2011 SENATE JUDICIARY

SB 2295

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2295
1/31/11
Job #13688

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:
Relating to recreational immunity

Minutes: There is attached written testimony

Senator Nething – Chairman

Senator Olafson – District 10 - Introduces the bill

Tag Anderson – Director of OMB – Director of the Risk Management Division – See written testimony

Senator Nething – Asks him before the Supreme Court Decision what the status of the law was as it related to recreational use.

Anderson – Explains and gives an example of duty of care.

Senator Nething – Asks if his example was a trespasser.

Anderson – States that is what recreational immunity statutes are designed to do. They effectively say that the duty of care is not dependent on whether they're there under the old common law definitions of an invitee, a licensee, or anticipated trespasser, it doesn't matter. Duty of care that is owed is only to warn against those things that are malicious, wanton, and reckless.

Steve Spilde – CEO of the ND Insurance Reserve Fund – See written testimony.

Senator Nething – Asks him to describe the law and how it affected the land owner prior to the Leet decision.

Spilde – Replies, in his practice or roll they applied the recreation immunity statute as a defense many times successfully. He relates how they did this. He tells of how the Leet Decision changed this.

Senator Nething – Asks if this bill will solve the problem by taking us back to recreational immunity.

Spilde – Replies that is the intent and explains.

Aaron Birst – Association of Counties – In support – Mentions that every time the Supreme Court or the courts broaden the recreational immunity and it allows more suits. He said they have to tell landowners to limit your liability and from a public policy perspective that is a bad thing because recreational use immunity is to encourage landowners to allow people to onto their land. He said every time we open that up to more liability the natural selection would be to push less use. This leads to poor results for the general public.

Jerry Hjelmstad – ND League of Cities – In support of the bill.

Paul Sanderson – Attorney for Zuger Kirmis & Smith of Bismarck – Representing Property Casualty Insurers Association of America. – See written testimony.

Senator Nething – Asks if this will reduce premiums.

Sanderson – Says he doesn't know the impact this bill will have on premiums. He believes it will impact and reduce the number of litigations. He believes this bill will protect innocent land owners.

Dana Schaar – ND Recreation & Park Association – Hands in written testimony for a board member.

Sandy Clark – ND Farm Bureau – In support of the bill – see written testimony.

Senator Nelson – Asks if signs could be put up on property to warn people of dangers.

Clark – Responds they cannot put signs on every gravel pit or slough, it is private property.

Ken Yantes –Executive Secretary of the ND Township Officers Association – In support of this bill.

Opposition

Alan Austad – Executive Director of the ND Association for Justice – Introduces Rod Pagel.

Rod Pagel – Representing the ND Association for Justice – Attorney for Pagel, Weikum in Bismarck. He asks if we should allow recreational immunity to persons who own property or land to everybody who enters on that regardless of the intent and regardless of their purpose. He believes even those that come on the land not to recreate should have the ability to bring a claim for negligence that occurs as a result of that person going onto that property. He said they still have the burden of proof. There are still guidelines and restrictions. He relates a story of hunters coming on his land. He thinks the language is very vague and over broad.

Senator Olafson – Asks if individuals should have common sense.

Pagel – Agrees that common sense should apply. It should also apply to the landowner also. He gives an example of a snow mobile and a barbed wire fence. He thinks it is appropriate to consider the use of that land, who is using that land and why they are on that land.

Senator Nething – Compares a story as a mall walker.

Pagel – He believes immunity applies in that situation under the current status of the law. But under these amendments it would allow a business owner to say you entered for recreational purpose in part, when you became a customer there is still immunity that applies because there is a recreational component to your entering the premises.

Senator Nething – Asks if he isn't invited to come in.

Pagel – Said it doesn't matter under the recreational immunity statute.

Senator Nething – States that because you start out recreational doesn't mean you stay recreational.

Pagel – Explains that the person injured still has to prove the landowner is responsible.

Close the hearing on 2295

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2295
2/14/11
Job #14497

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to recreational immunity

Minutes:

Senator Nething – Chairman

Senator Olafson moves do pass
Senator Sorvaag seconds

Discussion
Senator Sorvaag asks Senator Olafson to explain the bill. Senator Olafson gives a quick overview of the bill. Senator Nelson does not think land owners should have absolute immunity if something were to happen on their property. Senator Olafson responds by saying we need to have some personal responsibility on the shoulders of those who go out and involve themselves in whatever activity on someone else's property. He goes on to say that we do have provisions in the statute to protect people from hazards that are intentionally placed. He does not think natural hazards should be the responsibility of the landowner to provide protection from someone being harmed. Senator Lyson says he is concerned with the broadness of the bill. Senator Olafson reads the part of the code that states the owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes. He says this bill is only adding protection when someone is on the property for recreational purposes and brings someone else on to the property. He says this is a small expansion of what is already in code.

Senator Olafson moves a do pass on 2295
Senator Sorvaag
Roll call vote – 5 yes, 1 no
Motion passes
Senator Olafson will carry

Date: 2/14
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2295

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 Sorvaag

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

SB 2295: Judiciary Committee (Sen. Nething, Chairman) recommends **DO PASS** (5 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2295 was placed on the Eleventh order on the calendar.

2011 HOUSE JUDICIARY

SB 2295

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

SB 2295
March 16, 2011
Job #15516

☐ Conference Committee

Committee Clerk Signature D Penrose / D Shimek

Minutes:

Chairman DeKrey: Opened the hearing on SB 2295.

Tag Anderson, Director of Risk Management Division at OMB: I appear today in support of HB 2295. (See testimony #1). I heard a number of comments since this was first introduced and passed in the Senate that essentially this bill will broaden recreational immunity. Perhaps in narrow circumstances such as the Leet decision itself that might be true. The purpose here is to focus on landowners' intent and bring certainty to the application of recreational immunity; not to broaden the immunity or diminish the duty landowners have under current law. Some of the comments that I have received from a few of the Senators on the other side relative to their opposition to the bill was in the nature that we were taking a right away from someone or somehow letting a landowner get away with something. I think that argument really ignores and trivializes this body's role in defining the duty people have to one another. Ultimately, it is for this Body, the Legislature, to define the duties and responsibilities that people have to one another; not necessarily just the courts. I received some emails in relation to this bill with the suggestion that somehow this was designed to allow McDonalds to claim recreational immunity because they have a play land in their commercial establishment or Scheel's in Fargo because they have the Ferris wheel. This bill was developed by public non-commercial entities; a representative of the Risk Management Division, Steve Stilby from the NDIRF, Association of Counties, Association of Parks. For those entities to make those arguments, I would say those arguments can be made under current law. In fact those arguments are more likely where there is an equal focus on the intent of the individual who is on the land rather than just focusing on the intent and the landowner; him or herself. If a landowner cannot let the world know that its land is open for recreation without knowing what duty he or she owes to those people for coming on to the land for recreational purposes, the inducement to open is lost. Recreational immunity, if you want to call it that, applies only after factual inquiries through trial, is largely meaningless (continued with the testimony). I would just like to finish with an example. This would not apply to a public entity. Let's take a mall in a small town where a group of walkers wants to use the mall for walking in the winter at 5:00 am in the morning. The owner of that mall may say no, I don't have a

cleaning crew coming in there to make sure the property is going to be fit for walking until 8:00 am, but the recreational immunity statutes are designed to deal with that tradeoff where the owner of the premises can allow them to come in with a diminished duty of care. However, if those individuals are in there walking and the mall opens at 9:00 am and they are still in there walking, their presence on the property is no longer the result of the landowner's decision to allow his property to be used for recreational purposes. From our viewpoint, when the mall opens at 9:00 am, they are no longer there because of the landowner's decision or act. So the recreational immunity statute would not apply. I think that is the same arguments that have been raised in relation to McDonald's or Scheel's. They don't open the property for purposes other than commercial business. We need clarification on that issue; we certainly would work with any opposition to come up with language that can deal with that. I think a simple sentence that says this section does not apply to a landowner's decision or act to invite entrance onto the premise for commercial purposes would fix that.

(Handed out Sandy Clerk testimony #2) She was not present.

Rep. Delmore: Recreational purposes include what?

Tag Anderson: Recreational purposes include anything that would be for the pursuit of pleasure activities. It has been amended to include just about anything you could consider to be recreation.

Rep. Delmore: Is it spelled out in Code what those purposes are? Someone is on my property for recreational purposes so therefore I have no liability?

Tag Anderson: No I would not say that is the case. You, as a landowner, have to allow entrance onto the land for recreational purposes in order to claim a diminished duty of care.

Rep. Delmore: May I charge for those recreational purposes?

Tag Anderson: Largely no.

Rep. Delmore: Is it possible to charge for that recreational purpose under this bill?

Tag Anderson: This bill doesn't address this issue. There is a separate statute in Chapter 53.08 that deals with the intent; there can be charging and that section dealt with the fee hunting issue.

Rep. Delmore: If I am a homeowner and somebody comes up my driveway and it is icy and they fall, I don't have any recourse but to pay for what happens to that person, right, even if I may not have invited them to come into my home.

Tag Anderson: If you hadn't invited them onto your premises, I believe they would essentially be a trespasser and they would be at most an anticipatory trespasser and the duty of care would be exactly the same as under the recreational statutes.

Rep. Delmore: How is this different from the Agritourism bill we heard?

Tag Anderson: The Agritourism bill is different. It is dealing with agritourism commercial entities. This bill deals with largely landowners who, without fee, simply open their land for recreational purposes.

Rep. Onstad: How do you deal with section lines, established trails and heavy rain creates a washout across there? Landowners still own their side of that section line, so does this take away immunity from that and put it on the county or township. How do you interpret that situation?

Tag Anderson: There is a separate bill that dealt with the Kappenman decision; a decision where recreational immunity was raised. Although ultimately it was decided on largely different grounds, there was a bill designed to address that and the political subdivisions' responsibilities as it relates to unimproved, unmaintained section lines. With respect to the landowners, the individuals that actually own the land over which the public easement crosses, if they are there for recreational purposes we believe that, as it exists under current law, they could raise that they had no duty of care themselves as the landowner.

Chairman DeKrey: Did you say without the passage of this bill, the decision of the Supreme Court would lessen the landowner's desire to have recreational use on his land. If we are going to possibly be liable, why would you want those people on there? North Dakota's posting law is that it is open unless it is posted for "no trespassing". The state has pretty much a "we are open for business" sign on it for recreation.

Tag Anderson: We believe that the current status of the case law that has been developed, under the recreational immunity statutes, does create a large disincentive for a landowner to open it for recreational purposes. Because the inquiry has become sort of a multi-factored inquiry that includes almost an equal inquiry on the entrance intentions for being there as opposed to simply focusing on the landowners act or decision to open it.

Chairman DeKrey: So basically this bill takes it to where we thought it was.

Tag Anderson: That is correct.

Chairman DeKrey: Thank you. Further testimony in support of SB 2295.

Tiffany Johnson, Legal Counsel for the ND Insurance Reserve Fund: (See testimony #3). This amendment is not intended to expand the current state of the law. Rather it is intended to clarify what we believe the intent of the legislature was in passing the law.

Rep. Delmore: How expensive would insurance be? Don't most people carry some insurance now that would cover something that happened? If I thought somebody was coming on my land and I haven't pointed out anything that is dangerous, isn't there some type of insurance I should have to cover that type of liability; someone seriously injured because I didn't post it and I did know people were coming in?

Tiffany Johnson: This law was passed with the intent to have landowners open up their land to allow people to come on. It doesn't absolve landowners of any kind of duty. It just reduces the duty that the landowner owes to people that are coming onto their land. You still have the duty to guard against any willful or malicious attributes that might be on your land.

Rep. Delmore: As I read this bill it says "or to give any warning of a dangerous condition", uses structure of activity on such premises to persons entering for such purposes. So it doesn't have to be willful, I just don't have to do it.

Tiffany Johnson: The amendment portion that you have there isn't a representation of the entire statute. Section 58-03.05 addresses what kind of duty is still owed to individuals under the act. In that part of the code it does say that you still must refrain from a willful and malicious action.

Rep. Delmore: I do understand willful and malicious; but you can do it in a way that is not willful or malicious, but you can still have knowledge of. That is my concern here. If somebody was seriously injured; what recourse is there for that person who is going on the land, who thinks there is relative safety there and ends up badly injured. Then it is too bad, that is your problem.

Tiffany Johnson: It was a trade-off that the legislature wanted to make to encourage people to open up their land for recreational use. When people are going onto land to recreate, I think the perfect example is a case that I didn't talk about; it is Olson vs. City of Bismarck. I am not sure if that is the correct defendant. In that case there was the person who was sledding down O'Leary Golf Course and was injured; the court reasoned that the person, by sledding, assumed some type of risk and the city wasn't responsible for any injuries that were caused to that individual.

Rep. Delmore: You don't see any difference on the liability issue that sometimes, even though it is not willful, it might not be all on the part of someone coming onto the land for recreational purposes?

Tiffany Johnson: I understand what you are asking. I think at the time when the law was passed, the legislature considered that, they decided that in the interest of the

public they would provide that safety to the landowner. You let individuals come onto your land for these types of uses and we won't hold you liable then for the injuries.

Rep. Delmore: Would it be my understanding that some people could charge for recreational use and have this statute cover them. Is it possible?

Tiffany Johnson: No, I do not think that is possible under the current statute. The statute only allows someone to raise the recreational immunity defense if they did not charge; if it was free for the individual to come onto the property. If you charge you lose the immunity.

Rep. Klemin: If you charge you can still be have this diminished duty of care if you don't charge too much. I think the way the statute reads, if the charges don't exceed certain amounts.

Tiffany Johnson: I guess I am not familiar with that in the statute. When I read the statute it said without cost. I think you might be talking about 58-08-05.

Rep. Klemin: That is the section; as long as you don't charge too much. As long as it is not more than twice as much as property taxes and four times the amount in the previous calendar year and for agricultural land four times the amount of property taxes for the previous calendar year. So if you do charge more than that then you lose.

Tiffany Johnson: Thank you for clarifying that, I apologize if I got that wrong.

Rep. Hogan: How do you feel about Tag's proposed amendment that we might want to consider?

Tiffany Johnson: I spoke with Mr. Anderson yesterday about his proposed amendment. I think his amendment still accomplishes the goal that we have set out to accomplish by the amendment we had previously suggested. Not everything is perfect and certainly language can always be changed to be better. Whatever language is proposed that still accomplishes the same intent we would not have a problem with it.

Rep. Koppelman: The bill ends with "or", can you tell us what follows in that subsection 2.

Tiffany Johnson: I know that what you have is a portion of it and I don't have the entire thing memorized so I am not sure what comes after that.

Chairman DeKrey: Thank you. Further testimony in support.

Dana Schaar, ND Parks and Recreation Association: Introduced Ron Merritt.

Ron Merritt, ND Recreation & Park Association & Director of the Minot Park District: (See testimony #4).

Rep. Delmore: If this bill passes, you would still carry insurance that would cover your liability if it was indeed your fault that something happened to one of our citizens?

Ron Merritt: Yes, we would still carry the insurance. I think premiums last year were about $90,000 for insurance to cover us. The insurance is there to protect us if it were our fault. We have fewer claims toward us that end up being our fault than you would guess. Most of the claims; someone is injured on our property, so their insurance company requires them to file a claim against us. The NDIRF represents us using the recreational immunity statute; they are able to either settle or deny the claim without us having to go to court.

Rep. Delmore: It would be clearer because of this bill that it was not your fault?

Ron Merritt: The language clarifies the recreational immunity statute and makes it easier for the company that is representing us. If it is obvious that it is not our fault, they either deny a claim or settle with them without it going to court. It would clarify and make it easier for them to do that. Which in hand would save us a lot of money on insurance premiums, basically?

Rep. Delmore: So you believe your insurance premium would also go down because of this bill?

Ron Merritt: I don't often see insurance premiums go down on anything so I have no hope of that happening.

Chairman DeKrey: Thank you. Further testimony in support.

June Herman, Vice President of American Heart Association: (See testimony #5).

Rep. Delmore: I know that the schools in Grand Forks are close to 24/7 for various activities, but would you agree or disagree that this bill opens things up considerably just from schools, park boards and those types of things. It seems to open the law up for anybody for reason it says they are doing a recreational activity.

June Herman: By having this clarified we still see the schools having the ability to enter into the joint use agreement so they would purposely work with other entities for use of the grounds and schools probably very much like you do. In your case, the advice perhaps to the school district to enter into those types of agreements was provided locally and it was given a green light. There are other schools and I happen to live in the school district that got the opposite advice. You might not want to allow use because there could be some extended liability. We had assessed

code prior to seeing this bill come forward and it was identified we need to be clear in order to encourage more joint use relationships between the schools and groups who want to use them for recreation.

Rep. Delmore: As I read this bill, Rep. Onstad's land would be subject under the bill; the land he owns, which is quite considerable.

Rep. Onstad: The recreational use statute, isn't there a difference between somebody hunting pheasants, walking across a meadow or slew vs. a city park that just put up a skating rink or a school that constructed playground equipment. Isn't there a difference between nature vs. construction?

June Herman: We are here to speak in support of the bill because it clarifies it from the school prospective. As far as all the other elements, I will defer to the others that are here to testify to the benefit of the bill in regard to the broader use.

Rep. Onstad: I was talking about specific use and clarity; not knowing the details of that particular court case I don't know if we are looking to broaden the exception or not so, that is the reason for the question. There seems to be quite a difference asking to say that we are not responsible for you swinging on my swing set vs. somebody that shows up and hunts pheasants on my property, as Rep. Delmore said. I don't know if the recreational use intended that difference there?

June Herman: We do see one of the benefits of the bill as written it does enable us to encourage the joint use of the schools.

Chairman DeKrey: Thank you. Further testimony in support.

Aaron Birst, ND Association of Counties: In support of the bill. Counties have at least 37 county parks that they own or support. Many in primitive conditions so for the following reasons you heard we support the bill.

Rep. Koppelman: I am curious what your take is on this. Rep. Klemin was questioning Ms. Johnson about the failure to warn and the willful malicious statute which is 53-08-05. It does talk about the various levels of charges that he referred to, but in 53-08-03, which is the second section two of the bill that we are amending, it does say without charge. Are you familiar enough with that statute to clarify to the Committee what the effect of this bill would be with respect to charging or not charging for access to land; whether it is a political subdivision or a private land owner?

Aaron Birst: I am not as familiar with the recreational immunity. What I can tell you, is that counties are generally not charging any significant amount. If the committee felt that this language was too broad and would encompass more commercial uses that was not our intent. Our intent is basically for those free county parks that we keep open.

Rep. Koppelman: Do counties have campgrounds where they do charge and how would that be affected?

Aaron Birst: My basic understanding is if there are some charges you lose that protection. I can't honestly tell you if we charge enough to meet that protection. I will look at that and get back to you.

Chairman DeKrey: There is an old saying that an army on foot patrol that the first soldier wakes the snake up; second soldier ticks it off and the third one gets bit.

Rep. Delmore: Is hunting included as a recreational activity?

Aaron Birst: I believe so. I know the hunting parties in previous legislative sessions came in to clarify some of that too. That was one of the primary drivers of some of the charging too.

Rep. Delmore: Do you carry insurance on parks in the areas where people are and how expensive is it and would you still need it if we have this bill which seems to say you are kind of at your own risk.

Aaron Birst: Yes we do carry insurance. I do not know how much it is. I can try and find out. I can guess that the insurance reserve doesn't quite break it down so far for county government. I am assuming it would not go down if this bill is passed. I am assuming we would continue to pay because in those cases where recreational immunity wouldn't apply we would be liable so we would need some sort of insurance coverage.

Rep. Hogan: Parks and school boards often charge fees for recreational activities. How do you see that applying under this bill?

Aaron Birst: The intent was to just apply this, as least from the county prospective, for those county facilities that charge the absolute minimum or are free. That was our intent.

Chairman DeKrey: Thank you. Further testimony in support.

Keith Magnusson, ND League of Cities: We are here in support of this bill also. There is a whole wide range of recreation around. Entities do carry insurance because there may be something that is their fault. Also just because there is a bill or law like this doesn't mean somebody isn't going to sue; you have defense costs and all of those things. This is really trying to get is back to what the legislature and people intended when the original law was passed. My previous things have been in transportation and banking.

Rep. Steiner: Are you familiar with the Leet vs. City of Minot case?

Keith Magnusson: No I am not.

Chairman DeKrey: Thank you. Further testimony in support.

Chris Brosert, ND Farm Bureau: I believe that this bill has a lot to do with personal property rights. On my farm, I have people entering my property for recreational purposes on a regular basis; snowmobiling or hunting. Some have permission and some do not. I cannot be personally responsible for their actions while they are on my property. I don't feel that if they have an accident that I should be liable for their actions. I by no means want people to have an accident on my land, but farmland is inherently dangerous by nature. It has some hazards. I appreciate the efforts of the sponsors introducing this bill. It will add in strength in the liability law for landowners. I would encourage you to pass this bill. I would be happy to answer any questions.

Rep. Koppelman: You don't post your land. You allow people to hunt, snowmobile, and whatever.

Chris Brosert: That is correct.

Rep. Koppelman: Do you think you might be less likely to have people on your property if this law would pass?

Chris Brosert: Yes I believe it would. It would be something I would be afraid of, on my farm, if somebody would bring a suit against you. I do carry liability insurance, but I believe what I have now is just a million dollar blanket policy. It is possible someone could sue you for $2 million. It is a threat to my farm.

Rep. Delmore: I am interested in the snowmobiling as well. I serve on the transportation committee. If you had a trail going through your land, you would have to post it would you not?

Chris Brosert: I believe that is correct. I am not positive.

Rep. Delmore: I think it is a voluntary basis. If you knew there were certain areas that are a rock pile, would you try to post it or so something?

Chris Brosert: Yes, I would post that area or mark it with a flag even if it is posted.

Chairman DeKrey: Thank you.

Senator Olafson: Sponsor of the bill and in support of the bill. This bill is designed to close loopholes in the recreational immunity laws; I think this is an important protection for our landowners in the state. I am sure you heard quite a bit of testimony on the bill so I stand for questions.

Rep. Klemin: We heard testimony that this bill is introduced in response to a decision by the ND Supreme Court case, Leet vs. City of Minot. Was it your intention as the prime sponsor of the bill to reverse the result on that decision, or redirect the focus back to the landowner rather than the user?

Senator Olafson: Yes there have been a series of Supreme Court cases on this issue from the research I did. There was a 1987 Supreme Court case, a 1997 case which reversed the '87 decision; then the 2006 case that you are referring to. My intention was to clarify that immunity would apply, not only to the initial person entering the property, but also for any subsequent person who was related to the first person is my understanding of what we needed to close as a loophole. My intention is to try and protect the landowner.

Rep. Kingsbury: The previous testifier was asked if he knowingly had a rock pile on his land, would he post it if he knew it was there and a potential hazard. If he posted that rock pile, and it was under the snow, or if there was a boulder of some kind under the snow, is he liable for not posting that one if he did know?

Senator Olafson: I think you are familiar with the area around my ranch. If I started posting every rock, I would have to go out and buy another semi-load because the glacier which came through ten thousand years ago was kind enough to leave about 1,000 acres of property that I own covered with rocks. That is the point, there are a lot of natural hazards out there; if we have to warn everybody of every natural hazard that nature places out there, we would have the prairie of North Dakota covered with posts with red flags on them and I don't think that is what we want.

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

Allan Austin: We oppose this bill as written. To answer the legal questions, I would defer to Jeff Weikum from Pagel Weikum Law Firm, who is representing our Association.

Jeff Weikum, Pagel Weikum, PLLP: (See testimony #6). It is really up to you who they want to protect. What the Supreme Court did in connection with the Leet decision in the Leet vs. City of Minot was to say if you are coming on the land to recreate there is immunity for the landowner. The Supreme Court said if you are coming on for some other purpose like in the situation with Mr. Leet, you are coming on because that is what your employment is; that is what your job is and that is what your employer told you to do. You are not coming on to recreate; therefore, it is not fair. The law as it stands right now, doesn't differentiate if you are coming to do your job that there is immunity. That is really where the focus of this discussion today obviously should have been. Much of the discussion you heard about is if I have somebody come onto my land to shoot pheasants am I immune if they get injured in accordance with the statute. Absolutely and that continues; it continues even if you vote no on this Senate bill. What this Senate bill does, it says if I as an employer

tells my employee you are going to go to this recreational event for your job. If I run an electrical or plumbing shop and they need somebody to come in and do something electrical or plumbing etc. That person goes in there and they get injured through the negligence of the landowner. Let's say the landowner is negligent and a recreater comes on the property and the law in the normal circumstance say this landowner did something wrong, that recreater has no recourse. The Supreme Court, in the law that stands now, says if you go there not to recreate, but because of your job, you do have recourse. That is what the Supreme Court said in Leet. That seems like it was equitable. You have the power to protect the people you want to protect. But some of the people that you won't be protecting any more are firemen. If that fireman, while he is on the job, is injured as a result of the negligence of the landowner; his recourse in SB 2295 is nothing. He can go through WSI and they will probably hear about that. As we know WSI is only a partial recourse. It only pays you partial wages. Long term disability is not there to the extent that it needs to be there. City, State and County employees who are at these events to put up brochures to show what they are doing to promote the state; they will no longer be covered if the negligence of the landowner causes them injury. They are out. So it depends on who you want to protect. Teachers go on lots of field trips; the landowner invites them to their business, and the teacher is injured. The kids aren't covered right now because of recreational use. They would be there for educational purposes, but the teacher who doesn't have a choice. She goes on a field trip, if this law passes, she puts herself at risk and her recourse against a negligent landowner is nothing. What it does is shift the burden. Who is going to pay for those medical bills; who is going to pay for the lost wages if the negligent landowner and their insurance company is not responsible. WSI is going to be responsible; Medicaid is going to be responsible; the health insurance company is going to be responsible. It is a shifting of who is responsible; it depends on who we want to protect. I think there needs to be some work done on this because I think we want to understand the impact of it. We are certainly willing to work with Mr. Anderson and any other supporters to try and develop some language that will work. As Rep. Klemin indicated, it is a graduated scale as to whether or not you still get immunity depending on how much you charge. I would answer any questions.

Rep. Boehning: You give a lot of examples here. You talked about the teacher taking a recreational field trip. Rep. Delmore is walking her kids down to the lunchroom, falls and breaks a leg. She is on a field trip and walking along and falls down and breaks a leg. She is in her course of work educating students etc. WSI will cover her whether she falls in the school or whether she falls on a field trip. They are both an educational part of it. Wouldn't they?

Jeff Weikum: The issue is going to be when she signs on to be the teacher; she understands if she is injured, as many of us are, in the course of our employment, we have WSI. WSI and the statutes that we have in place right now said if you are injured through the negligence of a third party you are entitled to your full recourse, as well as states that WSI is entitled to recourse so you are able to bring that claim and that is the difference. That is the statutory difference with everyone. What this

does is it carves out another exception to that. Instead of protecting our employees, the citizens of the state in those situations, we are going to carve it out again because we want to protect a landowner to allow recreaters on his property. When the person is injured, like in the Leet case, and isn't a recreater, they are there for a job. It seems massively inequitable and opposite of the intent of the recreational immunity statute. The recreating statute does not say if I open up my land to recreation anybody can come on. The reason it doesn't say that is because that would be an absurd purpose and this takes it a step in that direction.

Rep. Klemin: In the Leet case, if I understand what you are saying, Mr. Leet was at the Minot City Auditorium as a part of his employment for someone else to build a booth that was going to be used during a senior event the following day. The senior event was a recreational purpose or use of that Minot city auditorium and he was there as a worker to build this booth and he was injured. In the bill it says whether the entry or use is for recreational purposes or related to the recreational purposes of other parties. So his work there to build this booth was related to the recreational purposes of other parties. Is that what would give the diminished duty of care in this case to Mr. Leet because he was there doing a job which was related to the recreational use of other parties the next day?

Jeff Weikum: That is exactly right.

Rep. Onstad: In the testimony, you talked about a recreational event and then we have recreational use. Is there a difference in those two terms?

Jeff Weikum: Basically, and by statute, it talks about what is included in recreational immunity. It is very broad and talks about what the design and purpose of it is; whether it is recreational use or a recreational event. The recreational use would take place at the event, in the case of Leet.

Rep. Onstad: It seems to me the intent of recreational use, 53-08, seems like everybody else has a different intent or definition of intent. What do you perceive as the intent of the original section 53-08?

Jeff Weikum: What seems to be the appropriate statutory and equitable intent, as well as the intent of the Supreme Court, as designed by Leet, is that if you are going somewhere to recreate, in exchange for you to go recreate there, we are going to immunize the landowner and give them a lesser burden with respect to the duty they owe you. However, if you are going there for your job, then you are not going to be held as someone who is a recreater; therefore, the landowner is not immunized and they have the regular duty that they would have to anybody who is coming onto their property.

Chairman DeKrey: So the way you see it; if Rep. Delmore is taking her class out to a farm to do a corn maze, and that would be recreation, the way they have the bill written the landowner would not be liable if she trips and breaks her leg. But the

way you would like to see it is if she would be covered then by the landowner's liability if she would trip and break her leg because she would be going for a recreational use.

Jeff Weikum: The analysis at that point is going to be the same as the analysis was in Leet and if she is the recreater and if she is going to recreate, then the immunity applies. If it is her job and her employer said this is what you are going to do with the 5th grade class this Tuesday; then she is not a recreater, she is working and it is not equitable or fair and right now it is not the law,.

Chairman DeKrey: What if no one sent her. She just wanted to take her class out and see this corn maze?

Jeff Weikum: That would be a fact question, as to whether or not she was doing it as a teacher and part of her job or whether she was doing it as a personal fun day. If it is a personal fun day, she is a recreater.

Rep. Delmore: However, these people would still be required to carry some sort of liability insurance. Would that be your interpretation?

Jeff Weikum: My understanding is they would continue to carry insurance because they are going to have other individuals and citizens of the state that are going to be on that property; they are going to want to make for sure that they are covered in the event that somebody is injured. Yes.

Rep. Delmore: It could still be taken to court if indeed I was taking my children out whatever. I still have a legal right to recourse. It might be a little more difficult to prove. Hopefully there is insurance there somewhere if I am injured bad enough that can compensate me.

Jeff Weikum: If you are acting in your capacity as the student's teacher, you take them out to the corn maze and are injured in your capacity as a teacher, if this bill is passed and is in place when you do that, there will be immunity that will apply and you will have no recourse other than WSI.

Rep. Klemin: Seems like there should be a distinction made between someone who is directly participating in the recreation, whether they are paid to do it or not, like a tour guide or teacher who is basically supervising the children and someone that this there to facilitate recreation by others like building the booth. I am not so sure that I agree that the diminished duty of care should not apply to the teacher who is directly participating in that recreation or the tour guide who is leading a group vs. Mr. Leet's situation where he is there not participating in the recreation at all. He is there to facilitate it in some manner like clean up the trail before people came walking along. Shouldn't there be a difference between these kinds of things?

Jeff Weikum: Yes, there needs to be definitiveness in the statute. Under this statute, in preparation for a recreational event, the landowner could have someone come out. A plumber or election and work on the facilities to do that. That individual being injured because it is within the realm of the recreational event could have no recourse against the landowner. That is exactly what this is. The broadness you are talking about is well taken and we are certainly willing to work with Mr. Anderson or anybody else to try and give some definitiveness to this statute. At this point this bill is very broad and includes everybody.

Rep. Koppelman: You are saying if Rep. Delmore took her class out for the corn maze tour that we talked about earlier, the children would apply under this statute. They would not have recourse against the landowner. If the bill would not pass, Rep. Delmore would, as the teacher, because she was there as part of her employment. On the other hand, if Rep. Delmore was a den mother for a cub scout troop in the evenings and she took them out on the land not as part of her professional responsibility, but in a leadership role, how would that apply to her?

Jeff Weikum: Again it would be a factual analysis, exactly like what we saw in Leet, with respect to the purpose of being there. In that situation, because she would not be in an employed capacity similar to what was done in Leet, it is a much bigger departure from the Leet decision so my guess would be that immunity would apply to the den mother.

Rep. Koppelman: If she were out there with a group of friends for a recreational tour, then it would not apply either under current law or if the bill were to pass because of the recreational use.

Jeff Weikum: Absolutely. The landowner would be immunized against that.

Rep. Koppelman: So you expect everyone in North Dakota to have the legal sophistication to do that analysis; determine before they allow someone on their land, is Rep. Delmore here as an individual doing recreation, is she here as a den mother leading the cub scouts, or is she here as a teacher and does that put me in some kind of legal liability threat situation.

Jeff Weikum: Absolutely not. I don't think it is up to the landowner to try and determine who is coming on the land and when. I think it is up to the legislature to try and define that for them, so that it is defined when their insurance company is looking at valuing the risks and have their actuary's evaluate that to provide proper protection. That is how it is done. So the structure to which you set the framework is the structure to which the insurance companies are going to be able to set the liability. They would say this is what the responsibility is going to be of the landowners.

Rep. Koppelman: Farmer Jones is saying the kids from school want to look at the corn maze tomorrow and that is purely recreational in his or her mind obviously they

are allowing people on their land for recreational purposes. My point is they would not have entertained that idea nor would their insurance company have entertained the minor distinction between the fact that 28 kids are going to be out there for recreational purposes, but their teacher and bus driver are not because they are acting professionally.

Jeff Weikum: I think the insurance company would understand. They deal in exactly that issue and they split hairs on exactly that issue on everything they are doing.

Rep. Koppelman: The point is, the insurance company does the underwriting and risk analysis; Farmer Jones buys the insurance. The farmer is not going to entertain that particular situation. When the school calls at 2 pm on a Tuesday afternoon and asks if the kids can come out afterschool; Farmer Jones isn't going to make the decision.

Jeff Welkom: Right, the farmer wouldn't be making that decision.

Rep. Delmore: Just for the record, I would be very careful.

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

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

SB 2295
March 23, 2011
15867

☐ Conference Committee

Committee Clerk Signature

Minutes:

Chairman DeKrey: We will take a look at SB 2295. We had a subcommittee on that.

Rep. Klemin: The amendments to SB 2295 were passed out (see attached 1). We held a couple of meetings at which the various parties, both for and against, came and proposed amendments and discussed them. The background for this bill came from at least two Supreme Court decisions that have been written relating to the recreational immunity statute. The subcommittee has read those decisions; personally, I think they were very well reasoned and good decisions. The point of this is that in those decisions there were some fact situations in which the recreational immunity statute was found not to apply. Basically the way the bill is written, the owner of the land has no duty of care to leave the premises safe for entry or use by others for recreational purposes. That's the law now. If this bill were to fail, for example, that would still be the law; that there is no duty of care. The question has really become, under those Supreme Court cases, that the person who is entering this land, what is that person doing there. Is that person there for recreational purposes or is that person there for some other reason.

The point of this bill is to reverse the Supreme Court decisions. In one case, that was the reason for this bill to be here to start with, Leet vs. City of Minot. We don't know all of the facts of that case but the facts that were relied upon by the Supreme Court basically tell us that the City of Minot has a city auditorium that was going to be used for a Senior Event of some sort. That event would be a recreational use of that auditorium in Minot. At that senior event, there were going to be various vendors there with booths to show different items to the seniors. Mr. Leet was hired by one of those vendors to go to the city auditorium, the day before the event, to build a booth and set it up and get it ready for the event. He was there working, constructing the booth. Before he got there, however, the City of Minot had its employees put up curtain dividers up in the city auditorium. Those curtain dividers were held up by pipes and Mr. Leet was in the auditorium working on the booth when that curtain divider fell and the pipe hit him in the head, injuring him. The City of Minot, as a defense, claimed it was immune because of the recreational immunity

statute; that Mr. Leet was there because of the recreational purpose of these other people that was to take place the following day and; therefore, the City of Minot should be immune from liability under the recreational immunity statute. The Supreme Court disagreed, and said that he wasn't there for recreational purposes; he was there because of his employment. There really wasn't a dispute about the fact that the City of Minot was negligent in the way its employees set up these curtains and regardless of what Mr. Leet was doing, or why he was there, he was simply underneath the pipe when it fell off the ceiling and hit him in the head. The bill as you have it before you, says that the owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes...then it goes on to say ...irrespective of the location and nature of the recreational purposes and whether the entry or use by others is for their own recreational purposes and here's the Leet part....or related to the recreational purposes of other parties. Now you put that in and the City of Minot would then have recreational immunity from a claim by Mr. Leet, because he was there due to the recreational purposes of other parties. The political subdivisions and the State of North Dakota want to clarify and/or maybe even expand the recreational immunity statute to make sure that they get recreational immunity under all circumstances regardless of the situation. In the course of the subcommittee meeting, we had a number of amendments to this bill presented to us by Tag Anderson, who's with Risk Management for the State of North Dakota. Basically these are his amendments, somewhat modified by the subcommittee and also with some changes suggested by the plaintiffs' attorneys who were also participating in our subcommittee meetings. I'm not sure that I'm entirely satisfied with these amendments, but I don't know that they will take care of Mr. Leet's situation if it should happen again, but they do take care of a number of situations.

The way the recreational immunity statute is, basically if an owner of land doesn't charge for entry onto his land, then that owner is immune unless he charges over a certain amount as we passed this statute a couple of sessions ago. If the owner of land does charge, he can charge up to a certain amount, and if he charges beyond that amount, he doesn't get the recreational immunity anymore because he is charging for entry to his property. It's based on taxes. Part of the problem is that the State of ND and the political subdivisions don't pay taxes so we can't really look to that to determine if they are charging too much; they do charge something, like there may be fees at a state park for example. There will probably be an access fee and I'm informed that's not an access fee for the individual to come in, but rather a fee for vehicles to come in and park. There is a definition of charge in this statute, and so the first amendment is to amend that definition of charge to say that it does not include vehicle parking, shelter or other similar fees required by any public entity. For example, if you are at a city park and they have a shelter fee that they charge if you want to reserve the shelter that would not be a charge under the statute that would say that if they charge they can't use the statute. You can use those shelters anytime just by walking into the park and sitting down there. But if you want to reserve them, you have to pay a fee. The mere fact that they charge that fee shouldn't mean that they are charging for use of the property. That's the jist of the

first amendment. The second definition is commercial purpose. That comes in because of the change in section 2. Section 2, the first part of this is the bill that you had before you already, except that we changed the word "irrespective" to "regardless", which is the term that is more commonly used in statutory language. Instead of saying that the recreational purposes are related to the recreational purposes of other parties, we say instead, directly derived from the recreational purposes of other persons. The intention there is to say that there must be more to the reason why the person is there. If he's not there for his own recreational purposes, there must be more to him being there other than it's related somehow, whether directly or indirectly to the recreational purposes of other parties. Instead it has to be directly derived from those recreational purposes. Maybe that will take care of the Leet situation, I'm not positive. We might have to have the Supreme Court tell us whether it does or not. That was directly derived from language that was agreeable to both Risk Management and plaintiffs' attorneys. Then, at the end of the new section 2, there is an additional amendment, that says that the section does not apply to persons who enter land to provide goods or services at the request of an owner, or to an owner engaged in a for-profit business venture, that directly or indirectly invites members of the public onto the premises for commercial purposes or during normal periods of commercial activity in which members of the public are invited. That arises in this amendment because of the second Supreme Court case that came up. That involved the Gateway Mall here in Bismarck and there was an event that was being sponsored by a church that was actually a tenant in the Mall. The church rented a space in the mall for its church purposes. They had an event out in the parking lot, and some person was injured at that event; they stepped in a hole and broke her ankle and she sued both the Mall and the church. They raised the issue of recreational immunity. The Supreme Court reversed, saying that the event was really being put on for commercial purposes because the Mall was trying to attract customers by allowing this event to take place out in their parking lot and the church was trying to attract new members to the church so they had their own motivation and it was not really recreational purposes that was behind the event that resulted in the person being injured. This amendment here at the end of section 2 is trying to take care of that situation where members of the public are coming in and they directly or indirectly invite members of the public onto the premises for commercial purposes or during normal periods of commercial activity. So if, for example, one person had gone to the Mall to shop and had stepped into this hole and broken his/her ankle, that person would have been covered anyway, if the Mall/landlord was negligent because he wasn't there for recreational purposes. It shouldn't really make any difference if somebody is there looking at this car show in the parking lot. The other way this might apply is if an owner of land is not charging for an event on his property somewhere, and it's not a commercial venture of any kind, but in order to prepare that land for an event that's being held on that person's property for recreational purposes, the owner hires somebody to come in and do some preparatory work, such as stringing up lights or whatever they are doing. That person gets injured due to the negligence of the owner who asked him to come and do it. The way the statute is right now, arguably there would be a claim of recreational immunity, even though it doesn't seem to make a whole lot of sense that

the owner asks the person to come out and do some work. The way the bill was originally written, related to the recreational purposes of others. If that language was left that way, then the owner could claim recreational immunity even against the injury by the person he asked to come out and do some work. That's another reason for the language we've got at the end of section 2. That's where the term "commercial purposes" is used, so you have to go back to the definition of "commercial purpose" in section 1. We put in a definition of what a commercial purpose means and it could mean a couple of different things. I don't need to read all that to you, but the point is, that at the end of that section, it says a commercial purpose does not include the operation of public lands by a public entity, except those direct activities for which there is a charge for goods or services; such as, if the public entity required some kind of fee for somebody to come in and use something on the public property, just because they were charging a fee to do that does not make it into a commercial purpose.

Rep. Hogan: So, for example, the home improvement shows at the Civic Auditoriums in various towns that would be considered a commercial use.

Rep. Klemin: It could be, but it wouldn't necessarily be the city. I'm sure that the City of Bismarck would require the sponsors of that homeowners show to have liability insurance covering the city also, in the event there was an incident there.

Rep. Hogan: So Pride of Dakota shows, those are run by the State and often in public buildings. Either the state or the local building would have to have coverage for them.

Rep. Klemin: This statute does not go into who has to have insurance. As a practical matter, I believe that the city isn't going to allow someone to go in and do these kinds of activities without making sure that they have liability insurance.

Rep. Steiner: Class B boys basketball in Minot, they charge $3 a vehicle to go in and park. Hundreds of people are parking back there. The charge does not include vehicle parking, so meaning that if I get out of my car, break my ankle, does this have anything to do with this being a recreational event at Minot State or the ND High School Activities Association. How does that all relate to that. Or you walk on the parking lot and you're just walking your dog, you're not going to the basketball game and you break your ankle. Are there two different standards there?

Rep. Klemin: I think they are the same standard; they would probably claim recreational immunity in both cases because walking your dog would be a recreational activity, the way it is defined already. It's so broad that it would cover both situations.

Rep. Onstad: As we continued to ask questions, it brought up more issues. It was clear in there that a park can charge for access and as defined, they are immune to it, but as soon as you, the landlord, charge, you are not immune based on this. For

that reason, I am against that portion. If we really pass the bill, the commercial purposes are needed because they are trying to separate out the commercial use vs. the private landowner part. We tried to cement as much as we could and even though it was submitted that way, whether we are all in favor of what it is or creating a bigger problem by trying to indemnify all of these situations out. On one hand, we're trying to minimize risk. As a risk manager you try to minimize risk as far as we can; yet Rep. Klemin is right, he still doesn't know if that would help the situation. The law cases that are brought forth, everybody kind of agreed that they were probably the right determination. If an amendment was going to be passed, it would probably be the one that Rep. Klemin offered the very first time when we heard the bill.

Rep. Klemin: To continue with section 3 amendment on this. The first part of this is in 53-08-03. In that section, you don't have the whole section before you, but basically it says that subject to the provisions of section 53-08-05, and that part talks about the amount that is charged, whether it's equal to taxes or a certain amount. An owner of land who either directly or indirectly invites or permits without charge, and this is the reason we need the definition of "charge", any person to use such property for recreational purposes does not thereby extend any assurance that the premises are safe for any purpose, confer upon such persons the legal status of an invitee or a licensee to whom a duty of care is owed, or assume responsibility for, or incur liability for any injury to a person or property caused by an act or omission of such persons. The original bill amended subsection 2 of this section, "confer upon such person the legal status of an invitee or licensee". Those people have a different status under the law and they are not just someone wandering onto the property to use it for recreational purposes of some sort. The original bill said, "Confer upon such person or any other person whose presence on the property arises out of those purposes". We changed that to say, "Directly derived from those recreational purposes" so it's consistent with what we said in section 2 of this amendment. Then we added on to the end of that section, "other than a person who enters the land to provide goods or services at the request of the owner", so that the owner can't claim recreational immunity for someone he asked to come and do work just because the person was there for recreational purposes of some other people for which there was no charge. I hope that's not too complicated. That last clause in section 3 was put in to be consistent with the last part of section 2. That's the amendment and I can see where there will be some circumstances from a public entity perspective that the way the Supreme Court is analyzing these cases; the Supreme Court is analyzing them from the standpoint of what was the purpose of the person who was there. Was he there for recreational purposes, was he there for another reason, like employment? If it was employment, then maybe the recreational immunity statute doesn't apply regardless of what the employment was for. A good example given to us was, let's say that a school class goes out to a state park, and we've got the students, the teacher and the driver in the bus. The bus driver is there for employment because he drove the bus to get to class there. The teacher is there for employment because she is there to supervise the class on the field trip. The students are there for recreational purposes under our definition

because recreational purpose includes any activity engaged in for the purpose of exercise, relaxation, pleasure, or education. So, if a student gets injured at a state park for some reason related to the negligence of the public entity that runs the park, recreational immunity statute says you can't recover from the state park because they have recreational immunity. The question is, if that same thing happened to either the bus driver or the teacher, who was there for employment, does the same thing happen. Logically, you would think that they are really there for the recreational purposes of others (the field trip). Otherwise you'd have to tell the teacher and the bus driver to stay on the bus and not get out while they are on the property. I can see the dilemma that the public entities are placed in with the way the Supreme Court is looking at why are they there for employment. Mr. Leet was there for employment. I think the amendment takes care of that situation because the reason the bus driver and the teacher are there is directly derived from the recreational purposes of the students. I have to tell you that almost of these amendments were brought to us by the people who put the bill in to start with. They are trying to clarify what they originally proposed. I think in recognition of all of these questions that the subcommittee raised and some of you raised here this morning, that those are the amendments we drafted and I think it does take care of some of the issues. It gives back some recreational immunity that the Supreme Court has taken away, but it doesn't give it all back. I move the amendments.

Rep. Beadle: Second the motion.

Chairman DeKrey: Further discussion.

Rep. Kretschmar: Well, I'm always a little reluctant to grant immunity that goes beyond the immunity that any of us have in the public have. I think this is a broad amendment. Is there somewhere in the statute that eliminates the question if the entity is acting with gross negligence or deliberation.

Rep. Klemin: There is, that's in section 53-08-05, which says that this chapter does not limit, in any way, any liability that otherwise exists or 1) willful and malicious failure to guard or warn against a dangerous condition, use, structure or activity...that kind of addresses your concern.

Chairman DeKrey: We will take a voice vote. Motion carried. We now have the bill before us as amended.

Rep. Maragos: I move a Do Pass as amended on SB 2295.

Rep. Kingsbury: Second the motion.

Rep. Klemin: If this Senate bill does pass, it's probably destined for a conference committee. I think it is a workable compromise of what was originally sought by the people who put the bill in to start with and also towards protecting people who are injured due to the negligence of someone else that's really not because of a

recreational use of the property. I urge a Do Pass. Otherwise, we are left in limbo with the Supreme Court decisions because they seem to do shift the focus from the immunity to why were you there. As I said, recreational purposes is so broadly defined, I think that's been subject to amendment over the past number of sessions itself. Those Supreme Court cases go through the whole history of that section. I think we are probably about as fair a situation as we can get.

10 YES 2 NO 2 ABSENT **DO PASS AS AMENDED**

CARRIER: Rep. Klemin

11.8246.01001
Title.02000

Adopted by the Judiciary Committee

March 23, 2011

VK 3/24/11 1pg

PROPOSED AMENDMENTS TO SENATE BILL NO. 2295

Page 1, line 1, replace the first "section" with "sections 53-08-01 and"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Section 53-08-01 of the North Dakota Century Code is amended and reenacted as follows:

53-08-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Charge" means the amount of money asked in return for an invitation to enter or go upon the land. "Charge" does not include vehicle, parking, shelter, or other similar fees required by any public entity.

2. "Commercial purpose" means a deliberative decision of an owner to invite or permit the use of the owner's property for normal business transactions, including the buying and selling of goods and services. The term includes any decision of an owner to invite members of the public onto the premises for recreational purposes as a means of encouraging business transactions or directly improving the owner's commercial activities other than through good will. "Commercial purpose" does not include the operation of public lands by a public entity except any direct activity for which there is a charge for goods or services.

3. "Land" includes all public and private land, roads, water, watercourses, and ways and buildings, structures, and machinery or equipment thereon.

~~3.~~ 4. "Owner" includes tenant, lessee, occupant, or person in control of the premises.

~~4.~~ 5. "Recreational purposes" includes any activity engaged in for the purpose of exercise, relaxation, pleasure, or education."

Page 1, line 6, overstrike "**landowner**" and insert immediately thereafter "**owner**"

Page 1, after line 6, insert:

"1."

Page 1, line 8, replace "irrespective" with "regardless"

Page 1, line 10, replace "related to" with "is directly derived from"

Page 1, line 10, replace "parties" with "persons"

Page 1, after line 12, insert:

"2. This section does not apply to:

a. A person that enters land to provide goods or services at the request of an owner; or

b. An owner engaged in a for-profit business venture that directly or indirectly invites members of the public onto the premises for commercial purposes or during normal periods of commercial activity in which members of the public are invited."

Page 1, line 16, replace "arises out of" with "is directly derived from"

Page 1, line 16, after "those" insert "recreational"

Page 1, line 17, after "owed" insert "other than a person that enters land to provide goods or services at the request of the owner"

Renumber accordingly

Date: 3/23/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2295

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 11.8246.01001 02000

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

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Maragos Seconded By Rep. Kingsbury

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) 10 No 2

Absent 2

Floor Assignment Rep. Klemin

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

REPORT OF STANDING COMMITTEE

SB 2295: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING). SB 2295 was placed on the Sixth order on the calendar.

Page 1, line 1, replace the first "section" with "sections 53-08-01 and"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Section 53-08-01 of the North Dakota Century Code is amended and reenacted as follows:

53-08-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Charge" means the amount of money asked in return for an invitation to enter or go upon the land. "Charge" does not include vehicle, parking, shelter, or other similar fees required by any public entity.

2. "Commercial purpose" means a deliberative decision of an owner to invite or permit the use of the owner's property for normal business transactions, including the buying and selling of goods and services. The term includes any decision of an owner to invite members of the public onto the premises for recreational purposes as a means of encouraging business transactions or directly improving the owner's commercial activities other than through good will. "Commercial purpose" does not include the operation of public lands by a public entity except any direct activity for which there is a charge for goods or services.

3. "Land" includes all public and private land, roads, water, watercourses, and ways and buildings, structures, and machinery or equipment thereon.

~~3.~~4. "Owner" includes tenant, lessee, occupant, or person in control of the premises.

~~4.~~5. "Recreational purposes" includes any activity engaged in for the purpose of exercise, relaxation, pleasure, or education."

Page 1, line 6, overstrike "**landowner**" and insert immediately thereafter "**owner**"

Page 1, after line 6, insert:

"1."

Page 1, line 8, replace "irrespective" with "regardless"

Page 1, line 10, replace "related to" with "is directly derived from"

Page 1, line 10, replace "parties" with "persons"

Page 1, after line 12, insert:

"2. This section does not apply to:

a. A person that enters land to provide goods or services at the request of an owner; or

b. An owner engaged in a for-profit business venture that directly or indirectly invites members of the public onto the premises for commercial purposes or during normal periods of commercial activity in which members of the public are invited."

Page 1, line 16, replace "arises out of" with "is directly derived from"

Page 1, line 16, after "those" insert "recreational"

Page 1, line 17, after "owed" insert "other than a person that enters land to provide goods or services at the request of the owner"

Renumber accordingly

2011 SENATE JUDICIARY

CONFERENCE COMMITTEE

SB 2295

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2295
4/11/11
Job #16480

☒ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to recreational immunity

Minutes:

Senators:
Olafson
Nething
Nelson
Representatives:
Klemin
Kretschmar
Guggisberg

Representative Klemin explains the amendments that the House made to the bill.
He describes the Leet case which was a Supreme Court case and this bill was originally intended to reverse that Supreme Court case. He said in their view the language was a little too broad. The committee discusses different scenarios that could arise to see if this would applicable. Rep. Klemin says the Supreme Court says you have to go through a balancing test. Their goal was not to have to go through this balancing test. They discuss being able to go into a mall for walking purposes before it opens. Rep. Klemin says that would be for commercial purpose and that is why the definition for commercial purpose is in the bill. Senator Olafson questions those that are invited onto the land and should there be a distinction whether the person is being paid by the owner. Rep. Klemin says as he reads it, it doesn't make a difference whether he is paid or not. He goes onto say this does not apply to a person who enters land to provide goods or services for compensation at the request of an owner. Rep. Guggisberg asks if it should read request or invites. Rep. Klemin says it may be more of a direction and control issue rather than whether they are being compensated. Senator Olafson says he feels it is more of a relevant issue than the compensation. The committee discusses it would be better to add under the direction and control of the owner.

Representative Klemin motions that the House recede from House amendments and further amend
Representative Guggisberg seconded

Discussion

Senator Nething asks about the responsibility of a mall owner with recreational walkers. He is concerned that this liability would shut down the mall to walkers and asks Rep. Klemin how he would envision that with this bill. Rep. Klemin says the malls expect that the walkers will shop after the stores are open. He thinks that the way it is written now actually tightens it up from the way the Supreme Court decision was. He thinks it won't affect anything. Rep. Guggisberg points out in Section two under exemptions that it has to be during normal periods of commercial activity so he doesn't think they would be covered. Rep. Klemin said commercial purpose was defined so it should be okay. Rep. Kretschmar asks if this will cover if you invite someone to your place to do repair work. Senator Olafson said it would not apply because this is recreational immunity.

Committee decides to meet again when they have the finished amendment before them.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2295
4/12/11
Job #16502

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to recreational immunity

Minutes:

Senators:
Olafson
Nething
Nelson
Representatives:
Klemin
Kretschmar
Guggisberg

Senator Olafson opens the conference committee and explains where they left off at the last meeting. He goes on to explain the proposed amendment. Rep. Klemin says they are okay with the proposed amendment.

The motion is that the House recede from House amendments and amend as follows. The intent is to keep the House amendments and add new language.

Rep. Klemin has made the motion
Rep. Guggisberg has seconded

Roll call vote – 6 yes, 0 no

Senator Olafson will carry

2011 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: Judiciary

Bill/Resolution No. 2295 as (re) engrossed

Date: 4-11-11

Roll Call Vote #: _____

Action Taken

- ☐ SENATE accede to House amendments
- ☐ SENATE accede to House amendments and further amend
- ☐ HOUSE recede from House amendments
- ☒ HOUSE recede from House amendments and amend as follows

Senate/House Amendments on SJ/HJ page(s) 1025 - 1026

- ☐ Unable to agree, recommends that the committee be discharged and a new committee be appointed

((Re) Engrossed) _____ was placed on the Seventh order of business on the calendar

Motion Made by: Rep Klemin Seconded by: Rep Guggisberg

Senators	4/11	4/12		Yes	No		Representatives	4/11	4/12		Yes	No
Olafson	X	X		X			Klemin	X	X		X	
Nething	X	X		X			Koetschnae	X	X		X	
Nelson	X	X		X			Guggisberg	X	X		X	

Vote Count: Yes 6 No 0 Absent _____

Senate Carrier Sen. Olafson House Carrier _____

LC Number 11.8246.01002 . _____ of amendment

LC Number _____ . _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

REPORT OF CONFERENCE COMMITTEE

SB 2295: Your conference committee (Sens. Olafson, Nething, Nelson and Reps. Klemin, Kretschmar, Guggisberg) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ pages 1025-1026, adopt amendments as follows, and place SB 2295 on the Seventh order:

That the House recede from its amendments as printed on pages 1025 and 1026 of the Senate Journal and pages 1115 and 1116 of the House Journal and that Senate Bill No. 2295 be amended as follows:

Page 1, line 1, replace the first "section" with "sections 53-08-01 and"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Section 53-08-01 of the North Dakota Century Code is amended and reenacted as follows:

53-08-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Charge" means the amount of money asked in return for an invitation to enter or go upon the land. "Charge" does not include vehicle, parking, shelter, or other similar fees required by any public entity.

2. "Commercial purpose" means a deliberative decision of an owner to invite or permit the use of the owner's property for normal business transactions, including the buying and selling of goods and services. The term includes any decision of an owner to invite members of the public onto the premises for recreational purposes as a means of encouraging business transactions or directly improving the owner's commercial activities other than through good will. "Commercial purpose" does not include the operation of public lands by a public entity except any direct activity for which there is a charge for goods or services.

3. "Land" includes all public and private land, roads, water, watercourses, and ways and buildings, structures, and machinery or equipment thereon.

~~3.~~4. "Owner" includes tenant, lessee, occupant, or person in control of the premises.

~~4.~~5. "Recreational purposes" includes any activity engaged in for the purpose of exercise, relaxation, pleasure, or education."

Page 1, line 6, overstrike "**landowner**" and insert immediately thereafter "**owner**"

Page 1, after line 6, insert:

"1."

Page 1, line 8, replace "irrespective" with "regardless"

Page 1, line 10, replace "related to" with "is directly derived from"

Page 1, line 10, replace "parties" with "persons"

Page 1, after line 12, insert:

"2. This section does not apply to:

a. A person that enters land to provide goods or services at the request of, and at the direction or under the control of, an owner; or

b. An owner engaged in a for-profit business venture that directly or indirectly invites members of the public onto the premises for commercial purposes or during normal periods of commercial activity in which members of the public are invited."

Page 1, line 16, replace "arises out of" with "is directly derived from"

Page 1, line 16, after "those" insert "recreational"

Page 1, line 17, after "owed" insert "other than a person that enters land to provide goods or services at the request of, and at the direction or under the control of, the owner"

Renumber accordingly

SB 2295 was placed on the Seventh order of business on the calendar.

2011 TESTIMONY

SB 2295

Testimony on HB 2295
Tag Anderson, Director
OMB Risk Management Division
January 31, 2011

Chairman Nething, and members of the Senate Judiciary Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of OMB. I appear today in support of HB 2295.

The State of North Dakota, like many states, has enacted laws designed to encourage landowners to open land for recreational purposes. These laws are codified in Chapter 53-08 of the North Dakota Century Code. These provisions are commonly referred to as the "recreational immunity statutes" although the term "recreational immunity" is not used in any of the statutory language. These statutory provisions define the duty a landowner has to those whose presence on the land is the result of the landowner's decision to directly or indirectly permit the property to be used for recreational purposes.

In a recent Supreme Court case, *Leet v. City of Minot*, 2006 ND 191, the Court strayed from focusing on the decision of the landowner to allow property to be used for recreational purposes and whether the person was on the property as a result of that decision and instead focused on the entrant's purposes for being on the land, something the landowner ordinarily would have no knowledge or control. Justice Crothers in his dissent in the *Leet* decision expressed it perhaps best:

> The majority's result is obtained by dramatically changing focus to each user's purpose for being present on the property and away from the owner's act of opening the property for recreational use. This shift strips the owner of any ability to control liability and hands that control to each user—or in this case—a user's employee. I do not believe this is the result directed by plain words of the recreational use immunity statutes. I do not believe this result is supported by a fair assessment of the Legislature's express and implied intent. To the contrary, the majority's analysis and conclusion thwart, rather than carry out, the Legislature's goal by reducing, rather than maintaining or expanding, land available for recreational use.

The changes in this proposed legislation are designed to return control over the duty of care owed back to the landowner as expressed by Justice Crothers, thereby furthering the policy of encouraging landowners to allow property to be used for recreational purposes. In addition, by focusing on the landowner's act of allowing property to be used for recreational purposes and asking solely whether an entrant is on property because of that decision, the application of recreational statutes becomes more certain in litigation. As the recreational use statutes apply equally to public and private landowners, the State has a strong interest in bringing clarity to the duty of care it owes as a landowner when it permits property to be used for recreational purposes.

That concludes my prepared remarks and I would be happy to answer any questions you may have.

Thank you.

(2)

TESTIMONY OF STEVEN SPILDE

REGARDING SENATE BILL NO. 2295

to the

NORTH DAKOTA SENATE JUDICIARY COMMITTEE

January 31, 2011

Chairman Nething and Members of the North Dakota Senate Judiciary Committee, my name is Steve Spilde, I am the CEO of the North Dakota Insurance Reserve Fund ("NDIRF") and appear today in **support** of SB 2295.

The NDIRF is a governmental self-insurance pool, providing liability and other risk coverage to nearly all political subdivisions in North Dakota. In that context, the NDIRF has observed at close hand application of North Dakota's recreational use immunity statute (Chapter 53-08 NDCC) to the defense of political subdivisions in a number of claims over the years.

Chapter 53-08 was enacted in 1965, 10 years before political subdivisions lost governmental immunity, for the purpose of encouraging landowners to allow use of their property by the public. Essentially, if a landowner allowed public use for recreational purposes, without charge, the landowner received certain immunities from tort liability for injuries resulting from such use.

In a 1987 case (Fastow v. Burleigh County Water Resource District), the North Dakota Supreme Court ("Court") seemed to extend the protections of Chapter 53-08 to political subdivisions using a theory that, since political subdivisions were subject under the tort claims act (Chapter 32-12.1 NDCC) to civil suit only in cases where they would be liable to such suit if a private party, and since Chapter 53-08 immunity was available to private parties, it should also inure to the benefit of political subdivisions.

The Court changed course in a 1997 case (Hovland v. City of Grand Forks), holding that the language we relied on from the 1987 Fastow case, discussing application of Chapter 53-08 to political subdivisions, was mere dicta and unnecessary to the decision of that case. The Court now held that Chapter 53-08 was not intended to apply to public (vs. private) landowners.

The North Dakota Legislative Assembly, in 1997, responding perhaps to the stimuli of both the Hovland decision and the recent loss of sovereign immunity by the State of North Dakota, clearly amended Chapter 53-08 to include public land, along with a very broad description of what constitutes recreational use ("...any activity engaged in for the purpose of exercise, relaxation, pleasure, or education").

Beginning in 2006, however, with its decision in Leet v. City of Minot, the Court has been introducing an analysis of facts regarding the location and nature of the injured person's conduct into its determination of whether Chapter 53-08 recreational immunity should apply to a particular claim. In our view, this strays from the legislative purpose of encouraging property use without charge because, instead of focusing on the benefits to a landowner of doing so, the Court is turning attention to the identity, location and activities of the recreational user.

A net result of the Court's fact-oriented review of these types of cases is that use of summary judgment motions in defending political subdivisions, a relatively economical means of concluding a claim where a statutory immunity applies, becomes more and more unlikely as we are shown to be unable to rely on the plain language of Chapter 53-08. A summary judgment motion simply turns into a significant added expense if it is unsuccessful – and success has become problematic in recreational immunity cases.

We believe that passage of SB 2295 would restore the original meaning of Chapter 53-08, as the Legislature acts to confirm its intent regarding recreational use immunity.

Thank you for your consideration. I would be pleased to respond to any questions.

(3)

TESTIMONY OF PAUL SANDERSON IN SUPPORT OF SENATE BILL 2295

SENATE JUDICIARY COMMITTEE

JANUARY 31, 2011

Chairman Nething and Members of the Senate Judiciary Committee, my name is Paul Sanderson. I am an attorney in the Bismarck law firm of Zuger Kirmis & Smith. I represent the Property Casualty Insurers Association of America. PCI is the nation's premier insurer trade association, representing over 1,000 companies that write over $180 billion in insurance premiums for automobile, homeowners, and business insurance.

PCI supports SB 2295. The bill will expand the protections granted to North Dakota landowners who allow the public on their land for recreational purposes. SB 2295 will close some loopholes plaintiffs have discovered to hold innocent landowners liable for injuries while on their property. This added protection will advance the legislative intent of the recreational immunity provisions in Chapter 53-08 by further encouraging landowners to open their land to the public for recreational purposes.

For the foregoing reasons, PCI supports SB 2295 and urges a Do Pass ~~on this bill as amended~~.

NORTH DAKOTA
RECREATION & PARK
ASSOCIATION

PO Box 1091 • Bismarck, ND 58502
Phone: 701-355-4458 • Fax: 701-223-4645 • www.ndrpa.com

Written Testimony of Ron Merritt, North Dakota Recreation & Park Association
Submitted to Senate Judiciary Committee
In Support of SB 2295, Recreational Immunity
Monday, January 31, 2011

I respectfully submit this written testimony in support of Senate Bill 2295. I am a board member for the North Dakota Recreation & Park Association (NDRPA) and director of the Minot Park District. NDRPA represents more than 500 members across the state, including park board members and park district staff, and works to advance parks and recreation for quality of life in North Dakota.

Park districts provide thousands of acres of public property across the state for the enjoyment and recreation of the public. Playgrounds, picnic shelters, frisbee golf courses, basketball courts, volleyball courts, tennis courts, skate parks and other amenities are provided. Public restrooms, parking lots, and public buildings are also available. There are many other examples of public property that are owned and maintained by park districts, and in all of these examples offered, injuries can occur through no fault of the park district. Public parks and trails are used for neighborhood baseball games, pickup football games, jogging, walking, cross country skiing, ice skating , and many other physical activities where injuries can occur. Most of the trails and open spaces are not supervised, nor is there a fee involved for the use of these areas, so the best park districts can do is make sure the areas do not have known dangers present.

Many park districts have liability insurance purchased from the North Dakota Insurance Reserve Fund (NDIRF), and we comply with risk management programs that are overseen by NDIRF to make sure we reduce our risk and exposure. NDIRF specialists perform a safety audit every year and point out any risk that may exist, and we take the recommended action to reduce or eliminate that risk. Playgrounds are often inspected by staff that are qualified and certified as inspectors, and many actions are taken to make sure everything we do is safe. This reduces the possibility of injuries, but does not prevent people from being people and having accidents that could not have been prevented by us. It is standard practice for insurance companies to send questionnaires to policy holders asking on whose property the injury occurred and if a claim has been filed with the property owner's insurance company. This is resulting in many more claims being filed than has occurred in the past.

Taxpayers pay the insurance premium, and without the protection offered by the recreational immunity statute, we could simply not afford the premium that would have to be charged to offer coverage. Public property needs to be protected from abuses of the system, and the North Dakota Recreation & Park Association urges a do pass recommendation on Senate Bill 2295.

I may be reached at 701-857-4136 or ronrpz@srt.com if you have any questions. Thank you.

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

Testimony on SB 2295 by North Dakota Farm Bureau
Senate Judiciary Committee

January 31, 2011
Presented by Sandy Clark, public policy director

Good morning, Mr. Chairman, and members of the committee. My name is Sandy Clark and I represent North Dakota Farm Bureau.

We stand today in support of SB 2295. NDFB policy says and I quote, "We believe that property owners should not be legally responsible for any natural or man-made obstacle or situation that may cause personal injury or property damage to persons using their property."

Other people are entering our landowner's property on a regular basis, whether it's for hunting, trapping, snowmobiling, bird watching, or ATV uses, among others. We recognize that we do have some hazards, like fences, gravel pits, sloughs, water dugouts and others.

We simply don't believe we should be liable for those who chose to enter our property, either with or without permission.

This language strengthens the immunity law and we encourage you to give SB 2295 a "do pass" recommendation.

Thank you and I would entertain any questions.

Testimony on HB 2295
Tag Anderson, Director
OMB Risk Management Division
March 16, 2011

Chairman DeKrey, and members of the House Judiciary Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of OMB. I appear today in support of HB 2295.

The State of North Dakota, like many states, has enacted laws designed to encourage landowners to open land for recreational purposes. These laws are codified in Chapter 53-08 of the North Dakota Century Code. These provisions are commonly referred to as the "recreational immunity statutes" although the term "recreational immunity" is not used in any of the statutory language. These statutory provisions define the duty a landowner has to those whose presence on the land is the result of the landowner's decision to directly or indirectly permit the property to be used for recreational purposes.

In a recent Supreme Court case, *Leet v. City of Minot*, 2006 ND 191, the Court strayed from focusing on the decision of the landowner to allow property to be used for recreational purposes and whether the person was on the property as a result of that decision and instead focused on the entrant's purposes for being on the land, something the landowner ordinarily would have no knowledge or control. Justice Crothers in his dissent in the *Leet* decision expressed it perhaps best:

> The majority's result is obtained by dramatically changing focus to each user's purpose for being present on the property and away from the owner's act of opening the property for recreational use. This shift strips the owner of any ability to control liability and hands that control to each user—or in this case—a user's employee. I do not believe this is the result directed by plain words of the recreational use immunity statutes. I do not believe this result is supported by a fair assessment of the Legislature's express and implied intent. To the contrary, the majority's analysis and conclusion thwart, rather than carry out, the Legislature's goal by reducing, rather than maintaining or expanding, land available for recreational use.

The changes in this proposed legislation are designed to return control over the duty of care owed back to the landowner as expressed by Justice Crothers, thereby furthering the policy of encouraging landowners to allow property to be used for recreational purposes. In addition, by focusing on the landowner's act of allowing property to be used for recreational purposes and asking solely whether an entrant is on property because of that decision, the application of recreational statutes becomes more certain in litigation. As the recreational use statutes apply equally to public and private landowners, the State has a strong interest in bringing clarity to the duty of care it owes as a landowner when it permits property to be used for recreational purposes.

That concludes my prepared remarks and I would be happy to answer any questions you may have.

Thank you.

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

2

Testimony on SB 2295 by North Dakota Farm Bureau
House Judiciary Committee

March 16, 2011
Presented by Sandy Clark, public policy director

Good morning, Mr. Chairman, and members of the committee. My name is Sandy Clark and I represent North Dakota Farm Bureau.

We stand today in support of SB 2295. NDFB policy says and I quote, *"We believe that property owners should not be legally responsible for any natural or man-made obstacle or situation that may cause personal injury or property damage to persons using their property."*

Other people are entering our landowner's property on a regular basis, whether it's for hunting, trapping, snowmobiling, bird watching, or ATV uses, among others. We recognize that we do have some hazards, like fences, gravel pits, sloughs, water dugouts and other hazards.

We simply don't believe we should be liable for those who chose to enter our property, either with or without permission.

This is a private property rights issue. People should not have the right to use our property and then file a lawsuit against us for accidents that are a result of their own actions.

This language strengthens the immunity law and we encourage you to give SB 2295 a "do pass" recommendation.

Thank you and I would entertain any questions.

3

TESTIMONY OF TIFFANY L. JOHNSON

REGARDING SENATE BILL NO. 2295

to the

NORTH DAKOTA HOUSE JUDICIARY COMMITTEE

March 16, 2011

Chairman DeKrey and Members of the North Dakota House Judiciary Committee, my name is Tiffany Johnson, I am legal counsel for the North Dakota Insurance Reserve Fund ("NDIRF") and appear today in **support** of SB 2295.

The NDIRF is a governmental self-insurance pool, providing liability and other risk coverage to nearly all political subdivisions in North Dakota. In that context, the NDIRF has observed at close hand application of North Dakota's recreational use immunity statute (Chapter 53-08 NDCC) to the defense of political subdivisions in a number of claims over the years.

Chapter 53-08 was enacted in 1965, 10 years before political subdivisions lost governmental immunity, for the purpose of encouraging landowners to allow use of their property by the public. Essentially, if a landowner allowed public use for recreational purposes, without charge, the landowner received certain immunities from tort liability for injuries resulting from such use.

In a 1987 case (Fastow v. Burleigh County Water Resource District), the North Dakota Supreme Court ("Court") seemed to extend the protections of Chapter 53-08 to political subdivisions using a theory that, since political subdivisions were subject under the tort claims act (Chapter 32-12.1 NDCC) to civil suit only in cases where they would be liable to such suit if a private party, and since Chapter 53-08 immunity was available to private parties, it should also inure to the benefit of political subdivisions.

The Court changed course in a 1997 case (Hovland v. City of Grand Forks), holding that language from the 1987 Fastow case, discussing application of Chapter 53-08 to political subdivisions, was mere dicta and unnecessary to the decision of that case. The Court now held that Chapter 53-08 was not intended to apply to public (vs. private) landowners.

Testimony of Tiffany L. Johnson

Regarding SB 2295 (Continued)

The North Dakota Legislative Assembly, in 1997, responding perhaps to the stimuli of both the Hovland decision and the recent loss of sovereign immunity by the State of North Dakota, clearly amended Chapter 53-08 to include public land, along with a very broad description of what constitutes recreational use ("...any activity engaged in for the purpose of exercise, relaxation, pleasure, or education").

Beginning in 2006, however, with its decision in Leet v. City of Minot, the Court has been introducing an analysis of facts regarding the location and nature of the injured person's conduct into its determination of whether Chapter 53-08 recreational immunity should apply to a particular claim. In our view, this strays from the legislative purpose of encouraging property use without charge because, instead of focusing on the benefits to a landowner for doing so (principally, immunity from liability), the Court is turning attention to the identity, location and activities of the recreational user.

A net result of the Court's new, fact-oriented, review of these types of cases is that use of summary judgment motions in defending political subdivisions, a relatively economical means of concluding a claim where a statutory immunity applies, becomes more and more unlikely as we are shown to be unable to rely on the plain language of Chapter 53-08. A summary judgment motion simply turns into a significant added expense if it is unsuccessful – and success has become problematic in recreational immunity cases. The difference in cost between defending a claim *to* summary judgment, rather than *through* trial, is dramatic.

We believe that passage of SB 2295 would restore the original meaning of Chapter 53-08, as amended in 1997, confirming the Legislature's intent regarding recreational use immunity.

Thank you for your consideration. I would be pleased to respond to any questions.

4

NORTH DAKOTA
RECREATION & PARK
ASSOCIATION

PO Box 1091 • Bismarck, ND 58502
Phone: 701-355-4458 • Fax: 701-223-4645 • www.ndrpa.com

Testimony of Ron Merritt, North Dakota Recreation & Park Association
To House Judiciary Committee
In Support of SB 2295, Recreational Immunity
Wednesday, March 16, 2011

Chairman DeKrey and Members of the Committee, my name is Ron Merritt, and I am a board member of the North Dakota Recreation & Park Association (NDRPA) and director of the Minot Park District. NDRPA represents more than 500 members across the state, including park board members and park district staff, and works to advance parks and recreation for quality of life in North Dakota. I am here on behalf of NDRPA in support of Senate Bill 2295.

Park districts provide thousands of acres of public property across the state for the enjoyment and recreation of the public. Playgrounds, picnic shelters, frisbee golf courses, basketball courts, volleyball courts, tennis courts, skate parks and other amenities are provided, along with public restrooms, parking lots, and public buildings. There are many other examples of public property owned and maintained by park districts, and at all of these, injuries can occur through no fault of the park district. Public parks and trails are used for neighborhood baseball games, pickup football games, jogging, walking, cross country skiing, ice skating, and many other physical activities where injuries can occur. Most of the trails and open spaces are not supervised, nor is there a fee involved for the use of these areas, so the best park districts can do is make sure the areas do not have known dangers present.

Many park districts have liability insurance purchased from the North Dakota Insurance Reserve Fund (NDIRF), and we comply with risk management programs that are overseen by NDIRF to make sure we reduce our risk and exposure. NDIRF specialists perform a safety audit every year and point out any risk that may exist, and we take the recommended action to reduce or eliminate that risk. Playgrounds are often inspected by staff that are qualified and certified as inspectors, and many actions are taken to make sure everything we do is safe. This reduces the possibility of injuries, but does not prevent people from being people and having

accidents that could not have been prevented by us. It is standard practice for insurance companies to send questionnaires to policy holders asking on whose property the injury occurred and if a claim has been filed with the property owner's insurance company. This is resulting in many more claims being filed than has occurred in the past.

Taxpayers pay the insurance premium, and without the protection offered by the recreational immunity statute, we could not afford the premium that would have to be charged to offer coverage. Public property needs to be protected from abuses of the system, and the North Dakota Recreation & Park Association urges a do pass recommendation on Senate Bill 2295. Thank you.

5

American Heart Association. | American Stroke Association.
Learn and Live.

Senate Bill 2295

June Herman
American Heart Association
June.Herman@heart.org

AHA Testimony

Chairman DeKrey and members of the House Judiciary Committee. For the record, I am June Herman, Vice President of Advocacy for the American Heart Association in North Dakota. I am here today to testify in support of SB 2295, as it serves to also clarify liability protections for use of school facilities during non-school hours.

While some implied protections exist in century code, language may not be clear enough for local school attorneys and insurers who serve local school districts to recommend joint use agreements with other entities for recreational access. SB 2295 would make it clear.

While a level of school liability protection is implied, local legal and insurance company guidance to schools may be to error on the side of caution, and restrict use. Such clarification could benefit smaller communities with limited physical activity resources and would be able to consider extended use of school facilities. It would also benefit our larger communities.

Land use and facility planning by local governments and school districts have become separated in many US communities and this lack of coordination has contributed to larger, more distant schools that have less connection with the people they serve. School facilities, especially those that are centered in the community, can be an excellent resource for recreation and exercise where there is limited availability or private options are too expensive. The most innovative districts are maximizing joint use of school facilities to address the educational and health needs of students and the community's need for recreational activity spaces.

In order for adults and children to get the exercise they need to be healthy, they need places to be active. Research has shown that people who have parks or recreational facilities nearby exercise 38 percent more than those who do not have easy access. Unfortunately, communities may have few resources to support active lifestyles and places to play and exercise.

6

Testimony in Opposition to Senate Bill No. 2295

Respectfully submitted by:

Jeffrey S. Weikum
PAGEL WEIKUM, PLLP
1715 Burnt Boat Drive
Madison Suite
Bismarck, ND 58503
701-250-1369
jweikum@pagelweikum.com

Mr. Chairman and members of the Committee:

Thank you for allowing me to speak with you this morning. I am an attorney from Bismarck and I have been practicing in North Dakota for over fifteen (15) years. I am also licensed to practice in Minnesota, South Dakota and Montana. I am a member of the North Dakota Association for Justice.

I am here in opposition to Senate Bill No. 2295.

The Leet v. City of Minot decision is the primary reason for this bill. In Leet a recreational event was held for an event for Senior Citizens. The day before the event was to occur, Mr. Leet was working in the Minot Auditorium when a curtain divider system fell and a pipe struck him on the head and injured him. Leet brought a claim against the City of Minot. In a nutshell, since Mr. Leet was not in the Minot Auditorium to recreate, but rather was there for work purposes (to put up a booth for his employer), recreational immunity did not apply. Please keep in mind that presumably hundreds to thousands of persons attended this event to look at booths and if any of these persons became injured, recreational immunity did apply to them, barring any claims for recovery.

The supporters of HB 2295 are seeking to broaden the recreational immunity statutes to get around the ND Supreme Court's decision in Leet. They want the blanket immunity to apply and they want to prevent the justice system from looking into the actually reasons people were on the premises before applying recreational immunity and preventing persons from recovering for injuries.

Several significant issues are raised by the current bill, some of the most logical ones are as follows:

- Shouldn't recreational immunity apply to those who are truly recreating?
- Why is recreationally immunity now being applied to individuals who are working in the course of their employment and are required to be on the premises to work, etc.?

Mr. Leet, and others like him who become injured did not attend these events / places to recreate but had to travel to these places for work. Why is it that the landowner is now immune from suit if they fail to keep up their premises and others become injured?

If this bill passes here is a very partial list of the type injured people who will no longer have a legal recourse to be covered:

1) **Teacher** injured while taking her grade school class to a recreational event;

2) A **law enforcement** officer hired as security for a recreational event;

3) A **plumber, electrician, laborer** hired to perform services at the recreation event;

4) A **fireman/firewoman** who is on the job giving a demonstration at a recreation event;

5) A **State employee** or **County employee** or **City employee** who attends the recreational event in the course of their duties;

6) **The list is endless.**

The supporters of SB 2295 will argue that these workers identified above will have partial coverage of their losses through Workforce Safety and Insurance or their health insurance carrier. Please remember who picks up the tab for this. It is the State of North Dakota and the citizens. A very bad fiscal policy.

I would ask that you vote "no" on Senate Bill No. 2295.

Thank you again for your time.

If you have any questions, please feel free to contact me

PROPOSED AMENDMENTS TO SENATE BILL NO. 2295

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 53-08-01 and 53-08-02 and subsection 2 of section 53-08-03 of the North Dakota Century Code, relating to recreational immunity.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA

SECTION 1. AMENDMENT. Section 53-08-01 of the North Dakota Century Code is amended and reenacted as follows:

53-08-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Charge" means the amount of money asked in return for an invitation to enter or go upon land. A charge does not include vehicle, parking, shelter, or other similar fees required by any public entity.

2. "Commercial purpose" means a deliberative decision of an owner to invite or permit the use of the owner's property for normal business transactions including the buying and selling of goods and services. A commercial purpose includes any decision of an owner to invite members of the public onto the premises for recreational purposes as a means of encouraging business transactions or directly improving the owner's commercial activities other than through good will. A commercial purpose does not include the operation of public lands by a public entity except those direct activities for which there is a charge for goods or services.

~~2~~ 3. "Land" includes all public and private land, roads, water, watercourses, and ways and buildings, structures, and machinery or equipment thereon.

~~3~~ 4. "Owner" includes tenant, lessee, occupant, or person in control of the premises.

~~4~~ 5. "Recreational purposes" includes any activity engaged in for the purposes of exercise, relaxation, pleasure, or education.

SECTION 2. AMENDMENT. Section 53-08-05 of the North Dakota Century Code amended and reenacted as follows:

53-08-02. Duty of care of ~~landowner~~owner.

Subject to the provisions of section 53-08-05, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, regardless of the location and nature of the recreational purposes and whether the entry or use by others is for their own recreational purposes or is directly derived from the recreational purposes of other persons, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. This

section does not apply to persons who enter land to provide goods or services at the request of an owner or to an owner engaged in a for profit business venture that directly or indirectly invites members of the public onto the premises for commercial purposes or during normal periods of commercial activity in which members of the public are invited."

SECTION 3. AMENDMENT. Subsection 2 of section 53-08-03 of the North Dakota Century Code is amended and reenacted as follows:

2. Confer upon such person, or any other person whose presence on the premises is directly derived from those recreational purposes, the legal status of an invitee or licensee to whom a duty of care is owed other than a person who enters land to provide goods or services at the request of the owner; or

Renumber accordingly

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2006 ND 191

Charles Leet and Janet Leet, Plaintiffs and Appellants
v.
City of Minot, Defendant and Appellee

No. 20060011

Appeal from the District Court of Ward County, Northwest Judicial District, the Honorable William W. McLees, Judge.
REVERSED AND REMANDED.
Opinion of the Court by VandeWalle, Chief Justice.
Kim E. Brust (argued) and Stephannie N. Stiel (appeared), Conmy Feste, Ltd., P.O. Box 2686, Fargo, N.D. 58108-2686, for plaintiffs and appellants.
William E. Bergman, Olson & Burns P.C., P.O. Box 1180, Minot, N.D. 58702-1180, for defendant and appellee.

Leet v. City of Minot

No. 20060011

VandeWalle, Chief Justice.

[¶1] Charles Leet and Janet Leet ("Leets") appealed from a summary judgment dismissing their complaint against the City of Minot and awarding costs and disbursements to Minot. Because we conclude the recreational use immunity statutes do not bar the Leets' claims, we reverse and remand for further proceedings.

I

[¶2] In May 2002, while Charles Leet was working at the Minot Auditorium, he was injured when a curtain divider system fell and a pipe struck him on the head. The auditorium is owned, operated, and maintained by Minot, and city employees had set up the curtain divider system. Charles Leet was at the auditorium to set up a booth for his employer, Experience Works, a vendor participating in the

Salute to Seniors event, which was taking place the following day. The Minot Senior Coalition holds its "Salute to Seniors Celebration" annually, offering educational information as well as entertainment and information from area businesses and organizations that have booths at the event. Experience Works finds training and employment for people aged fifty-five and older by putting them in community service positions, and its booth at the event was to promote its services. Charles Leet was Experience Works' field operations coordinator, and he received workers compensation benefits for his injuries.

[¶3] In August 2003, the Leets sued Minot, alleging it was negligent in causing Charles Leet's injuries. Minot moved for summary judgment, arguing it was entitled to judgment as a matter of law under the recreational use immunity statutes in N.D.C.C. ch. 53-08. The Leets opposed Minot's motion, arguing the recreational use immunity statutes were not applicable to their action and, further, the recreational immunity defense had not been properly pled. The district court granted Minot summary judgment, ruling Minot was immune from suit under N.D.C.C. ch. 53-08.

II

[¶4] The Leets argue Minot was precluded from asserting the recreational immunity defense for the first time in its motion for summary judgment. Minot responds the district court did not abuse its discretion in considering the recreational use immunity defense because the Leets were not prejudiced by the assertion of the defense nor was there an allegation of prejudice to the district court.

[¶5] Recreational use immunity is generally recognized to be an affirmative defense. See, e.g., Dan Nelson Constr., Inc. v. Nodland & Dickson, 2000 ND 61, ¶ 33, 608 N.W.2d 267 (applying Wyoming law); DiMella v. Gray Lines of Boston, Inc., 836 F.2d 718, 720 (1st Cir. 1988); Hollonbeck v. Torrey, 171 F.R.D. 244, 245 (E.D. Ark. 1997). Generally, the failure to plead an affirmative defense results in a waiver of the defense. Hansen v. First American Bank & Trust, 452 N.W.2d 770, 771 (N.D. 1990). Rule 8(c), N.D.R.Civ.P., governing affirmative defenses, provides in relevant part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

[¶6] We have, however, held that N.D.R.Civ.P. 8(c) must be read in

conjunction with N.D.R.Civ.P. 15(a), governing amendment of pleadings. Hansen, 452 N.W.2d at 771-72. Rule 15(a), N.D.R.Civ.P., provides, in part:

> A party's pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party's pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

[¶7] Under N.D.R.Civ.P. 15(a), while leave to amend the pleadings is to be freely given when justice so requires, leave is not automatically granted. See Bernabucci v. Huber, 2006 ND 71, ¶ 28, 712 N.W.2d 323; Hansen, 452 N.W.2d at 772. The decision on a motion to amend a pleading is within the sound discretion of the district court and will not be overruled on appeal absent an abuse of discretion. Bernabucci, at ¶ 28; First Interstate Bank v. Rebarchek, 511 N.W.2d 235, 243 (N.D. 1994). A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when its decision is not the product of a rational mental process leading to a reasoned determination, or when it misinterprets or misapplies the law. North Dakota Human Rights Coalition v. Bertsch, 2005 ND 98, ¶ 11, 697 N.W.2d 1.

[¶8] Here, the district court said the affirmative defense could be raised for the first time in Minot's motion for summary judgment, in the absence of prejudice to the opposing party. The district court effectively granted a motion to amend by permitting the defense to be raised. Other courts have allowed assertion of affirmative defenses for the first time in response to a motion for summary judgment where there is no prejudice or surprise to the nonmoving party. See Financial Timing Publ'ns, Inc. v. Compugraphic Corp., 893 F.2d 936, 944 n.9 (8th Cir. 1990); Allied Chem. Corp. v. Mackay, 695 F.2d 854, 855 (5th Cir. 1983). The district court found the Leets had not alleged any prejudice, and no prejudice was apparent from the record.

[¶9] While Minot's summary judgment motion was timely under the district court's scheduling order, the Leets also argue Minot should be prevented from raising the recreational use immunity defense for the first time less than two months before trial. The Leets assert all depositions in the case had been conducted and, therefore, they were precluded from asking questions in those depositions which could

have addressed whether the statutes properly applied. The Leets claim Minot's delay in bringing the motion for summary judgment disadvantaged and prejudiced them. This Court, however, has previously held that mere delay does not necessarily result in prejudice to the litigant. See Hansen, 452 N.W.2d at 772-73 (no abuse of discretion where district court allowed defendant to amend its answer to raise various affirmative defenses on the day of trial where case had been pending for 13 months, both parties took depositions, participated in pre-trial motions, and were required to prepare for trial); Bender v. Time Ins. Co., 286 N.W.2d 489, 491 (N.D. 1979) (no abuse of discretion where district court allowed defendant to amend its answer to assert a statute of limitations defense more than 19 months after the complaint was originally filed).

[¶10] In addition to failing to make an affirmative showing of prejudice, the Leets did not request a continuance in their response to Minot's summary judgment motion under Rule 56(f), N.D.R.Civ.P., which permits a court to order a continuance for further discovery upon affidavit from the opposing party. Nonetheless, the trial in this case, which had initially been scheduled for March 2005, was eventually continued for eight months until November 2005. We conclude the district court did not act in an arbitrary, unreasonable, or unconscionable manner by permitting Minot to raise the affirmative defense of recreational use immunity for the first time in its motion for summary judgment.

III

[¶11] The Leets argue the district court erred in concluding Charles Leet was using the Minot Auditorium for a recreational purpose and in granting Minot summary judgment based upon recreational use immunity. Minot counters that Charles Leet's presence at the auditorium the day before the Salute to Seniors event was for a recreational purpose because he was preparing for an event that was recreational and for the dissemination of information to seniors.

[¶12] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. State ex rel. N.D. Housing Fin. Agency v. Center Mut. Ins. Co., 2006 ND 175, ¶ 8. Whether the district court properly granted summary judgment is a question of law that we review de novo on the record. Id. Summary judgment is appropriate if the issues in the case are such that the resolution of any factual disputes will not alter the result. State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶ 4, 712 N.W.2d 828. In reviewing an appeal from a summary judgment, we view the evidence in the light most favorable to the non-moving party and then determine if the district

court properly granted summary judgment as a matter of law. See Ertelt v. EMCASCO Ins. Co., 486 N.W.2d 233, 234 (N.D. 1992). The interpretation and application of a statute is a question of law, which is fully reviewable on appeal. State ex rel. Stenehjem, at ¶ 5.

[¶13] The interpretation of N.D.C.C. ch. 53-08 is a question of law, which is fully reviewable on appeal. See In re G.R.H., 2006 ND 56, ¶ 15, 711 N.W.2d 587; Ash v. Traynor, 2000 ND 75, ¶ 4, 609 N.W.2d 96. The primary purpose of statutory construction is to ascertain the Legislature's intent. Douville v. Pembina County Water Res. Dist., 2000 ND 124, ¶ 9, 612 N.W.2d 270. In ascertaining legislative intent, we first look to the words used in the statute, giving them their plain, ordinary, and commonly understood meaning. N.D.C.C. § 1-02-02. Where a statute's plain language is clear and unambiguous, the letter of the statute can not be disregarded under the pretext of pursuing its spirit because legislative intent is presumed clear from the face of the statute. N.D.C.C. § 1-02-05; see In re G.R.H., at ¶ 15; County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 325 (N.D. 1985). Where a statute's language is ambiguous, however, a court may resort to extrinsic aids, including legislative history, to interpret the statute. County of Stutsman, at 325. Additionally, this Court will construe statutes to avoid constitutional infirmities. In re G.R.H., at ¶ 15.

[¶14] North Dakota adopted its version of the recreational use immunity statutes in 1965 to protect landowners who opened their land for recreational purposes. 1965 N.D. Sess. Laws ch. 337 (codified at N.D.C.C. ch. 53-08). This Court has recognized that recreational use immunity statutes advance the important legislative goal of opening property to the public for recreational use in a manner that closely corresponds to the achievement of that goal. See Olson v. Bismarck Parks & Recreation Dist., 2002 ND 61, ¶ 6, 642 N.W.2d 864. In Olson, at ¶ 8, in the context of an equal protection challenge to the classification of nonpaying recreational users and other users, we briefly summarized the legislative history of the recreational use immunity statutes:

> In 1993, the Legislature first amended the statutes by changing the language of N.D.C.C. § 53-08-05(1) from "[w]illful or malicious" to "[w]illful and malicious." 1993 N.D. Sess. Laws ch. 503, § 1. After this Court abrogated sovereign immunity in Bulman v. Hulstrand Const. Co., Inc., 521 N.W.2d 632 (N.D. 1994), the Legislature again amended the statutes. In 1995, the Legislature changed the definition of "[l]and" in N.D.C.C. § 53-08-01 to include "all public and private land," and amended the definition of "[r]ecreational purposes" to its present form. 1995 N.D. Sess. Laws ch. 162, § 7. The amendment to the definition of land was intended to clarify that the statutes provide "a limitation of liability for all landowners, regardless of whether they are private or public." Hearing on S.B. 2127

> Before the Senate Agriculture Comm., 54th N.D. Legis. Sess. (Jan. 5, 1995) (testimony of Robert Olheiser, State Land Commissioner). In Hovland v. City of Grand Forks, 1997 ND 95, ¶¶ 8, 17, 563 N.W.2d 384, a majority of this Court ruled the Fastow [v. Burleigh County Water Res. Dist., 415 N.W.2d 505 (N.D. 1987)] court's discussion of N.D.C.C. ch. 53-08 and political subdivisions was "dictum," and ruled the pre-1995 version of the recreational use immunity statutes did not apply to political subdivisions.

[¶15] Under N.D.C.C. § 53-08-02, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." (Emphasis added.) Further, N.D.C.C. § 53-08-03 provides:

> Subject to the provisions of section 53-08-05, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> 1. Extend any assurance that the premises are safe for any purpose;
> 2. Confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed; or
> 3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

[¶16] Under N.D.C.C. § 53-08-05, any willful and malicious failure to warn parties of any dangerous conditions will result in liability. See Stokka v. Cass County Electric Coop, Inc., 373 N.W.2d 911, 916 (N.D. 1985) (discussing "willful conduct" definition). The dispositive issue here, however, is whether Charles Leet was present at the Minot Auditorium for "recreational purposes." Section 53-08-01(4), N.D.C.C., specifically defines "[r]ecreational purposes" to "include[ ] any activity engaged in for the purpose of exercise, relaxation, pleasure, or education."

[¶17] Prior to 1995, N.D.C.C. § 53-08-01(4) stated:

> "Recreational purposes" includes, but is not limited to, any one or any combination of the following: hunting, fishing, swimming, boating, camping, picnicing, hiking, pleasure diving, nature study, water skiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, geological, scenic, or scientific sites, or otherwise using land for purposes of the user.

See 1995 N.D. Sess. Laws, ch. 162, § 7. In 1995, the Legislature amended N.D.C.C. § 53-08-01(4), to make clear that the definition of "recreational purposes" "should be interpreted to cover all recreational activities." Hearing on S.B. 2127 Before the House Agriculture Comm., 54th N.D. Legis. Sess. (Feb. 23, 1995) (written testimony dated Feb. 22, 1995, of Robert Olheiser, State Land Commissioner). The intent in proposing the amendment was not to limit "recreational purposes" to the previously listed activities, but to include any activity by the user for purposes of exercise, relaxation, pleasure, or education. Id.

[¶18] In our prior decision that the recreational use immunity statutes did not violate N.D. Const. art. I, § 21, and advanced the important legislative goal of opening property to the public for recreational use in a manner that closely corresponds to the achievement of that goal, we specifically discussed how the statutes created two classes of persons and treated them differently, i.e., nonpaying recreational users of another's land and all other persons using the land of another. Olson, 2002 ND 61, ¶¶ 14, 17, 642 N.W.2d 864. We recognized that "[t]he class distinction is based upon the location and nature of the injured person's conduct when the injury occurs. . . . The recreational use immunity statutes therefore protect landowners when others use the property without charge for their personal enjoyment, . . . but continue to hold landowners responsible for their willful and malicious conduct." Id. at ¶ 14 (citations omitted). Our decision in Olson and the plain meaning of the language that a landowner owes no duty to persons entering for "such [recreational] purposes," which is defined to include any activity engaged in for the purpose of exercise, relaxation, pleasure, or education, focus on the user's actions in entering the landowner's property. Based on our prior interpretations of those statutes and the plain language of the statute, we interpret our statutes to include consideration of the user's intent on the property.

[¶19] In granting summary judgment, the district court concluded Charles Leet was using the auditorium for recreational purposes at the time of his injury on May 6, 2002, because the landowner's intent controls whether the recreational use statutes apply in this situation, not Charles Leet's intent in entering the auditorium. The court said, "[T]he fact that Charles was at the Auditorium in an employment capacity in behalf of one of the vendors at the 'Salute to Seniors Celebration' does not preclude a finding by the Court that Charles was a recreational user of the premises at the time. The 'Salute to Seniors Celebration' was an activity with a 'recreational purpose,' and Charles was there to further that recreational purpose." (Emphasis in original.) Although the landowner's intent is not irrelevant, we conclude the district court erred in holding the landowner's intent controlled in determining whether the recreational use immunity statutes applied.

[¶20] The proper analysis in deciding whether to apply the recreational use immunity statutes must include consideration of the location and nature of the injured person's conduct when the injury occurs. See Herman v. City of Tucson, 4 P.3d 973, 978 (Ariz. Ct. App. 1999) (legislature did not clearly intend to render irrelevant the entrant's "purposes" for coming onto the land, even though the legislature obviously intended the statute to limit public landowners' liability to recreational users). Some courts have adopted a reasonable person standard for this determination. See, e.g., Minnesota Fire & Cas. Ins. Co. v. Paper Recycling of La Crosse, 2001 WI 64, ¶ 21, 627 N.W.2d 527 (applying a reasonable person standard to determine whether a property user's activity is recreational based on the totality of circumstances surrounding the activity); see generally 62 Am. Jur. 2d Premises Liability § 144 (whether an injured person was engaged in a recreational activity for purposes of a recreational immunity statute is an objective one). The issue of the appropriate test for this determination has neither been briefed nor addressed by the parties on appeal. Because we are able to resolve this case on the specific facts already established, we decline to adopt a specific test here.

[¶21] Here, it is undisputed Charles Leet's purpose for being at the Minot Auditorium was to work for his employer who was a vendor at the Salute to Seniors event taking place the following day. While the spirit of the statute is to grant immunity to property owners who open their property to the public for recreational use, the plain language of the statute is not so broad as to include a person present on the property for purposes of the person's employment. The word "includes" is ordinarily not a term of limitation, but rather a term of enlargement. See Amerada Hess Corp. v. State, 2005 ND 155, ¶ 13, 704 N.W.2d 8; Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980). While the word "includes," as used in the context of N.D.C.C. § 53-08-01(4), suggests a broadening of the activities which are for "recreational purposes," we cannot conclude it encompasses all activities. Cf. Iodence v. City of Alliance, 700 N.W.2d 562, 564 (Neb. 2005) (stating prior "broad" interpretations of statute's "recreational purpose" definition do not extend to all activities). Although Minot's intent in opening its auditorium may have been for a public recreational use, we conclude as a matter of law Charles Leet's presence at the Minot Auditorium on the day before the Salute to Seniors event was for employment purposes and not for a recreational purpose.

[¶22] Accordingly, we hold the district court erred in granting Minot summary judgment under the recreational use immunity statutes. Because we hold N.D.C.C. ch. 53-08 does not apply, we need not address the Leets' remaining issues on appeal.

IV

[¶23] We reverse the district court judgment and remand for further proceedings consistent with this opinion.

[¶24] Gerald W. VandeWalle, C.J.
Carol Ronning Kapsner
Dale V. Sandstrom
Mary Muehlen Maring

Crothers, Justice, concurring in part and dissenting in part.

[¶25] I concur with Part II of the majority decision that the district court did not err allowing Minot to assert the recreational use immunity defense. I respectfully dissent from Part III regarding summary judgment because the majority erroneously concludes the Leets' claim is not barred by N.D.C.C. chapter 53-08. I also write separately to highlight this issue so that the Legislature might consider whether statutory clarification is warranted.

[¶26] This case requires us to apply the recreational use immunity statute to a situation most likely not contemplated by the Legislature: whether a landowner's immunity from liability extends to claims by a paid employee of a vendor preparing to participate in a public educational event. I part company with the majority because I believe they misread the statutes, misapply legislative intent, and reach a result antithetical to the Legislature's goal leading to adoption of recreational use immunity laws.

[¶27] The Legislature enacted the original statutes to encourage landowners to open their land for free recreational use by others. Majority opinion at ¶ 14 and Olson v. Bismarck Parks and Recreation Dist., 2002 ND 61, ¶ 6, 642 N.W.2d 864. The legislation was titled an Act "Limiting Liability of Landowners." 1965 N.D. Sess. Laws ch. 337. The Act was "[t]o encourage landowners to make available to the public, land and water areas and other property for recreational purposes by limiting their liability toward users." Id. The scope of immunity was expanded in 1995 when the recreational use statutes were modified to cover public and private property, and to ensure the recreational purpose definition covered all recreational activities. Olson, at ¶ 8. Subsequently, "[t]his Court has recognized that recreational use immunity statutes advance the important legislative goal of opening property to the public for recreational use in a manner that closely corresponds to the achievement of that goal." Majority opinion at ¶ 14 (citing Olson, at ¶ 6). Importantly, the Legislature has never retreated from that goal by narrowing the scope of the recreational use immunity statutes.

[¶28] Despite the original expression of legislative intent, and despite later legislative changes and expanded expressions of intent to maintain open access to both private and public property, the

majority focuses on the user's use of the property rather than the owner's purpose in making the property available. This is evident by that portion of the opinion stating, "Although the landowner's intent is not irrelevant, we conclude the district court erred in holding the landowner's intent controlled in determining whether the recreational use immunity statutes applied." Majority opinion at ¶ 19. Their conclusion builds on an earlier statement that "[t]he proper analysis in deciding whether to apply the recreational use immunity statutes must include consideration of the location and nature of the injured person's conduct when the injury occurs." Id. at ¶ 20. By so ruling, the majority strays from the Legislature's expressly stated goal of gaining access to property by protecting owners from liability. See 1965 N.D. Sess. Laws ch. 337.

[¶29] I do acknowledge that N.D.C.C. § 53-08-02 contains language about land available "for entry or use by others for recreational purposes" and the lack of a duty "to persons entering for such purposes." However, this section does not call for invention of a balancing test that looks to the entrant's use or intent, as is done by the majority. Instead, the Legislature has directed us to focus on the landowner when section 53-08-02 is read in the context of the other sections of chapter 53-08. When that is done, the rational interpretation is that the landowner has immunity from liability arising from recreational use that he, she, or it intended be conducted on the property. At the same time, section 53-08-02 should be read to say the owner has no immunity from claims arising out of injury to users who are on the property, by grant of authority from the owner, for other than recreational purposes.

[¶30] Under my interpretation, premises liability in the latter circumstance would be decided under the long-standing rule announced in O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977) (adopting ordinary negligence principles for licensees and invitees). However, premises liability would not occur, absent willful and malicious failure to guard or warn, for injury to a recreational user or injury to a third party using the property in connection with activities reasonably related to the recreational use. Set to facts, this means a landowner has no liability to an injured recreational snowmobiler. See Stokka v. Cass County Elec. Coop., 373 N.W.2d 911 (N.D. 1985). Nor should that landowner incur liability if an uninjured snowmobiler has mechanical problems, calls for repairs without involvement of the landowner, and the repairman is injured on the property open for recreational use. Yet the majority's opinion reaches just the opposite result.

[¶31] The majority's result is obtained by dramatically changing focus to each user's purpose for being present on the property and away from the owner's act of opening the property for recreational use. This shift strips the owner of any ability to control liability and hands that control to each user—or in this case—a user's employee. I

do not believe this is the result directed by plain words of the recreational use immunity statutes. I do not believe this result is supported by a fair assessment of the Legislature's express and implied intent. To the contrary, the majority's analysis and conclusion thwart, rather than carry out, the Legislature's goal by reducing, rather than maintaining or expanding, land available for recreational use. I would therefore affirm the district court judgment granting Minot summary judgment. Because the majority does not do so, I respectfully dissent from that part of its opinion.

[¶32] Daniel J. Crothers

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2010 ND 69

Jacqueline K. Schmidt and Randall R. Schmidt, Plaintiffs and Appellants
v.
Gateway Community Fellowship, a North Dakota corporation, and North Bismarck Associates II, a North Dakota general partnership, Defendants and Appellees

No. 20090047

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable David E. Reich, Judge.
REVERSED AND REMANDED.
Opinion of the Court by Kapsner, Justice.
Ariston Edward Johnson (argued) and David Del Schweigert (on brief), P.O. Box 955, Bismarck, ND 58502-0955, for plaintiffs and appellants.
Chris Ardon Edison, P.O. Box 4007, Bismarck, N.D. 58502-4007, for defendant and appellee Gateway Community Fellowship.
Stephen W. Plambeck, P. O. Box 2626, Fargo, N.D. 58108-2626, for defendant and appellee North Bismarck Associates II.

Schmidt v. Gateway Community Fellowship

No. 20090047

Kapsner, Justice.

[¶1] Jacqueline and Randall Schmidt appeal from a summary judgment dismissing their personal injury action against Gateway Community Fellowship and North Bismarck Associates II after the district court decided Gateway Community Fellowship and North Bismarck Associates II were entitled to recreational use immunity because Jacqueline Schmidt entered a parking lot at a shopping mall for recreational purposes and she was not charged to enter the premises. The Schmidts argue there are factual issues about whether Jacqueline Schmidt entered the premises for recreational purposes

and whether there was a charge for her entry to the premises. We reverse and remand.

I

[¶2] The Schmidts alleged Jacqueline Schmidt injured her right ankle on September 14, 2002, when she stepped in a hole in a paved parking lot on the north side of Gateway Mall shopping center in Bismarck while attending an outdoor automotive show and skateboarding exhibition sponsored by Gateway Community Fellowship, a non-profit church affiliated with the Church of God. At the time, Gateway Community Fellowship leased space for church services inside Gateway Mall from North Bismarck Associates II, the mall owner.

[¶3] On September 14, 2002, Gateway Community Fellowship sponsored an outdoor automotive show and skateboarding exhibition, the "Impact Auto Explosion", on a paved lot on the north side of Gateway Mall from 10 a.m. to 4 p.m., which was during the mall's regular Saturday business hours. According to Pastor Barry Saylor, the exhibition was held as a community outreach program to expose area youth to the teachings of Jesus Christ. Gateway Community Fellowship distributed videos and approximately 500 fliers during the exhibition, explaining the outreach program. The public was not charged an admission fee for entry to the exhibition, but Gateway Community Fellowship procured exhibition sponsors to defray costs. Additionally, the automotive show included several contests, and Gateway Community Fellowship charged car owners a registration fee to enter the contests. Gateway Community Fellowship had sponsored a similar event in 2001 which, according to Pastor Barry Saylor, was "extremely successful," and resulted in 1,200 more people at the mall than on a comparable day in 2000. The 2001 exhibition was on a parking lot on the south side of Gateway Mall, and according to Pastor Barry Saylor, the mall manager for North Bismarck Associates II directed Gateway Community Fellowship to hold the exhibition on the same weekend as Folkfest on the parking lot on the north side of Gateway Mall to increase visibility from Century Avenue in Bismarck. North Bismarck Associates II did not separately charge Gateway Community Fellowship for use of the parking lot for the 2002 exhibition. The parking lot on the north side of Gateway Mall had been part of a lumber yard of a previous mall tenant, and the area had holes and depressions in the concrete from the removal of posts that had formed part of an enclosure around the lumber yard. According to North Bismarck Associates II, the area of the parking lot used for the 2002 exhibition usually was roped off to be less accessible by the public.

[¶4] On September 14, 2002, Jacqueline Schmidt and her son were driving by Gateway Mall when they saw activity in the parking lot

north of Gatewall Mall, and they stopped at the exhibition. According to Jacqueline Schmidt, they decided "it would be fun. They had skateboarders, and they had music, and it was a nice day out. . . . We were enjoying ourselves. We were watching the skateboarders. We were looking around, looking at the vehicles. It was a pleasant day out. It was very nice out, and we were just enjoying spending time together, looking at the activities." Jacqueline Schmidt and her son were not charged an admission fee for entry to the property or to the exhibition. According to her, she severely injured her right ankle as she walked across the parking lot and stepped in a posthole from the prior tenant's lumber yard.

[¶5] The Schmidts sued Gateway Community Fellowship and North Bismarck Associates II, alleging they negligently and carelessly failed to eliminate the holes in the parking lot or to warn exhibition attendees about the holes and were liable for the hazardous condition on the premises. Gateway Community Fellowship and North Bismarck Associates II separately answered, denying they were negligent and claiming the Schmidts' action was barred by recreational use immunity under N.D.C.C. ch. 53-08. Gateway Community Fellowship and North Bismarck Associates II separately moved for summary judgment, arguing they were entitled to recreational use immunity under N.D.C.C. ch. 53-08, because the premises were used for recreational purposes and Jacqueline Schmidt was not charged to enter the premises.

[¶6] The district court granted summary judgment, concluding Gateway Community Fellowship and North Bismarck Associates II were entitled to recreational use immunity, because Jacqueline Schmidt entered the land for the recreational purpose of enjoying the exhibition with her son and she was not charged to enter the premises. The court also decided the statutory provisions for recreational use immunity were not unconstitutional as applied to the Schmidts' action.

II

[¶7] Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that reasonably can be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Kappenman v. Klipfel, 2009 ND 89, ¶ 7, 765 N.W.2d 716; Leet v. City of Minot, 2006 ND 191, ¶ 12, 721 N.W.2d 398. Whether the district court properly granted summary judgment is a question of law that we review de novo on the record. Kappenman, at ¶ 7; Leet, at ¶ 12. Summary judgment is appropriate if the issues in the case are such that the resolution of any factual disputes will not alter the result. Leet, at ¶ 12. A party moving for summary judgment must establish there are no genuine issues of material fact and the case is appropriate for judgment as a matter of

law. Kappenman, at ¶ 7. In determining whether summary judgment is appropriate, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which reasonably can be drawn from the record. Kappenman, at ¶ 7; Leet, at ¶ 12. However, if the movant meets its initial burden of showing the absence of a genuine issue of material fact, the opposing party may not rest on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact. Kappenman, at ¶ 7. The interpretation and application of a statute is a question of law, which is fully reviewable on appeal. Leet, at ¶ 12.

III

[¶8] Under North Dakota law for premises liability, general negligence principles govern a landowner's duty of care to persons who are not trespassers on the premises. See O'Leary v. Coenen, 251 N.W.2d 746, 748-52 (N.D. 1977) (abandoning common law categories of licensee and invitee for premises liability and retaining standard that owner owes no duty to trespasser except to refrain from harming trespasser in willful and wanton manner). Thus, a landowner or occupier of premises generally owes a duty to lawful entrants to exercise reasonable care to maintain the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of injury, and the burden of avoiding the risk. Id. at 751. See generally 1 Norman J. Landau and Edward C. Martin Premises Liability Law and Practice § 1.06[2][a] (perm ed., rev. vol. 2009).

[¶9] Under that formulation, an owner or possessor of commercial property owes a duty to lawful entrants to exercise reasonable care to maintain the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of injury, and the burden of avoiding the risk. See Groleau v. Bjornson Oil Co., 2004 ND 55, ¶ 16, 676 N.W.2d 763; Green v. Mid Dakota Clinic, 2004 ND 12, ¶ 8, 673 N.W.2d 257. See generally 1 Premises Liability Law and Practice, at § 4.01[2][a] (explaining owner or possessor of commercial property must warn entrants of all known dangers, must inspect premises to discover hidden dangers, and must provide proper warning of known dangers); 62 Am. Jur. 2d Premises Liability, §§ 435, 439 (2005) (discussing commercial property owner's duty to customers and potential customers in shopping centers and malls). Similarly, a church or religious institution generally owes the same duty of care to lawful entrants on its premises. See 1 Premises Liability Law and Practice, at § 4.03[5]; 62 Am. Jur. 2d Premises Liability, at §§ 456-57.

[¶10] In 1965, the Legislature enacted recreational use immunity

statutes to encourage landowners to open their land for recreational purposes by giving them immunity from suit under certain circumstances. 1965 N.D. Sess. Laws ch. 337 (codified at N.D.C.C. ch. 53-08); Hearing on S.B. 312 Before Senate Agricultural Comm., 39th N.D. Legis. Sess. (Feb 4, 1965); Kappenman, 2009 ND 89, ¶ 22, 765 N.W.2d 716; Leet, 2006 ND 191, ¶ 14, 721 N.W.2d 398; Olson v. Bismarck Parks and Recreation Dist., 2002 ND 61, ¶ 6, 642 N.W.2d 864. See generally 1 Premises Law and Practice, at § 5.01 [1]; 62 Am. Jur. 2d, Premises Liability, at §§ 125 et seq.

[¶11] Under N.D.C.C. § 53-08-02, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." Section 53-08-03, N.D.C.C., also provides:

> Subject to the provisions of section 53-08-05, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> 1. Extend any assurance that the premises are safe for any purpose;
>
> 2. Confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed; or
>
> 3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

At the time of the 2002 automotive show and skateboarding exhibition, N.D.C.C. § 53-08-05, provided there was no recreational use immunity for "[w]illful and malicious failure to guard or warn against a dangerous condition, use, structure, or activity,"or for "[i]njury suffered in any case where the owner of land charges the person or persons who enter or go on the land other than the amount, if any, paid to the owner of the land by the state." See 2003 N.D. Sess. Laws ch. 453 (amending N.D.C.C. § 53-08-05 to current language).

[¶12] For purposes of the recreational use immunity statutes, N.D.C.C. § 53-08-01, provides:

> 1. "Charge" means the amount of money asked in return for an invitation to enter or go upon the land.
>
> 2. "Land" includes all public and private land, roads, water, watercourses, and ways and buildings, structures, and machinery or equipment thereon.

> 3. "Owner" includes tenant, lessee, occupant, or person in control of the premises.
>
> 4. "Recreational purposes" includes any activity engaged in for the purpose of exercise, relaxation, pleasure, or education.

As originally enacted in 1965, N.D.C.C. § 53-08-01 defined "recreational purposes" to include, but not be limited to "any one or any combination of the following: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and visiting, viewing, or enjoying historical, archeological, geological, scenic, or scientific sites, or otherwise using land for purposes of the user." 1965 N.D. Sess. Laws ch. 337, § 1. In 1995 N.D. Sess. Laws ch. 162, § 7, the Legislature amended the definition of "recreational purposes" to its present form to cover "all recreational activities." Hearing on SB 2127 Before the House Agricultural Comm., 54th N.D. Legis. Sess. (Feb. 23, 1995) (written testimony of Robert Olheiser, State Land Commissioner). The amendment was not intended to limit recreational purposes to the previously listed activities but to include any activity by the user for purposes of exercise, relaxation, pleasure, or education. Id. See Leet, 2006 ND 191, ¶ 17, 721 N.W.2d 398.

IV

[¶13] The Schmidts argue the district court did not view the evidence in the light most favorable to them and erred in finding, as a matter of law, that Jacqueline Schmidt's use of the land was recreational in character and that there was no charge for her to enter the land. They argue the court erred in failing to weigh the business purposes of Gateway Community Fellowship and North Bismarck Associates II in having the exhibition on the dangerous parking lot. They claim Gateway Community Fellowship's purpose was to increase membership, including tithing, and North Bismarck Associate's purpose was to increase foot traffic for its Gateway Mall tenants. The Schmidts also argue the court erred in applying the statutory language allowing recovery if there is a charge for use of the property. They claim the statutes do not grant immunity if the owner has charged any person in exchange for allowing the plaintiff upon the land. They also assert a factual issue exists in this case because, although Gateway Community Fellowship did not directly charge Jacqueline Schmidt to enter the exhibition, it procured sponsors for the exhibition and charged contestants a registration fee to enter the contests in the automotive show.

[¶14] The interpretation of the recreational use immunity statutes is a question of law, fully reviewable on appeal. Kappenman, 2009 ND 89, ¶ 21, 765 N.W.2d 716; Leet, 2006 ND 191, ¶ 13, 721 N.W.2d

398. Our primary objective in interpreting a statute is to ascertain the intent of the legislation. Kappenman, at ¶ 21; Leet, at ¶ 13. Words in a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07.

[¶15] The parties do not dispute that both Gateway Community Fellowship and North Bismarck Associates II are "owners" of the premises for purposes of the plain language of the recreational use immunity statutes. See N.D.C.C. § 53-08-01(3) (defining owner to include "tenant, lessee, occupant, or person in control of the premises"). The issue here involves the scope of "recreational purposes" in a case in which the property "owners" are a mall and a church and their purposes have recreational and nonrecreational components. This Court has acknowledged the "expansively broad language" of N.D.C.C. ch. 53-08, including the current definition of "recreational purposes." Olson, 2002 ND 61, ¶ 22, 642 N.W.2d 864 (Neumann, Justice concurring and joined by two other justices).

[¶16] In Kappenman, we considered the definition of "recreational purposes" in the context of an unimproved section line road. 2009 ND 89, ¶ 21, 765 N.W.2d 716. There a 13 year-old boy was killed when he drove an all terrain vehicle into a washout across an unimproved section line in a rural area as he was driving home after mowing a field and was looking for a spot to place a deer stand. Id. at ¶¶ 2-3, 28. The trial court granted summary judgment dismissing the parents' wrongful death action against a township and an adjacent property owner, concluding the boy's use of the section line was recreational in nature and the action was barred by recreational use immunity. Id. at ¶¶ 5 , 19. We reversed the summary judgment against the township on that ground, concluding the action was not barred by the recreational use immunity statutes. Id. at ¶¶ 1 , 30, 40. We explained our analysis required interpretation of the recreational use statutes and their applicability to unimproved section lines, which are public roads open to the public for travel. Id. at ¶¶ 21, 28. We acknowledged the definition of "land" in N.D.C.C. § 53-08-01 (2) includes public roads, but we declined to construe the recreational use statutes to relieve governmental entities from their duties as supervisors of roads under all circumstances because public roads are primarily opened for purposes of travel, not recreation. Kappenman, at ¶ 23. We said a "section line is held out for purposes of travel rather than recreation, and is used for both recreational and nonrecreational purposes . . . [and b]ecause the section line is made available to the public for nonrecreational travel . . . the recreational use immunity statutes do not apply in this case." Id. at ¶ 28. We explained that conclusion was consistent with our caselaw applying the recreational use immunity statutes in which the injury occurred in a place that was opened for a recreational purpose and helped alleviate constitutional concerns associated with disparate treatment

of individuals based upon the place of an injury and whether it occurred during recreational or nonrecreational activities. Id. at ¶ 29.

[¶17] In Leet, an individual was injured while at the Minot City Auditorium to set up a booth for his employer, a vendor participating in a "Salute to Seniors Celebration" at the Auditorium the following day. 2006 ND 191, ¶ 2, 721 N.W.2d 398. A majority of this Court reversed a summary judgment dismissal of the individual's personal injury action against the City of Minot, concluding the recreational use immunity statutes did not bar the individual's action. Id. at ¶¶ 1 , 22-23. We said the owner's intent was not irrelevant, but did not control whether the recreational use immunity statutes applied. Id. at ¶ 19. We decided the proper analysis in deciding the application of those statutes included consideration of the location and nature of the injured person's conduct when the injury occurred. Id. at ¶ 20. We acknowledged the purpose of the statutes was to grant immunity to property owners who open their property to the public for recreational use, but we explained the language of the statutes was not so broad to include a person on the property for purposes of that person's employment. Id. at ¶ 21. We concluded "[a]lthough Minot's intent in opening its auditorium may have been for a public recreational use, . . . as a matter of law [the individual's] presence at the Minot Auditorium on the day before the Salute to Senior's event was for employment purposes and not for a recreational purpose." Id. at ¶ 21.

[¶18] In Olson, two individuals were injured while sledding free of charge on a hill on property owned, operated, and maintained by a public landowner, the Bismarck Parks and Recreation District. 2002 ND 61, ¶ 2, 642 N.W.2d 864. The district court rejected the individuals' state equal protection challenge to N.D.C.C. ch. 53-08 and granted the landowner's motion for summary judgment dismissal. Id. at ¶ 3. Relying on the undisputed facts that the individuals were engaged in a voluntary recreational use of the hill free of charge when they were injured, we held the recreational use immunity statutes did not violate state equal protection provisions because the statutes advanced the important legislative goal of opening property to the public for recreational use in a manner that closely corresponded to the achievement of that goal. Id. at ¶¶ 16-17.

[¶19] A common thread under our caselaw interpretating the recreational use immunity statutes is that the intent of both the owner and the user are relevant to the analysis and that the location and nature of the injured person's conduct when the injury occurs are also relevant. Kappenman, 2009 ND 89, ¶¶ 20, 28-29, 765 N.W.2d 716; Leet, 2006 ND 191, ¶¶ 18-20, 721 N.W.2d 398. Our caselaw effectively recognizes more than one purpose may be involved with the use of land. See Kappenman, at ¶ 28; Leet, at ¶¶ 19-20. Other jurisdictions have acknowledged that cases involving claims of recreational use immunity involve fact-driven inquiries in which

nonrecreational uses or purposes may be mixed with recreational uses or purposes. See Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 598 S.E.2d 471, 473-76 (Ga. 2004); Anderson v. Atlanta Comm. for the Olympic Games, Inc., 537 S.E.2d 345, 348-50 (Ga. 2000); Crichfield v. Grand Wailea Co., 6 P.3d 349, 357-61 (Haw. 2000); Auman v. School Distr. of Stanley-Boyd, 2001 WI 125, ¶¶ 11-13, 635 N.W.2d 762.

[¶20] In Anderson, 537 S.E.2d at 348, the Georgia Supreme Court recognized that application of the Georgia recreational use statute does not require the public to be on property for "sheer recreational pleasure" and that the statute may apply where commercial interests are mixed with recreational purposes. The court recognized the difficulties in cases where commercial and recreational aspects of the land were closely intertwined and adopted an objective balancing test from Silingo v. Village of Mukwonago, 458 N.W.2d 379, 382 (Wis. Ct. App. 1990), to determine an owner's true purpose in making the land available free of charge to the public by requiring the trier of fact to consider all relevant social and economic aspects of the activity:

> [The test] requires that all social and economic aspects of the activity be examined. Relevant considerations on this question include, without limitation, the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity's purpose and consequence.

537 S.E.2d at 349. The court explained that balancing test did not preclude consideration of the user's subjective assessment of the activity, but did not make that subjective assessment controlling. Id. The court reversed a summary judgment in favor of the landowner and remanded for utilization of the balancing test to determine whether the recreational use statute provided the landowner immunity. Id.

[¶21] On remand, the trial court again granted the landowner summary judgment, ruling the recreational use statute provided the landowner immunity. Atlanta Comm., 598 S.E.2d at 473. The Georgia Supreme Court again reversed the trial court and remanded, stating the purpose for which the public was permitted on the property involves the examination and weighing of evidence in those instances in which there exist both commercial and recreational aspects for the use of the property, and if there is conflicting evidence regarding the purpose, the trier of fact must resolve the conflict. Id. at 473-74. The court explained that even if there is no dispute about the activities on the land, the nature and extent of the mixed uses of the land may raise factual issues about the owner's purpose for directly or indirectly inviting or permitting a person to use the land without charge. Id. at 474. The court explained the issue for resolution by the trier of fact was whether the owner directly or

indirectly invited or permitted any person to use the property for recreational purposes in light of any evidence the owner's purpose in allowing the public to be on the land free of charge was to derive, directly or indirectly, a pecuniary gain from business interests on the land. Id. The court said summary judgment for that issue was appropriate only when reasonable minds could not differ as to the conclusion. Id. The court recognized the inquiry was intensively fact driven and also elaborated on the type of evidence necessary to resolve a mixed use case where the land's commercial and recreational aspect were closely intertwined. Id. at 474-76. The court explained relevant considerations include whether the owner makes the property available to the public free of charge during regular business hours or at other times and whether the owner's financial arrangements with commercial interests that are both on and off the land indicate the property was made available for recreational or commercial purposes. Id.

[¶22] In Auman, 2001 WI 125, ¶ 12, 635 N.W.2d 762 (footnotes omitted), the Wisconsin Supreme Court said the line between recreational and nonrecreational purposes was an intensely fact-driven inquiry and reiterated the test for resolving the issue:

> Although the injured person's subjective assessment of the activity is pertinent, it is not controlling. A court must consider the nature of the property, the nature of the owner's activity, and the reason the injured person is on the property. A court should consider the totality of circumstances surrounding the activity, including the intrinsic nature, purpose, and consequences of the activity. A court should apply a reasonable person standard to determine whether the person entered the property to engage in a recreational activity.

[¶23] Under N.D.C.C. ch. 53-08 and our caselaw interpreting those provisions, we decline to construe our recreational use statutes to necessarily provide a commercial landowner immunity where there is a recreational and commercial component to the landowner's operation. We conclude the rationale and balancing test from Anderson, Atlanta Comm., Auman and Silingo, provide persuasive authority for construing our statutes and assessing mixed use cases. We hold that balancing test applies to our recreational use immunity statutes in mixed use cases and that inquiry generally involves resolution of factual issues unless the facts are such that reasonable minds could not differ.

[¶24] Although there is evidence that North Bismarck Associates II opened an area of the mall parking lot that was not normally accessible to the public, there is also evidence that North Bismarck Associates II allowed its tenant to hold the exhibition on mall property on a Saturday during regular business hours to increase foot traffic for the Gateway Mall tenants. Compare Piligian v. United

States, 642 F.Supp. 193, 194-96 (D. Mass. 1986) (applying Virginia recreation use statutes and holding statute did not preclude defendant's duty of ordinary care to visitor who was injured when folding chair collapsed while visitor was sitting in chair to watch chorus perform after visitor had been shopping in a shopping concourse) with Nitishim v. The Musicland Group, Inc., 20 Mass. L. Rptr. 347, 2005 WL 3627262 (Mass. Super. 2005) (plaintiff injured while engaged exclusively in recreational walking at mall at 5:30 a.m. before mall opened for business; held facts fit within literal text of recreational use immunity statute). North Bismarck Associates II is a commercial enterprise that owns the Gateway Mall and increasing foot traffic is a commercial component to operation of the mall. See Crichfield, 6 P.3d at 361 (declining to construe recreational use immunity statute to create a universal defense to commercial establishments where there is a recreational and commercial component to the establishment's operation). Gateway Community Fellowship was a rent-paying tenant for Gateway Mall, which supports an inference that North Bismarck Associates II allowed Gateway Community Fellowship use of the parking lot as part of that landlord and tenant arrangement. There is also evidence that Gateway Community Fellowship held the exhibition as part of a youth outreach program to expose area youth to the teachings of Jesus Christ, which is consistent with the purpose of the church and not necessarily congruent with only a recreational purpose. Moreover, there is evidence Gateway Community Fellowship procured sponsors for the exhibition and charged contestants a registration fee to enter the car contests. Those facts do not constitute an "amount of money asked in return for an invitation to enter or go upon the land" under the literal language of N.D.C.C. § 53-08-01(1), but we believe those facts may be considered under the balancing test to determine whether there is immunity as a recreational purpose. Here, the district court focused solely on Jacqueline Schmidt's subjective purpose for entering the premises without considering the owners' purposes under the balancing test for mixed uses we adopt today. Although her subjective purpose is relevant, it is not controlling. Leet, 2006 ND 191, ¶ 19, 721 N.W.2d 398. See Auman, 2001 WI 125, ¶ 12, 635 N.W.2d 762. We conclude the facts in this case are not such that reasonable persons could reach one conclusion and there are disputed factual issues about whether North Bismarck Associates II and Gateway Community Fellowship are entitled to recreational use immunity. We therefore conclude resolution of the issue by summary judgment was inappropriate and a remand is necessary for the trier of fact to apply the balancing test to this mixed use case.

V

[¶25] The Schmidts claim the district court erred in failing to consider evidence that Gateway Community Fellowship and North Bismarck Associates II willfully and maliciously failed to guard

against a dangerous condition, which would preclude application of recreational use immunity to this case. See N.D.C.C. § 53-08-05(1). They argue there are disputed issues of fact about whether the defendants' conduct met that standard. However, the Schmidts' complaint alleged the defendants engaged in negligent and careless conduct, and the Schmidts did not adequately raise an issue about willful and malicious conduct in the district court in their pleadings or otherwise. On this record, we decline to address Schmidts' argument about willful and malicious conduct. However, they are not precluded from making a motion to amend their complaint on remand.

VI

[¶26] The Schmidts argue the district court erred in deciding the recreational use immunity statutes are constitutional as applied to the facts of their action. They claim the recreational use statutes violate state equal protection guarantees and argue the statutes do not have a close correspondence to the legislative goal of encouraging landowners to open their land to recreational users. In view of our interpretation of the recreational use immunity statutes and our disposition of this appeal, we need not address the Schmidts' equal protection argument.

VII

[¶27] We reverse the summary judgment and remand for proceedings consistent with this opinion.

[¶28] Carol Ronning Kapsner
Mary Muehlen Maring
Donovan J. Foughty, D.J.

I concur in the result.
Gerald W. VandeWalle, C.J.

[¶29] The Honorable Donovan John Foughty, D.J., sitting in place of Crothers, J., disqualified.

Sandstrom, Justice, dissenting in part.

[¶30] I respectfully dissent.

[¶31] I am not convinced that a church should be denied the protection otherwise provided by law because one of the reasons for, or consequences of, its generosity is that others may be inspired to join in its good work or in the beliefs that inspire it.

[¶32] Nor do I believe that persons who lead "a godly life"—perhaps

feeding the poor, providing free medical care, or providing "Good Samaritan" relief at the scene of an accident, all without expectation of remuneration, thinking that is what they are called to do—should be denied the protections otherwise provided by law because they believe or hope that others may be inspired by their example to join with them in doing good works. See N.D.C.C. § 32-03.1.

[¶33] Nor should a philanthropist lose the protections of law because the philanthropist hopes that an example of generosity will inspire others to become philanthropists.

[¶34] Nor should a service club doing good works be denied the protections of law because its members or leaders hope the example of selfless service may inspire others to join them in their work.

I

[¶35] Although our statute is not as clear as we might like, the language focuses on the purpose of the person invited onto the property. See N.D.C.C. ch. 53-08.

[¶36] Section 53-08-02 of the North Dakota Century Code provides:

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

N.D.C.C. § 53-08-02 (emphasis added). Under the words of the statute, it is the "entry or use" of the premises "by others" that is "for recreational purposes." The focus of this statute is on the users of the property. What was their purpose in entering and using the property? This focus is consistent with our holding in Leet v. City of Minot, 2006 ND 191, 721 N.W.2d 398, where we looked to the purpose for which the plaintiff was on the premises. In that case, even though others were on the premises for recreational purposes, the plaintiff was on the premises for business purposes. Id. at ¶ 21.

[¶37] The plaintiffs here came onto the property for recreational purposes.

II

[¶38] I have found no case in the country denying recreational use immunity that would otherwise be available to clubs or religious organizations on the basis that hosted events included an aim of recruiting new members.

[¶39] In Bronsen v. Dawes County, 722 N.W.2d 17 (Neb. 2006), an attendee of a historical fur trade celebration stepped into a hole in a county courthouse lawn and fell down and broke her ankle and then brought a negligence action against the county and the nonprofit organization, Fur Trade Days, that hosted the event. The Supreme Court of Nebraska held the attendee was "picnicking," which was a recreational purpose, and thus the nonprofit organization was immune from liability. While part of the purpose of the celebration was likely to bring awareness and recruitment to Fur Trade Days, the Nebraska court made no mention of that aspect and simply held it was not erroneous for the district court to find the attendee's actions fell into the category of "picnicking," which constituted a recreational purpose under the Recreation Liability Act.

[¶40] Similarly, in Maleare v. Peachtree City Church of Christ, 445 S.E.2d 321 (Ga. App. 1994), a church left its grounds and fixtures, including a playground, open to the general public free of charge. After a church member was severely injured when the swing she was sitting on broke, she brought suit against the church. The district court granted summary judgment to the church, finding it was granted immunity under the Recreational Property Act. The church member argued she was a "paying member" of the church, but the Georgia Court of Appeals denied that argument, because the playground was frequently and regularly used by the public, including non-members of the church. The Georgia Court of Appeals upheld the summary judgment and did not consider the possible argument that the church left its grounds open to raise awareness and increase recruitment to the church.

[¶41] In Thompson v. St. Mary's Immaculate Conception Church, 1998 WL 13936 (Conn. Super. Ct.), the Superior Court of Connecticut denied a motion for summary judgment and found the defendant church would not be granted immunity from liability. In that case, the plaintiff attended a fund-raising fair hosted by the church, fell down, and was injured. The district court declined to grant the church recreational use immunity, because although the concerts were free, the fair also included games, rides, and amusements, which were not.

III

[¶42] I would not deny to the church the benefits of the recreational use immunity statute simply because a reason for or an effect of the church's permitting members of the public to enter for recreational purposes may be that some participants might ultimately choose to join the church.

[¶43] Dale V. Sandstrom