problem, why are we asked to fix something in anticipation that there might be a problem.

Rep. Maragos: As I look at this, I see us putting something into law that really will make the term "unintended consequences" fly right to the top; especially when you are dealing with liability. There are so many different situations, of course, I don't know if this law is really going to cover all the situations. I think generally the courts make a determination and so if currently the courts are interpreting what this bill proposes to do. I don't really see the need for it either.

Chairman DeKrey: The clerk will call the roll on a DNP on HB 1452.

6 YES 6 NO 2 ABSENT **WITHOUT COMMITTEE RECOMMENDATION**

CARRIER: Rep. DeKrey

Date: 2/8/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1452

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☑ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Onstad Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey		✓	Rep. Delmore	✓	
Rep. Klemin			Rep. Guggisberg	✓	
Rep. Beadle		✓	Rep. Hogan		
Rep. Boehning		✓	Rep. Onstad	✓	
Rep. Brabandt		✓			
Rep. Kingsbury		✓			
Rep. Koppelman		✓			
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Steiner	✓				

Total (Yes) 6 No 6

Absent 2

Floor Assignment Rep. DeKrey

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1452: Judiciary Committee (Rep. DeKrey, Chairman) recommends **BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION** (6 YEAS, 6 NAYS, 2 ABSENT AND NOT VOTING). HB 1452 was placed on the Eleventh order on the calendar.

2011 SENATE JUDICIARY

HB 1452

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1452
3/16/11
Job #15835

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Provide landowner immunity for injuries to trespassers

Minutes: There is attachments

Senator Nething – Chairman

Representative B. Thoreson - See written testimony.

Larry Boschee – ND Defense Lawyers Association – See written testimony.

Jeb Oehlke – ND Chamber of Commerce – In favor of the bill.

Julie Ellingson – ND Stockman's Association – In favor of the bill.

Rep. Thoreson – Says he will provide an amendment and details what it will say.

Tom Bodine – ND Farm Bureau – In favor of the bill.

Opposition

Dave Maring – Attorney from Bismarck – See written testimony.

Senator Nething – Asks what harm this does.

Maring – Replies it brings in new words and explains we're introducing immunity. He also says it is bad precedence for the Legislature. He doesn't think it's a good use of time.

Close the hearing 1452

Rep. Thoreson – Presents his amendment.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1452
3/22/11
Job #15835

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Provide landowner immunity for injuries to trespassers

Minutes:

Senator Nething – Chairman

Committee work

Senator Olafson explains that the amendment is because Rep. Thoreson said a court case somewhere found that a living animal was an artificial condition.

Senator Olafson moves to adopt the amendment, .001001
Senator Sitte seconded
Verbal vote – all yes

Senator Olafson moves a do pass as amended
Senator Sitte seconded

Discussion
Senator Olafson says this is a preempted strike to maintain our current law.

Roll call vote – 5 yes, 1 no
Motion passes

Senator Olafson will carry

11.0537.01001
Title.

Prepared by the Legislative Council staff for
Representative Thoreson
March 16, 2011

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1452

Page 2, after line 5, insert:

"(6) For purposes of this subsection, artificial condition means a structure or other manmade condition and does not include living animals."

Renumber accordingly

Date: 3/22/11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1452

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment .01.007
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Sitte

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman			**Carolyn Nelson**		
Curtis Olafson – V. Chairman					
Stanley Lyson					
Margaret Sitte					
Ronald Sorvaag					

Total (Yes) _____ No _____

Absent _____

Floor Assignment Senator _____

If the vote is on an amendment, briefly indicate intent:

Verbal - all yes

Date: 3/22/11
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1452

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Sitte

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson		X
Curtis Olafson – V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 5 No 1

Absent _____

Floor Assignment Senator Olafson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1452: Judiciary Committee (Sen. Nething, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). HB 1452 was placed on the Sixth order on the calendar.

Page 1, line 9, after "1." insert "a."

Page 1, line 11, replace "a." with "(1)"

Page 1, line 14, replace "b." with "(2)"

Page 1, line 16, replace "c." with "(3)"

Page 1, line 18, replace "(1)" with "(a)"

Page 1, line 20, replace "(2)" with "(b)"

Page 1, line 22, replace "(3)" with "(c)"

Page 2, line 1, replace "(4)" with "(d)"

Page 2, line 4, replace "(5)" with "(e)"

Page 2, after line 5, insert:

b. For purposes of this subsection, artificial condition means a structure or other manmade condition and does not include living animals."

Renumber accordingly

2011 TESTIMONY

HB 1452

North Dakota Defense Lawyers Association

P.O. Box 2466
Bismarck, ND 58502-2466

Excellence in Civil Litigation

February 2, 2011

Chairman Dekrey and
Members of the House Judiciary Committee

Re: HB 1452

Dear Chairman Dekrey and Members of the House Judiciary Committee:

The North Dakota Defense Lawyers Association is a state-wide association whose member lawyers are actively engaged in defending civil lawsuits. The North Dakota Defense Lawyers Association supports HB 1452.

HB 1452 would legislatively fix in place current North Dakota common-law relating to a possessor of land's liability to trespassers. Under current common-law principles, the general rule, with a few exceptions, is that the possessor of land owes no duty of care to a trespasser. HB 1452 is meant to preempt a provision in the new Restatement of the Law Third Torts: Liability for Physical and Emotional Harm. The new provision imposes upon possessors of land a duty to exercise care to all entrants, including trespassers. The only exception is for flagrant trespassers, a term that the Restatement does not even define.

The legislature should fix in place the current law to prevent arguments that the court system should adopt the new Restatement provision as a matter of common law. The current common law makes common sense. Except for the exceptions listed in the bill, possessors of land should not have to exercise care to protect persons whom the possessor does not even want on the land.

The North Dakota Defense Lawyers Association urges a DO PASS on HB 1452. Thank you for your attention to this matter.

Sincerely,

Larry L. Boschee
North Dakota Defense Lawyers Association
Lobbyist No. 417

North Dakota Farm Bureau
Bringing ag home

1101 1st Ave. N., Fargo, ND 58102
P.O. Box 2064, Fargo, ND 58107-2064
Phone: 701-298-2200 • 1-800-367-9668 • Fax: 701-298-2210

4023 State St., Bismarck, ND 58503
P.O. Box 2793, Bismarck, ND 58502-2793
Phone: 701-224-0330 • 1-800-932-8869 • Fax: 701-224-9485

House Judiciary Committee

February 2, 2011

SB 1452 Testimony by North Dakota Farm Bureau

presented by Tom Bodine, leadership development assistant

Good morning, Mr. Chairman and members of the committee. For the record, my name is Tom Bodine and I represent North Dakota Farm Bureau.

North Dakota Farm Bureau supports HB 1452.

Immunity from liability is an important issue for farmers and ranchers. People use our land for a number of recreational purposes, like hunting, snowmobiling, ATV riding and others. They enter our land with and without the landowner's permission.

If North Dakota residents want our land open to the public, it is important that landowners are offered immunity in its broadest sense.

We understand this bill essentially attempts to adopt the common law as set forth in case law. We believe it is important that the legislature establish clear law or the courts will interpret it for us.

However, this bill has been a problem for us because of Section 2, subsection c, regarding landowner liability toward children. Our attorney has reviewed this bill and strongly recommends that the definition of a child must be included in this section.

At the same time, our attorney suggests that this bill should include Section 3 of the model legislation, dealing with a severability clause. He also suggests that Section 4 should be included, which is a repealer clause. He recommends these sections be included because if an issue is not addressed by the legislature the courts will fill in the holes.

Unfortunately, we do not have those sections available today, because we have not been able to locate the total model legislation, but we would be happy to provide them to the committee members within a couple days.

Again, we want to emphasize the importance of immunity for landowners in North Dakota.

We encourage you to consider these amendments and give a "do pass" recommendation to HB 1452.

Thank you for your attention and I would try to answer any questions you might have.

North Dakota
STOCKMEN'S ASSOCIATION
407 SOUTH SECOND STREET
BISMARCK, NORTH DAKOTA 58504
Ph: (701) 223-2522
Fax: (701) 223-2587
e-mail: ndsa@ndstockmen.org
www.ndstockmen.org

HB 1452

Good morning, Chairman DeKrey and House Judiciary members. For the record, my name is Sheyna Strommen and I represent the North Dakota Stockmen's Association.

Our organization rises in opposition to HB 1452 as written.

The NDSA's Executive Vice President, Julie Ellingson of St. Anthony, has visited with some of the sponsors of the bill. We understand and appreciate its intent. In fact, we very much support Section 1 of the bill, which specifies that landowners, lessees or other occupants are not subject to liability for any injury to a trespasser. We think this is common-sense, since trespassers are just that, trespassers, and landowners should not be subject to liability because someone else is breaking the law and chooses their land to do it on. Thus, we very much support the clarification in the first section of this bill.

However, with that being said, Section 2, with all of its exemptions, gives us pause and reason to oppose the bill in this form. A landowner's liability against a trespasser's injury or death should be no different whether the trespasser is an adult or a child. Grown children should know better, and younger children should be under the control and supervision of their parents or guardians, and so they should assume the liabilities, not the unlucky landowner who happens to own the site of the trespass.

We'd question at what age a child would be considered a liability, and how this would be enforced.

Likewise, we'd argue that it is inappropriate to saddle a property owner with the liability burden and require that he or she "exercise reasonable care to eliminate the danger to a trespassing child." Trespassing is against the law, and property owners should not have to take extra steps they otherwise wouldn't to protect those who are breaking the law.

We disagree with point 3 on line 7 of page 2 of the bill, that this section doesn't create or increase the liability of any person or entity. We think it would actually do just that!

Therefore, we'd ask that you strike Section 2 of the bill. If that is done, we'd change our stance on HB 1452.

H.B. 1452 Protects North Dakota's Longstanding Trespasser Liability Rules

North Dakota has long maintained clear and sound rules regarding the liability of land possessors to those who trespass on their property. Like most other states, North Dakota provides that a land possessor owes no duty of care to a trespasser, except in a few narrow and well-defined circumstances. H.B. 1452 would codify these traditional common law rules to preempt courts from adopting a liberal provision in the new *Restatement Third of Torts: Liability for Physical and Emotional Harm* that would dramatically expand trespassers' rights to sue landowners and impose costly burdens on property owners, potentially leading to higher homeowners' insurance premiums. Giving trespassers new rights to sue is bad public policy. HB 1452 is based on model legislation that was unanimously adopted by the American Legislative Exchange Council (ALEC) in 2010. The bill was voted out of the North Dakota House by a vote of 63 to 29 on February 11, 2011.

Why Legislation Is Necessary At This Time

In North Dakota and most other states, land possessors generally owe no duty of care to trespassers and are not liable for their injuries. These rules have existed for decades, usually as part of the common (court-made) law, but also sometimes in the statutory law (e.g., landowner immunity for recreational uses of the land). They are based on the principle that land possessors are entitled to the free enjoyment of their land.

The American Law Institute's (ALI) latest Restatement Third of Torts (§ 51) seeks to upend the traditional approach by recommending that courts should impose a broad new duty on land possessors to exercise reasonable care for all entrants on their land, including unwanted trespassers. The only exception to the proposed new duty rule would be for harms to so-called "flagrant trespassers"—a concept that will lead to litigation over its meaning because the term is not defined in the Restatement and does not exist in any state's tort law.

Thus, instead of following the historical common law approach found in North Dakota, and providing that land possessors generally owe no duty to trespassers (subject to a few narrow exceptions), the new Restatement takes a "reformist" approach, imposing liability on land possessors for harm to any entrant except the "flagrant trespasser." The new duty requirement would particularly impact owners and renters of residential property.

The new Restatement does not have the force of law by itself, but courts often look to ALI "Restatements" when developing legal rules. The ALI is highly influential with courts because the ALI is perceived to be objective and is composed of the nation's top echelon judges, law professors, and practitioners.

An example is the Restatement (Second) of Torts § 402A (1965), which helped launch the doctrine of strict products liability. At the time the ALI approved § 402A, California was the only state to recognize strict products liability. Nevertheless, the ALI chose to include it in the Restatement (Second). Within a decade, the doctrine of strict product liability set forth in § 402A was adopted by most states and generally became the "law of the land." In 1974, the North Dakota Supreme Court adopted § 402A in *Johnson v. American Motors Corp.*, 225 N.W.2d 57, 58 (N.D. 1974).

In trespasser liability area, the North Dakota Supreme Court adopted § 339 of the Restatement (Second), which provides that landowner owe a duty in some circumstances to protect child trespassers from "attractive nuisances" (*e.g.*, man-made conditions) that may cause injury. *See Mikkelson v. Risovi*, 141 N.W.2d 150, 153-154 (N.D. 1966) ("We accept the principle as stated in Section 339, Second Edition, Restatement of the Law, as the rule applicable in this case.").

There are numerous other examples where the North Dakota Supreme Court has adopted or relied upon provisions of ALI Restatements for authority in reaching its decisions. For example:

- *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 545 (N.D. 1994) ("[W]e adopt the majority view and hold that an employer of an independent contractor is not vicariously liable to the independent contractor's employees under Sections 416 and 427 of the Restatement (Second) of Torts.").
- *Blair v. Boulger*, 336 N.W.2d 337, 340 (N.D. 1983) ("The formulation of the exception, relevant to the particular facts of this case, which we adopt occurs in Section 914 of 4 Restatement of Torts 2d."), *cert. denied,* 465 U.S. 1014 (1984).
- *South v. National R. R. Passenger Corp. (AMTRAK)*, 290 N.W.2d 819, 837 (N.D. 1980) ("We believe that the position expressed by § 322, Restatement (Second) of Torts (1965), reflects the type of basic decency and human thoughtfulness which is generally characteristic of our people, and we therefore adopt the standard imposed by that section.").

In 2010, a former president of the Association of Trial Lawyers of America (ATLA), now known as the American Association of Justice (AAJ), teamed up with an author of the new Restatement on an article for a national personal injury lawyer magazine (TRIAL, Apr. 2010) which publicly characterized the new Restatement as a "powerful new tool" for "[t]rial lawyers handling tort cases." They described the new Restatement as "a work that trial lawyers would be well advised to review and use" – and specifically listed the new duty rule for land possessors as one of the "top 10" provisions in the new Restatement that will benefit trial lawyers. They candidly acknowledged that the new rule is "a major departure from the first and second restatements, which followed the historic approach...."

What the Legislation Would Accomplish

H.B. 1452 freezes current North Dakota law and preempts courts from adopting the radical approach proposed by the new Restatement and subjecting landowners to broad new liability. The following is a section-by-section breakdown of the bill:

- **Section 1** codifies the current, longstanding, and straight-forward rule that a land possessor owes no duty of care to a trespasser and is not liable for injury to a trespasser.
  - ✓ This rule is explicit in North Dakota Supreme Court case law dating back almost a century, *see Dubs v. N. Pac. Ry. Co.*, 195 N.W. 157 (N.D. 1923); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Smith v. Kulig*, 696 N.W.2d 521 (N.D. 2005), and is found in North Dakota Pattern Jury Instruction C – 17.20 (Duty to Trespasser).

- **Section 2** sets forth the three exceptions in current North Dakota law where a land possessor may be subject to liability for harm to a trespasser:

  1) If the land possessor acts willfully or wantonly to injure a trespasser, *see Smith*, 696 N.W.2d at 524, 525 (landowner must "refrain from harming the trespasser in a willful and wanton manner."); *O'Leary*, 251 N.W.2d at 751.

  2) If the land possessor knows of the trespasser's presence and fails to exercise reasonable care to avoid injuring the trespasser, *see Smith*, 696 N.W.2d at 525 (once "the trespasser's presence in a place of danger becomes known . . .the occupier's duty is to exercise ordinary care to avoid injuring him."); *O'Leary*, 251 N.W.2d at 751.

  3) Under the doctrine of attractive nuisance for harm to a child trespasser injured by a dangerous artificial (man-made) condition on the land that the child was too young to appreciate but was known to the landowner.

  - ✓ This rule is explicit in North Dakota Supreme Court case law dating back at least four decades to *Mikkelson*, 141 N.W.2d at 153-154; *see also Gessner v. City of Minot*, 583 N.W.2d 90, 94 (N.D. 1998), and is found in North Dakota Pattern Jury Instruction C – 17.30 (Premises Dangerous to Child).

- **Section 2** also makes clear that the bill does not affect North Dakota's recreational use law (chapter 53-08) and does not create or increase the liability of any person or entity.

(2)

SENATE JUDICIARY COMMITTEE
Wednesday, March 16, 2011 - 9:00 a.m.

HOUSE BILL NO. 1452

Testimony of:

Larry L. Boschee
Appearing for the
North Dakota Defense
Lawyers Association

Chairman Nething and Members of the Committee:

My name is Larry Boschee and I am appearing for the North Dakota Defense Lawyers Association in support of HB 1452. The North Dakota Defense Lawyers Association is a statewide association whose member lawyers are primarily engaged in defending civil lawsuits.

HB 1452 would freeze current North Dakota court-made law relating to a land possessor's liability to trespassers. The North Dakota Defense Lawyers Association *supports* HB 1452.

Under current North Dakota common-law principles, the general rule, with a few exceptions, is that the possessor of land owes no duty to trespassers. HB1452 would legislatively fix in place those common-law principles and preempt a provision in the new Restatement (Third) of the Law Torts: Liability for Physical and Emotional Harm that would expand liability to trespassers.

The new Restatement provision would impose upon possessors of land a duty to exercise reasonable care to all entrants, including trespassers. Restatement (Third) of the

Law Torts: Liability for Physical and Emotional Harm § 51. The only exception is for flagrant trespassers, a term the Restatement does not even define. Id. § 52. Comment j to section 51 of the Restatement summarizes the rule as follows: "This Section [51], in conjunction with § 52, requires land possessors to exercise reasonable care on behalf of trespassers (save for flagrant trespassers) for risks created by the possessor and those posed by artificial and natural conditions." Id. § 52, cmt. j.

Under this duty-of-reasonable-care standard, land possessors – including those with large tracts of unimproved and uninhabited land – would have to take steps to search for and eliminate conditions that could create a risk of harm to trespassers. How much they must do to avoid liability is unclear. The standard is amorphous and provides little guidance. Whether the land possessor met the standard of care would in most cases be a jury question.

The new Restatement provision presents a real risk. Although not the law, the American Law Institute's Restatements are highly influential works. "Because of the high level of respect that the American Law Institute has earned, the Restatements' taking a certain position is likely to influence the development of the law." Kristen David Adams, The Folly of Uniformity? Lessons from the Restatement Movement, 33 Hofstra Law Rev. 423, 436 (2004). The American Law Institute itself states on its website that many of its publications "have been accorded an authority greater than that imparted to any legal treatise, an authority more nearly comparable to that accorded to judicial decisions." The American Law Institute – How ALI Works, http://www.ali.org./index.cfm?

fuseaction=about.instituteworks (last visited March 11, 2011).

The North Dakota Supreme Court has often relied on the Restatements in developing the state's common law. Specifically referring to the tort Restatements, the supreme court has said, "The Restatements of Tort are carefully studied and precisely stated summaries of basic principles of law. . . . They are entitled to respect as authoritative and reasoned outlines of the law 'as it has developed in the courts.'" Stanley v. Turtle Mountain Gas & Oil, Inc., 1997 ND 169, ¶ 10, 567 N.W.2d 345 (quoting Restatement (Second) of the Law of Torts, intro. at VII).

The current common law makes common sense. Excepting the already-developed common-law exceptions provided in the bill, possessors of land should not have to exercise care to protect persons whom the possessor does not even want on the land.

HB 1452 is a pragmatic solution to the risk the new Restatement provision presents. All that is required to start a lawsuit against a landowner is a good faith argument. The legislature should fix in place the current common law to prevent even an argument that the courts should apply the new Restatement provision.

The North Dakota Defense Lawyers Association urges a DO PASS on HB 1452.

PLEASE BRING THIS DRAFT TO THE ANNUAL MEETING

(3)

THE AMERICAN LAW INSTITUTE

Restatement of the Law Third
Torts: Liability for Physical and Emotional Harm

Tentative Draft No. 6

(March 2, 2009)

SUBJECT COVERED

CHAPTER 9 Duty of Land Possessors

§ 51. General Duty of Land Possessors

Subject to § 52, a land possessor owes a duty of reasonable care to entrants on the land with regard to:

(a) conduct by the land possessor that creates risks to entrants on the land;

(b) artificial conditions on the land that pose risks to entrants on the land;

(c) natural conditions on the land that pose risks to entrants on the land; and

(d) other risks to entrants on the land when any of the affirmative duties provided in Chapter 7 is applicable.

Comment:

a. History and scope. Largely for historical reasons, the duty of a land possessor has not been a general duty of reasonable care, but instead has consisted of differing duties depending on the status of the person on the land. At the time these status-based duties were developed, no general duty of care existed, and duties were based on relationships or specific activities. Thus, the status-based duties imposed on land possessors were consistent with basic negligence law and were the basis for imposing *any* duty on land possessors. However, with the evolution of a general duty of reasonable care to avoid physical harm as recognized in § 7 (Proposed Final Draft No. 1, 2005), the status-based duties for land possessors are not in harmony with modern tort law. This Section rejects the status-based duty rules and adopts a unitary duty of reasonable care to entrants on the land. At the same time, § 52 reflects a policy-based modification of the duty of land possessors to those on the land whose presence is antithetical to the rights of the land possessor or owner.

exposed himself to the perils of an open and obvious danger." The court did not confront or explain the obvious contradiction between adopting a duty of reasonable care for all invitees and licensees and its conclusion in *Bucki* that the land possessor owed no duty of care or why a plaintiff's conduct, however unreasonable, barred recovery in a state with pure comparative fault.

The fact that an entrant is a trespasser does not, by itself, bear on whether the entrant is contributorily negligent. See Beard v. Atchison, Topeka & Santa Fe Ry. Co., 84 Cal. Rptr. 449 (Ct. App. 1970) (proof that entrant was a trespasser does not establish entrant assumed the risk of dangers on the property).

§ 52. Duty of Land Possessors to Flagrant Trespassers

(a) The only duty a land possessor owes to flagrant trespassers is the duty not to act in an intentional, willful, or wanton manner to cause physical harm.

(b) Notwithstanding Subsection (a), a land possessor has a duty to exercise reasonable care for flagrant trespassers who reasonably appear to be imperiled and

(1) helpless; or

(2) unable to protect themselves.

Comment:

a. Flagrant trespassers. This Section, in conjunction with § 51, distinguishes among trespassers and employs the concept of "flagrant trespassers" as the basis for that distinction. "Flagrant" is used here in the sense of egregious or atrocious rather than in its alternative meaning of conspicuous. Nevertheless, no single word can capture the concept, which is further explained in this Comment. This Section leaves to each jurisdiction employing the concept to determine the point along the spectrum of trespassory conduct at which a trespasser is a "flagrant" rather than an ordinary trespasser. The critical aspect of this Section is that a distinction is made and that different duties of care are owed depending on whether a trespasser is a flagrant trespasser or an ordinary trespasser. This Section thus reflects a specific application of § 7(b) (Proposed Final Draft No. 1,

The new restatement's top 10 tort tools

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm *contains many clarifications and modifications that you can use to your clients' advantage. Here's a quick look at the most important updated provisions.*

MICHAEL D. GREEN AND LARRY S. STEWART

Trial lawyers handling tort cases have a powerful new tool: the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm.* Thirteen years in development, it is now largely finished. State supreme courts and federal courts already have cited some of its provisions, and its influence is only going to grow.

In the early 1990s, the American Law Institute decided to update the *Restatement (Second) of Torts.* Most of that restatement had been published in 1965, during a time when contributory negligence and joint and several liability existed and strict products liability was only a twinkle in reporter William Prosser's eye.

But no Prosser was on the scene 30 years later to undertake the entire revision of torts. So instead of creating a single revised restatement, the institute began a series of discrete projects that, together, would comprise the *Restatement (Third) of Torts.* The first project was to update products liability with what had been learned in the 30 years since §402A set off the strict products liability revolution. That project came to fruition in 1998 with the publication of the *Restatement (Third) of Torts: Products Liability,* with its controversial requirement of a reasonable alternative design to prove a design defect.[1]

The second piece, *Apportionment of Liability,* was published two years later. It addresses comparative fault ("comparative responsibility" in the restatement vernacular), joint and several (and several) liability, contribution, and indemnity.

That brings us to the third piece in the third restatement sequence. In 2005, seven chapters were finally approved; they were part of a proposed final draft entitled "Liability for Physical Harm." The project was extended to cover two related areas: "pure" emotional harm and land possessors' duties. The inclusion of emotional harm caused a name change: *Restatement (Third) of Torts: Liability for Physical and Emotional Harm.* Chapters one through six, which cover definitions of the bases for tort liability, negligence, duty, strict liability (other than strict products liability), factual cause, and scope of liability (proximate cause), were published in December 2009.

Chapter 7, on the limited affirmative duties to rescue or protect someone else; Chapter 8, on emotional harm; and Chapter 9, on land possessors' duties, also have been approved but await the drafting of a final chapter on the liability of employers of independent contractors.[2] These chapters will be part of a second volume of the physical and emotional harm restatement, but that remains several years off.[3]

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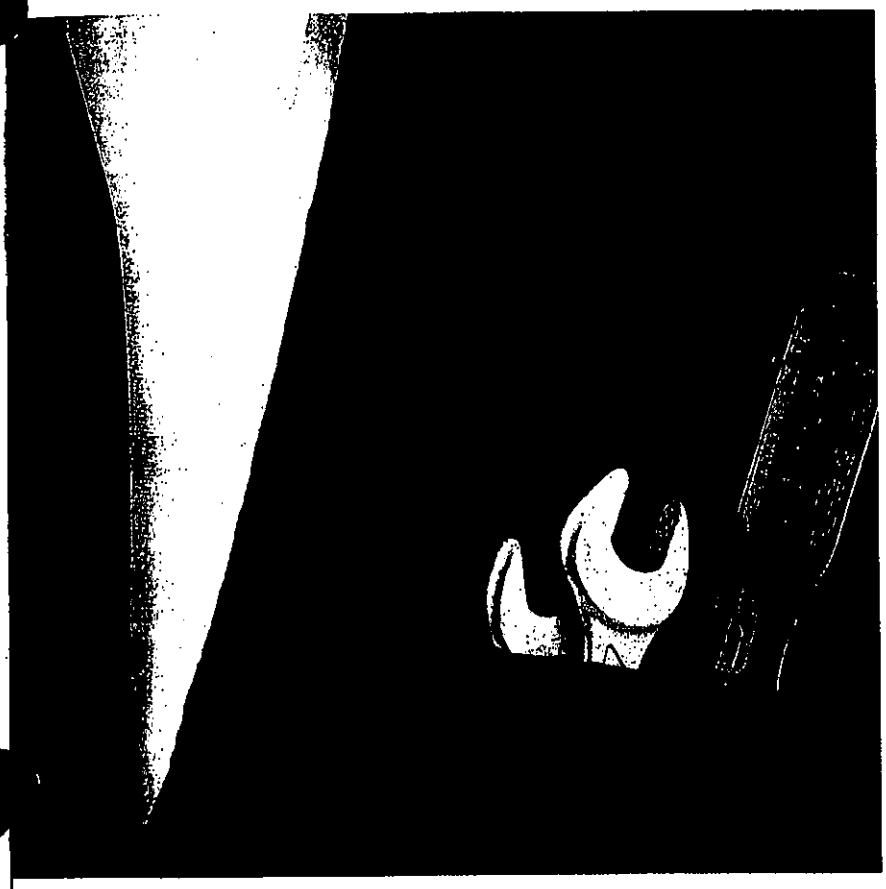

MICHAELA BEGSTEIGER/PHOTOLIBRARY

The third restatement can be a powerful persuasion tool. Any lawyer involved in tort litigation should be aware of several important provisions in the new restatement and how they differ from those in the second restatement. Here are the 10 most important.

1. The duty to use reasonable care as the default rule. Cases are sometimes dismissed because a court determines that the defendant owed no duty to the plaintiff or because the injury-causing event was not foreseeable. Whether a duty exists and what it consists of are questions of law for the court, and courts are more comfortable declaring that no duty exists than finding that no reasonable jury could find negligence. When a court does the latter, it is treading on the right to trial by jury in a way that a "no-duty" determination does not. "Foreseeability" determinations often provide similar comfort to courts when used as a surrogate for "duty." This is dubious reasoning, as the analytical framework and rules of the new restatement make clear.

First, the third restatement completes the circle of evolution of legal theory, concluding that as a general default rule, all people have a duty of reasonable care not to create a risk to others. With the exception of unusual categories of cases, "an actor's duty to exercise reasonable care does not require attention from the court."[4] This means that except for a small subset of cases, a duty of reasonable care ordinarily exists or, at least, is the starting point for any analysis of that issue.

Second, the restatement explains that the categories of cases in which a no-duty determination is permissible are only those exceptional cases in which a countervailing policy justifies modifying the default duty of reasonable care. Thus, §37 explains that when a defendant has had no role in putting the plaintiff at risk (has not created a risk), he or she ordinarily has no duty to rescue or take precautions to protect that person.[5]

Third, the restatement bars the use of foreseeability for duty determinations.[6] Foreseeability is important for negligence, as risk must be foreseen before precautions are required. But if duty is about a *category* of cases—such as the liability of social hosts or homeowners with regard to professional rescuers on their property—then nothing very useful can be said about foreseeability, since it depends on the specific facts of the case.

Finally, to protect jury prerogative, §8 of the third restatement makes plain that negligence usually is a question of fact for the jury. Stated another way, no-duty determinations cannot be based on the specific facts of a case but instead must address a "particular category of recurring facts."[7] No-duty determinations should not be a "ticket for a single ride."[8]

Already, the Arizona Supreme Court has relied on the third restatement (and an article that makes this case) to hold that foreseeability should not be considered in determining whether a duty exists.[9] The Iowa Supreme Court went even further in *Thompson v. Kaczinski*, a case decided last November.[10]

Two homeowners left a disassembled trampoline on their property. Several weeks later a severe storm came through and, because it was not secured, blew the trampoline onto an adjacent road. On the road, the plaintiff swerved to avoid the obstacle, lost control of his car, and was injured in the resulting accident.

The trial court granted summary judgment, reasoning that the defendants had no duty to the plaintiff because of the unforeseeability of the risk. The Iowa Court of Appeals affirmed but the supreme court reversed, holding similarly to the Arizona Supreme Court that foreseeability was relevant only to breach—such

as negligence—but not to whether there was a duty of reasonable care in the first place. Beyond that, the court adopted the third restatement's view that a duty of reasonable care ordinarily exists for anyone who creates a risk of harm to others.[11]

These holdings barring foreseeability in duty determination prohibit a common practice in which courts use the malleability of foreseeability to declare that the harm was unforeseeable, so the defendant had no duty. That confuses duty with breach, which the restatement goes to significant efforts to avoid. The *Kaczinski* decision adopting an ordinary duty of reasonable care for those creating risks goes a long way toward ensuring that juries, not judges, will decide the case based on the facts and whether the defendant's conduct was unreasonable.

The third restatement completes the circle of evolution of legal theory, concluding that as a general default rule, all people have a duty of reasonable care when they act, so as to not create a risk to others.

2. Legal causation. "Proximate cause" is sometimes used to mean factual cause, sometimes used to mean scope of liability, and sometimes used to mean both, which leads to unnecessary confusion. It also results in juries being instructed on an issue not in dispute, as frequently the only issue is factual causation, yet approved instructions combine both facets of proximate causation.

The third restatement disentangles proximate cause, separating it into its two components, factual cause and scope of liability. Separate chapters address each distinct subject.[12] The factual cause chapter adopts a "but for" standard for factual causation, while the scope of liability chapter employs a "harm within the risk" test that is similar but not identical to the popular foreseeability test.[13] In *Kaczinski*, the Iowa Supreme Court adopted both of these provisions from the third restatement.[14]

Notably, §34 declares that so long as the harm that occurred arose out of the risks that made the defendant negligent, superseding causes have no role to play. For example, a company specializing in equipment for security personnel sells a defective walkie-talkie designed for law enforcement and security personnel. If a private security guard using that equipment is accosted by thieves but cannot contact backup personnel because of a defect in his walkie-talkie, the manufacturer will be liable as a matter of law for the harm the guard suffered, and the intervention of the thieves is not a superseding cause.[15]

3. Proof of causation by toxic substances. In most traumatic injury cases, proof of causation is relatively straightforward. Not so with disease injuries, especially those involving toxic substances. In such cases, causation often is not obvious, not well understood, and difficult to prove. In the early 1980s, courts began to struggle with developing "rules" for such proof. The results have been conflicting, inconsistent, and, at times, arbitrary.

Section 28, comment c, seeks to clear the air. It not only contains a framework for the different aspects of toxic causation, but its Reporters' Notes also cite extensively to cases, articles, and references on scientific evidence.

Toxic-substance cases often involve statistical and group-based scientific studies. Finding proof of causation usually involves a two-step process that relies on expert testimony to establish that the substance was capable of causing the disease (general causation) and that the substance actually caused the plaintiff's disease (specific causation). While the third restatement does not address the admissibility of such expert opinions, it provides important guidance concerning the sufficiency of that evidence.

Rather than propose bright-line rules, the third restatement recognizes that whether an inference of causation is appropriate is a matter of informed judgment, not scientific certainty; scientific analysis is informed by numerous factors (commonly known as the Hill criteria); and, in some cases, reasonable scientists can come to differing conclusions.[16] Regarding epidemiologic studies, the third restatement cautions against any threshold requirement.

In the case of specific causation, the restatement recognizes that juries generally should be permitted to infer causation if group studies establish that exposure to the substance results in an incidence of disease that is more than twice an unexposed group[17] or other potential causes can be ruled out by a "differential etiology." Until there is better understanding of biological mechanisms for disease development, and therefore more accurate proof, this comment will provide important guidance on how courts should approach such cases.

4. Reasonable medical proof. Many courts hold that expert opinion must be expressed in terms of medical or scientific "certainty." Requiring certainty seems to impose a criminal-law-like burden of proof that is inconsistent with civil burdens of preponderance of the evidence to establish a fact. Such a requirement is also problematic at best because medical and scientific communities have no such "reasonable certainty" standard. The standard then becomes whatever the

attorney who hired the expert tells the expert it means or, absent that, whatever the expert imagines it means.

Section 28, comment e, of the restatement criticizes this standard and makes clear that the same preponderance standard (or "more likely than not" standard), which is universally applied in all aspects of civil cases, also applies to expert testimony.

5. Affirmative duties. As §37 of the new restatement recognizes, someone who has not created a risk of harm to another generally has no duty of care to that other person. But the restatement sets out new relationships in which an "affirmative" duty of care might arise, such as in the case of conduct creating a continuing risk of harm, §39; under certain special relationships, §§40 and 41; when an actor undertakes to render services to another, §§42 and 43; and in the case of taking custody of another, §44. Of particular note in §40 is the recognition of new relationships imposing an affirmative duty of reasonable care to protect, including a school's relationship with its students and a landlord's with its tenants.

Section 41, dealing with duties to third parties, reflects the California Supreme Court's seminal decision in *Tarasoff v. Regents of the University of California*, which requires a psychotherapist who knew or should have known that a patient posed a danger to a third party to take reasonable steps to notify the third party of the danger.[18] Comment g to §41 also contains an extensive discussion of a non-mental-health physician's duty to third parties.

6. Statutes as the basis for affirmative duties. A new provision takes account of the prevalence of statutes that impose affirmative duties to protect others. Consider a statute requiring a health care professional to report suspected child abuse. Although he or she would not have a common law duty of care to the child, §38 counsels that courts should consider such statutes in deciding whether to adopt an affirmative duty in a tort action.[19]

7. Land possessor duties. The third restatement breaks important new ground in land possessor duties. First, §51 adopts a unitary standard of reasonable care for almost all entrants on land. This constitutes a major departure from the first and second restatements, which followed the historic approach of differentiating duties based on the status of entrants.

Since the second restatement, jurisdictions generally have split on this question, with half using historic status-based categories and the other half adopting a unitary standard of reasonable care under the circumstances. Consistent with its reasonable care default rule, the third restatement adopts the more modern, reformist position of a unitary standard.

Second, it proposes a visionary way of dealing with the vexing problem of trespassers under a unitary standard. Prescribing rules to deal with trespassers, who by definition enter land without consent, creates a clash between the principles of tort (requiring reasonable care to protect others) and property (which provides freedom to use private property as the owner wishes).

One of the principal objections to a unitary standard has been imposing a reasonable care standard for trespassers who come on the land for reasons that are offensive or repugnant to the land possessor—such as criminal or malicious activity or intentional misconduct directed at the land possessor or his or her family. While reasonable care generally has been acceptable for innocent, inadvertent, or child trespassers, requiring land possessors to exercise care for "flagrant" trespassers flies in the face of common sense, and many states have excluded all trespassers from the unitary standard for that reason. Section 52 distinguishes among trespassers, categorizing them as ordinary trespassers and "flagrant" trespassers. It provides that the only duty to the latter is to not act in an intentional, willful, or wanton manner that causes harm to the trespasser.

Many courts hold that expert opinion must be expressed in terms of medical or scientific 'certainty.' This is problematic because medical and scientific communities have no 'reasonable certainty' standard.

This concept comes from a synthesis of decisions, not from a majority or plurality rule. A flagrant trespasser is not a bright-line concept but one that is left to develop in future cases. But it does have the advantage of a reasoned, progressive approach that avoids the confusing array of classes of trespassers that are sprinkled throughout decisions and, at the same time, recognizes that not all trespassers are alike.

8. Negligent infliction of emotional distress. The second restatement contained no provisions for liability for negligently inflicting stand-alone emotional harm; the only provision for recovery for such harm was for intentionally inflicted harm. The third restatement reflects developments since 1965, and §§47 and 48 permit recovery for people who suffer severe emotional harm—both those in the zone of danger and bystanders who perceive serious physical harm to a close family member. This provision includes a catchall suggesting that in categories of cases in which it is especially foreseeable that a rea-

sonable person would suffer serious emotional harm, courts may permit such a claim. Telegrams containing erroneous reports of a family member's death are one such historical category; a modern example would be a hospital permitting a newborn to be abducted.

9. Res ipsa loquitur. Plaintiffs sometimes rely on the doctrine of res ipsa loquitur to prove negligence. In many instances, courts dealing with those claims impose "rules," such as requiring that the defendant be in "exclusive control" of the "instrumentality," excluding expert testimony on liability, and denying the claim if the plaintiff attempts to prove specific acts of negligence.

The third restatement clears the air by making explicit that res ipsa is only another appropriate form of circumstantial evidence enabling proof of negligence. It implies that the court does not know, and may never know, what actually happened in the individual case but that because of the type or category of the accident, it is more likely than not due to negligence.

Under §17, juries would be allowed to infer negligence if the accident was of "a type . . . that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member."[20] For example, a defendant parks his car at the top of an inclined driveway, and the car rolls down the driveway, injuring a pedestrian. Even though the defendant was not in possession of the car at the time, res ipsa loquitur is appropriate and would permit the jury to infer that the defendant's negligence caused the plaintiff's harm.[21]

Gone would be the ancillary rules—so it would not matter that the defendant was not in exclusive control at the precise moment of the accident, that the plaintiff introduced expert testimony to establish that the accident was of a type or category that normally does not happen in the absence of negligence, or that the plaintiff attempted to prove a specific act of negligence on the defendant's part. And, as the restatement makes clear, because this type of claim ordinarily derives from common knowledge and experience (sometimes augmented by expert testimony), the case usually will go to the jury.

10. Abnormally dangerous activity. The second restatement listed five factors to be considered in determining whether an activity qualified as abnormally dangerous and therefore subject to strict liability. Those factors had become largely outdated in actual practice.

The third restatement returns to the first restatement's two-requirement approach: that the activity must be one that is not common and that creates a significant risk of harm even when all reasonable precautions are taken.[22] For example, consider a manufacturing company, located in an otherwise largely residential community. Its manufacturing process produces a toxic chemical that is stored on-site until it can be shipped for proper disposal. The company complies with all applicable regulatory requirements and exercises reasonable care to contain the byproduct chemical it stores. Nevertheless, when the storage bins are opened, sudden wind gusts may disperse the chemicals throughout the neighborhood, which can cause serious illness.

This activity might be declared abnormally dangerous by a court and therefore subject to strict liability.[23] Strict liability for engaging in abnormally dangerous activity plays a small role in the contemporary tort system, but this clarification will simplify how courts deal with such claims.

The new restatement accomplishes other updates beyond these 10 provisions. It reflects many of the legal reforms the past 40 years have seen, tweaks many aspects of tort law, contains hard-headed analysis and justification, and is filled with copious citation to leading court decisions and legal scholarship of the modern era.

While it does not govern law per se until the courts adopt it, given the deference accorded to restatements, it will have a profound impact on tort law development and is a work that trial lawyers would be well advised to review and use. ■

Notes

1. *See* Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime*, 74 Brooklyn L. Rev. 1039, 1043–45 (2009).

2. Employer liability is already covered, in part, in *Restatement (Third) of Agency* §§2.04 and 7.07 (2006).

3. In the meantime, all of the third restatement can be found on Westlaw or Lexis. Hard copies of the nine approved chapters also are available from the American Law Institute in Philadelphia (*see* www.ali.org) and some large law libraries.

4. *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* §6 cmt. b (2010) [hereinafter *Third Restatement*]; *see also Restatement (Third) of Agency* §7.

5. *Third Restatement* §37.

6. *Id.* §7 cmt. j.

7. *Id.* §7 cmt. i.

8. *See* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. Cal. L. Rev. 671, 729 (2008).

9. *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007).

10. 774 N.W.2d 829 (Iowa 2009).

11. *Id.* at 835; *Third Restatement* §7.

12. *See June v. Union Carbide Corp.*, 577 F.3d 1234, 1239–44 (10th Cir. 2009) (commenting on separation of legal cause into factual causation and scope of liability).

13. *Third Restatement* §29.

14. 774 N.W.2d at 836–39.

15. *Third Restatement* §34 illus. 7.

16. This comment was informed by a groundbreaking joint conference with the National Academy of Sciences, in which the reporters discussed this issue with five distinguished scientists. Reporters' Note §28 cmt. c.

17. A doubling of incidence is not a bright-line test and in some cases may not be sufficient by itself. On the other hand, less than a doubling of incidence does not mean there is no specific causation so long as there is other evidence that the plaintiff's disease was more likely than not caused by the agent.

18. 551 P.2d 334 (Cal. 1976).

19. The restatement also explains the difference between a statute used for negligence per se purposes and used to impose a tort duty. *See Third Restatement* §38 cmt. d.

20. The new products liability restatement contains a similar res ipsa provision. *Restatement (Third) of Torts: Products Liability* §3 (1998).

21. *Third Restatement* §17 illus. 2.

22. *Third Restatement* §20(b).

23. *Third Restatement* §20 illus. 2.

(4)

TESTIMONY OF DAVID S. MARING –
OPPOSITION TO HOUSE BILL NO. 1452

Submitted by:

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Mr. Chairman and Members of the Committee:

My name is Dave Maring. I am an attorney with Maring Williams Law Office, P.C. in Bismarck. I am appearing on behalf of myself. I am presenting this testimony in opposition to House Bill No. 1452 which is intended to provide landowner immunity for injuries to trespassers. My primary reason for opposing this Bill is that it is not necessary. The principles which are set forth in House Bill No. 1452 are already present in the law of North Dakota and have been the law of North Dakota for a significant period of time. In Smith v. Kulig, 2005 ND 93, 696 N.W.2d 521, the North Dakota Supreme Court reaffirmed that a landowner in North Dakota "does not owe a duty to a trespasser" other than to "refrain from harming the trespasser in a willful and wanton manner." 2005 ND 93, ¶ 10. That same concept is contained in House Bill No. 1452.

In 1977, the North Dakota Supreme Court modernized the law of premises liability in O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977), by abolishing the artificial distinctions between categories of visitors to the premises (such as licensee or invitee). The Court specifically stated, however, that "[w]e do not change our rule as to trespassers." In Footnote 6, the Court cited to a 1923 case to reaffirm the point that North Dakota law on trespassers is "well-settled" and has stayed the same for a long time.

A concern has been expressed that a new Restatement of the Law, Third-Torts approved by the American Law Institute may bring about a change in the law concerning trespassers. That concern is nothing more than speculation. The law in North Dakota is well established and has been reaffirmed time and time again since 1923 or earlier. There is no basis for suggesting that the North Dakota Supreme Court will, all of a sudden, adopt a totally different view of the rights of a trespasser.

Over the years, the North Dakota Supreme Court has decided cases which clearly set forth the rights of a trespasser. Other than when an exception applies, a landowner owes no duty to that trespasser. To enact a statute at this point which suggests that "immunity" is going to be provided to landowners may have the effect of upsetting the well-settled law that has been in place in North Dakota for decades. There is no reason to pass a statute when the only purpose is speculation that the North Dakota Supreme Court may someday change its position.

Bottom line, this statute is not necessary. The law in North Dakota on this topic is well established and uncertainty should not be created by introducing the concept of "immunity" into this area of law.