

SCHOOLS—DISTRICT LIABILITY:
POLITICAL SUBDIVISION LIABILITY AND SCHOOL DUTIES
PREVAIL OVER RECREATIONAL USE IMMUNITY

M.M. v. Fargo Public School District No. 1,
2010 ND 102, 783 N.W.2d 806

ABSTRACT

In *M.M. v. Fargo Public School District No. 1*, the North Dakota Supreme Court held North Dakota's recreational use immunity statutes were not applicable when a student was injured on school grounds during school hours. Thus, a school district, as a political subdivision, can be liable for a student's injuries pursuant to section 32-12.1-03 of the North Dakota Century Code. Recreational use immunity statutes, or some variation of the statutes, can be found in all states and are in place to encourage landowners to open their property for recreational purposes without facing the risks of liability. While landowners do not have a duty to warn or keep the premises safe for recreational users, a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity may still result in liability. Since North Dakota's enactment of the recreational use immunity statutes in 1965, the statutes have endured several modifications and judicial interpretations, including their applicability to political subdivisions. However, through consideration of the purpose of the recreational use immunity statutes, the location of the accident, other laws pertaining to the special relationship between schools and students, and the analysis provided by other courts, the North Dakota Supreme Court declined to immunize the school district under these statutes when *M.M.*, a student, injured himself while performing a bike stunt in the school auditorium shortly after classes adjourned. By narrowing the use of the recreational use immunity statutes, more liability may result from the *M.M.* decision as contrary to the legislature's policy decision behind enacting the statutes.

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I. FACTS

In 2004, M.M. was a ninth grade student attending Discovery Middle School in Fargo, North Dakota.¹ As a part of the curriculum taught by U.S. History teacher Eugenia Hart, students could participate in the annual event called “60s Day,” which consisted of various activities.² One year, a student performed a bike stunt for the event in the school’s auditorium.³ M.M.’s classmate, J.B., learned of the student’s stunt and approached M.M. about recreating the stunt for the 2004 “60s Day.”⁴ When J.B. asked Hart about the stunt, J.B. allegedly did not receive an affirmative “yes” or “no” answer until Hart later approached M.M. and told M.M. it was “not a good idea.”⁵

The day before the event, J.B. and M.M. decided to practice the stunt in the school’s auditorium.⁶ Without formal permission to do so, and despite Hart’s conversation with M.M., M.M. and J.B. brought their bikes into the auditorium in order to practice; the two entered through a side door left ajar, between 3:45 p.m. and 4:00 p.m.⁷ At the school, classes adjourned at 3:30 p.m., but teachers and administrators typically stayed until 4:00 p.m.⁸ On this particular day, Hart left the school at approximately 3:30 p.m.⁹

When practicing, J.B. successfully completed his stunt.¹⁰ When M.M. attempted the stunt, however, he fell and hit his head on the auditorium floor.¹¹ As a result of the fall, M.M. sustained serious injuries.¹²

M.M. and his father, Thomas Moore, brought suit against Hart and Fargo Public School District No. 1 (the District) in 2007 for Hart’s negligent actions during the course of her employment.¹³ The District moved for summary judgment before trial, which was granted on the ground that the recreational use immunity statutes from chapter 53-08 of the North Dakota Century Code shielded the school from liability for accidents occurring on

1. M.M. v. Fargo Pub. Sch. Dist. No. 1, 2010 ND 102, ¶ 2, 783 N.W.2d 806, 808.

2. *Id.* at 809.

3. *Id.* ¶ 3.

4. *Id.*

5. *Id.* ¶¶ 3-4.

6. *Id.* ¶ 4.

7. *Id.* ¶¶ 4-5.

8. *Id.* ¶ 4.

9. *Id.*

10. *Id.* ¶ 5.

11. *Id.*

12. *Id.*

13. *Id.* ¶ 6. A separate claim was brought against Hart for personal liability. *Id.*

school property.¹⁴ The trial court also found the “willful and malicious” exception to the recreational use immunity statute did not apply based on the evidence presented.¹⁵ M.M. and Thomas Moore appealed the decision, arguing the district court erred in ruling recreational use immunity shielded the District from liability.¹⁶

II. LEGAL BACKGROUND

All fifty states have some form of recreational use immunity statutes in place to protect landowners from injuries stemming from recreational use of their land when it is open for such use.¹⁷ Many of these statutes are similar to model legislation promulgated by the Council of State Governments called “Public recreation on private lands: limitations on liability.”¹⁸ North Dakota followed the example legislation and passed chapter 53-08 of the North Dakota Century Code, entitled “Limiting Liability of Landowners,”

14. *Id.*

15. *Id.*

16. *Id.* ¶ 7, 783 N.W.2d at 810.

17. *Id.* ¶ 14, 783 N.W.2d at 812; see MATTHEW BENDER, PREMISES LIABILITY—LAW AND PRACTICE § 5.01 (2010); see also ALA. CODE §§ 35-15-1 to -28 (2009); ALASKA STAT. § 09.65.200 (2008); ARIZ. REV. STAT. ANN. § 33-1551 (2007); ARK. CODE ANN. §§ 18-11-301 to -307 (2009); CAL. CIV. CODE § 846 (Deering 2011); COLO. REV. STAT. §§ 33-41-101 to -106 (2009); CONN. GEN. STAT. §§ 52-557f to -557i (2005); DEL. CODE ANN. tit. 7, §§ 5901-5907 (2010); FLA. STAT. § 375.251 (2008); GA. CODE ANN. §§ 51-3-20 to -26 (2009); HAW. REV. STAT. §§ 520-1 to -8 (2006); IDAHO CODE ANN. § 36-1604 (2009); 745 ILL. COMP. STAT. §§ 65/1-65/7 (2008); IND. CODE § 14-22-10-2 (2003); IOWA CODE §§ 461C.1-461C.7 (2010); KAN. STAT. ANN. §§ 58-3201 to -3207 (2005); KY. REV. STAT. ANN. § 411.190 (LexisNexis 2005); LA. REV. STAT. ANN. § 9:2795 (2011); ME. REV. STAT. tit. 14, § 159-A (2009); MD. CODE ANN., NAT. RES. §§ 5-1101 to -1108 (LexisNexis 2005); MASS. GEN. LAWS ch. 21, § 17C (2009); MICH. COMP. LAWS SERV. § 324.73301 (LexisNexis 2001); MINN. STAT. §§ 604A.20-.27 (2010); MISS. CODE ANN. §§ 89-2-1 to -27 (1999); MO. REV. STAT. §§ 537.345-537.347 (2008); MONT. CODE ANN. §§ 70-16-301 to -302 (2009); NEB. REV. STAT. §§ 37-729 to -736 (2008); NEV. REV. STAT. ANN. § 41.510 (LexisNexis 2006); N.H. REV. STAT. ANN. § 212:34 (LexisNexis 2009); N.J. STAT. ANN. §§ 2A:42A-2 to -5.1 (West 2010); N.M. STAT. ANN. § 17-4-7 (2006); N.Y. GEN. OBLIG. LAW § 9-103 (Consol. 2006); N.C. GEN. STAT. §§ 38A-1 to -4 (2009); N.D. CENT. CODE §§ 53-08-01 to -06 (2007); OHIO REV. CODE ANN. §§ 1533.18 to -181 (LexisNexis 2007); OKLA. STAT. ANN. tit. 76, § 10.1 (West 2010); OR. REV. STAT. § 105.682 (2009); 68 PA. CONS. STAT. ANN. §§ 477-1 to -7 (West 2010); R.I. GEN. LAWS §§ 32-6-1 to -6 (2009); S.C. CODE ANN. §§ 27-3-10 to -70 (2007); S.D. CODIFIED LAWS §§ 20-9-12 to -18 (2010); TENN. CODE ANN. §§ 11-10-101 to -104 (1999); TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.001-75.003 (West 2005); UTAH CODE ANN. §§ 57-14-1 to -7 (LexisNexis 2009); VT. STAT. ANN. tit. 12, §§ 5791-5795 (2002); VA. CODE ANN. § 29-130.2 (2009); WASH. REV. CODE §§ 4.24.200-.210 (LexisNexis 2008); W. VA. CODE §§ 19-25-1 to -6 (LexisNexis 2007); WIS. STAT. ANN. § 895.52 (West 2006); WYO. STAT. ANN. §§ 34-19-101 to -107 (2009).

18. Cf. Robin C. Miller, Annotation, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 A.L.R.4th 262, 270 (2010).

in 1965.¹⁹ However, since 1965, the statutes have undergone several legislative modifications in response to judicial rulings.²⁰

A. AN OVERVIEW OF RECREATIONAL USE IMMUNITY STATUTES

The express purpose of many recreational use immunity statutes is “to encourage owners of land to make land and water areas available to the public for recreational purposes.”²¹ The statutes arose due to judicial expansion of those who constitute an “invitee”²² on land for purposes of owing a duty of care, thereby immunizing landowners against claims concerning maintenance and operation of property offered for free, recreational purposes.²³ While recreational use immunity statutes may differ from state-to-state, many of these statutes follow partially or entirely the suggested legislation offered by the Council of State Governments.²⁴

Overall, the suggested legislation provides that a landowner whose land is being used for recreational purposes, without charge, owes no duty either to provide care to keep the property safe for entry or use or to give any warning of “a dangerous condition, use, structure, or activity” on the property.²⁵ Additionally, the legislation states a landowner neither extends any assurances the property is safe for a recreational user nor confers on a recreational user the legal status of an invitee²⁶ or licensee,²⁷ which would impose a duty of care on a landowner.²⁸ Yet, any “willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity” may result in a landowner’s liability.²⁹ Therefore, the main question

19. See 1965 N.D. Laws 648-50. Today, the chapter is known as “Liability Limited for Owner of Recreation Lands.” N.D. CENT. CODE ch. 53-08.

20. Compare, e.g., *Hovland v. City of Grand Forks*, 1997 ND 95, ¶ 13, 563 N.W.2d 384, 388 (noting that recreational use immunity statutes, as enacted in 1965, were applicable only to private landowners), with N.D. CENT. CODE § 53-08-01(2) (“‘Land’ includes all public and private lands . . .”).

21. BENDER, *supra* note 17, § 5.01; see also 24 SUGGESTED STATE LEGISLATION 150 (The Council of State Governments, 1965).

22. An “invitee,” particularly a “public invitee,” is defined as “a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.” RESTATEMENT (SECOND) OF TORTS § 332 (1965).

23. 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.05.42 (3d ed. 2003).

24. Miller, *supra* note 18, at 270.

25. *Id.* at 271; 24 SUGGESTED STATE LEGISLATION, *supra* note 21, at 151; see, e.g., N.D. CENT. CODE §§ 53-08-02 to -03.

26. See *supra* note 22.

27. A “licensee” is defined as “a person who is privileged to enter or remain on land only by virtue of the possessor’s consent.” RESTATEMENT (SECOND) OF TORTS, *supra* note 22, § 330.

28. Miller, *supra* note 18, at 271; 24 SUGGESTED STATE LEGISLATION, *supra* note 21, at 151; see, e.g., N.D. CENT. CODE §§ 53-08-03 to -04.

29. Miller, *supra* note 18, at 271; 24 SUGGESTED STATE LEGISLATION, *supra* note 21, at 151; see, e.g., N.D. CENT. CODE § 53-08-05.

that arises in many suits pertaining to recreational use and personal injuries is whether the statutes are applicable and, if they are not, which common law principles will determine the landowner's liability.³⁰

B. STATUTORY EVOLUTION OF RECREATIONAL USE IMMUNITY STATUTES IN NORTH DAKOTA

With the enactment of the recreational use immunity statutes in chapter 53-08 of the North Dakota Century Code, the North Dakota Legislature mirrored the purpose stated by the Council of State Governments and explicitly wanted "to encourage landowners to open their land to the public for recreational purposes" by limiting landowners' liability toward users.³¹ However, faced with judicial decisions expanding potential liability and limiting the application of these statutes after their enactment,³² the legislature was forced to change the language of some sections in chapter 53-08 to broaden the statutes' applicability.³³

1. *Enactment and Original Purpose in 1965*

Following the lead of many states and the Council of State Governments' suggested legislation, North Dakota introduced and passed the recreational use immunity statutes in 1965.³⁴ These statutes provided so long as the owner of land did not perform willful or malicious acts against recreational users and did not charge the person injured for recreational use of the land, he or she owed no duty of care to keep the premises safe for recreational purposes, or to give any warning to those individuals on the premises of potentially dangerous conditions.³⁵ Also, by using the land for recreational purposes, the user did not have any assurances the land is safe, that he or she has the legal status of an invitee or licensee, or that the owner assumed any responsibility for injuries.³⁶ Initially, the term "recreational purpose" was defined by including examples of recreational activities.³⁷ "Land" also included an exhaustive list of "roads, water, watercourses,

30. Miller, *supra* note 18, at 271.

31. Hovland v. City of Grand Forks, 1997 ND 95, ¶ 10, 563 N.W.2d 384, 387.

32. *See id.*; *see also* Fastow v. Burleigh Cnty. Water Res. Dist., 415 N.W.2d 505, 508 (N.D. 1987) (citing Kitto v. Minot Park Dist., 224 N.W.2d 795, 797 (N.D. 1974)).

33. *See Fastow*, 415 N.W.2d at 508-09.

34. *Cf.* 1965 N.D. Laws 648-50.

35. N.D. CENT. CODE §§ 53-08-02, -05 (2007).

36. *Id.* §§ 53-08-03 to -04.

37. *See Stokka v. Cass Cnty. Elec. Coop.*, 373 N.W.2d 911, 913 (N.D. 1985) ("Recreational purposes' includes, but is not 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, archaeological, geological, scenic, or scientific sites, or otherwise using land for purposes of the user.").

private ways and buildings, structures and machinery or equipment thereon when attached to the realty.”³⁸

The statutes remained unchallenged until the 1985 case of *Stokka v. Cass County Electric Cooperative*.³⁹ While the main argument in the case was whether Stokka’s snowmobiling accident occurred in a location within the definition of “land,” as defined in section 53-08-01 of the North Dakota Century Code, Stokka made a public policy argument toward expanding tort liability in order to disallow the statutes’ applicability in his case.⁴⁰ The court rejected the argument as beyond the duty of the judiciary and more appropriate for the North Dakota Legislature.⁴¹ Rather, the court noted its task was to interpret the current recreational use statutes, which led the court to conclude the public highways Stokka used when his snowmobiling accident occurred fell within the bounds of the statutes.⁴² As a result, the statutes shielded the landowner from liability unless the landowner’s actions were willful or malicious.⁴³

2. *Application in Response to Governmental Liability*

After the abolishment of governmental immunity for political subdivisions, the North Dakota Legislature passed chapter 32-12.1, relating to political subdivision liability.⁴⁴ The recreational use immunity statutes were questioned in relation to a new subsection in chapter 32-12.1, subsection 32-12.1-03(1), in *Fastow v. Burleigh County Water Resource District*.⁴⁵ In that case, Fastow dove into a designated swimming area regulated by the Water District and injured his spinal cord.⁴⁶ Because the Water District was a political subdivision and the activities Fastow engaged

38. *Id.*

39. *Id.*

40. *Id.* at 914.

41. *Id.*

42. *Id.* at 915.

43. *Id.*

44. *Fastow v. Burleigh Cnty. Water Res. Dist.*, 415 N.W.2d 505, 508 (N.D. 1987) (citing *Kitto v. Minot Park Dist.*, 224 N.W.2d 795, 797 (N.D. 1974)). In particular, subsection 32-12.1-03(1) provides:

Each political subdivision shall be liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee’s employment or office under circumstances where the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition or use of tangible property, real or personal, under circumstances where the political subdivision, if a private person, would be liable to the claimant.

N.D. CENT. CODE § 32-12.1-03(1) (2010).

45. 415 N.W.2d 505 (N.D. 1987).

46. *Fastow*, 415 N.W.2d at 507.

in were recreational, an issue on appeal was whether the more recently passed chapter 32-12.1 of the North Dakota Century Code required the application of the recreational use immunity statutes to political subdivisions.⁴⁷

The trial court determined subsection 32-12.1-03(1) provided two instances for a political subdivision to be held liable for injuries, and the North Dakota Supreme Court agreed.⁴⁸ One instance of political subdivision liability arises when the injury occurred due to a condition or use of the property and a private person could be liable under the same circumstances.⁴⁹ Another instance of liability may arise for “injuries caused by the negligence or wrongful act or omission of an employee acting within the scope of the employee’s employment [for the political subdivision].”⁵⁰ Although political subdivision liability exists under these circumstances, the court stated when injuries are sustained by a nonpaying recreational user such as Fastow, chapter 53-08 of the North Dakota Century Code precludes liability for acts of ordinary negligence or property conditions.⁵¹

The issue addressed in *Fastow* was revisited in *Hovland v. City of Grand Forks*.⁵² There, Hovland was injured while in-line skating on a municipal bike path and sued the City of Grand Forks (City) for negligence.⁵³ The lower court granted the City’s motion for summary judgment on the basis that the recreational use immunity statute applied to political subdivisions.⁵⁴ The North Dakota Supreme Court disagreed, holding the discussion announced in *Fastow*—regarding political subdivision liability in relation to recreational use—to be dicta because the essential holding of *Fastow* was that the political subdivision waived its immunity by purchasing insurance coverage.⁵⁵ Therefore, because the application of the recreational use immunity statutes to political subdivisions would circumvent the legislative intent behind political subdivision liability in chapter 32-12.1, and because the recreational use immunity statutes were created to encourage *private* landowners to open lands for public access, the court determined the City was not immune.⁵⁶

47. *Id.*

48. *Id.* at 509.

49. *Id.*

50. *Id.*

51. *Id.* When a political subdivision has insurance coverage, however, chapter 53-08 does not apply for immunity. *Id.*

52. 1997 ND 95, 563 N.W.2d 384.

53. *Hovland*, ¶¶ 2-3, 563 N.W.2d at 385-86.

54. *Id.* ¶ 4, 563 N.W.2d at 386.

55. *Id.* ¶ 8, 563 N.W.2d at 386-87.

56. *Id.* ¶¶ 11, 13, 563 N.W.2d at 387-88 (emphasis added).

3. *Legislative Amendments to Recreational Use Immunity Statutes*

The North Dakota Legislature recognized the need to alter the recreational use immunity statutes to withstand further judicial scrutiny.⁵⁷ Thus, the legislature first amended the statutes by changing the language “willful or malicious” in subsection 53-08-05(1) to “willful and malicious.”⁵⁸ In 1995, the statutes were again amended to change the definitions of “land” and “recreational purposes.”⁵⁹ The new definitions provided “land” included “all public and private land . . .” and “recreational purpose” was “any activity engaged in for the purpose of exercise, relaxation, pleasure, or education.”⁶⁰ The legislative intent behind changing these definitions was to protect landowners, regardless of whether the land was public or private, as well as to expand the types of activities that were recreational to protect against the exposure of liability.⁶¹

C. CASE LAW DEVELOPMENT OF RECREATIONAL USE IMMUNITY

The North Dakota cases dealing with recreational use immunity can be categorized into two separate time frames according to the legislative changes explained above: pre- and post-1995 amendments to chapter 53-08. Although political subdivision liability had been discussed in North Dakota cases, the issue of a school’s liability had not been addressed, with the exception of one concurring opinion in *Olson v. Bismarck Parks and Recreation District*.⁶²

1. *North Dakota’s Interpretation of Recreational Use Immunity Prior to the 1995 Amendments*

The first recreational use immunity case before the North Dakota Supreme Court was *Stokka*.⁶³ However, the first case to question political subdivision liability in relation to recreational use immunity was *Fastow*.⁶⁴

57. See *Hearing on S.B. 2127 Before the House Agric. Comm.*, 54th Legis. Assemb. (N.D. 1995) [hereinafter *House Hearing*] (written testimony of Robert Olheiser, State Land Comm’r, dated Feb. 22, 1995).

58. *Olson v. Bismarck Parks & Recreation Dist.*, 2002 ND 61, ¶ 8, 642 N.W.2d 864, 867 (citing 1993 N.D. Laws ch. 503, § 1) (emphasis added).

59. *Id.* (citing 1995 N.D. Laws ch. 162, § 7).

60. N.D. CENT. CODE § 53-08-01 (2007) (emphasis added).

61. See *Olson*, ¶ 8, 642 N.W.2d at 867; see also *Hearing on S.B. 2127 Before the Senate Agric. Comm.*, 54th Legis. Assemb. (N.D. 1995) (testimony of Robert Olheiser, State Land Comm’r).

62. See *Olson*, ¶ 22, 642 N.W.2d at 872 (Neumann, J., concurring).

63. See *supra* Part II.B.1.

64. See *supra* Part II.B.2.

Despite the *Fastow* court's discussion that chapter 53-08 relating to immunity precludes subsection 32-12.1-03(1) liability for ordinary negligence of a political subdivision,⁶⁵ the North Dakota Supreme Court held, in *Hovland*, the original recreational use immunity statutes only insulated private landowners from liability in light of the abolition of governmental immunity.⁶⁶ The change in the court's interpretation sparked the legislature's willingness to broaden the recreational use immunity statutes and allowed, once again, for some form of political subdivision immunity with the inclusion of "public lands" in the recreational use statutes.⁶⁷

2. *North Dakota's Interpretation Following the 1995 Amendments*

In their current form, the broadened recreational use immunity statutes are constitutionally applicable to political subdivisions.⁶⁸ This pronouncement occurred in *Olson v. Bismarck Parks and Recreation District*.⁶⁹ In *Olson*, two sledders injured themselves on property owned by the Parks and Recreation District, which was a political subdivision.⁷⁰ After determining the legislature had altered the recreational use immunity statutes to include public landowners, the North Dakota Supreme Court held the statutes applied to preclude any suit for ordinary negligence against the political subdivision.⁷¹ Because the activity of sledding was clearly recreational, the statutes' purpose was fulfilled by limiting tort liability for opening land without charge for recreational use.⁷²

Even with considerable legislative changes to recreational use immunity statutes, more cases questioned the extent of the new definitions. For instance, in *Leet v. City of Minot*,⁷³ Leet was injured while working at a municipal auditorium for a vendor that was participating in an educational and entertainment event.⁷⁴ Although the legislature's intent in changing the definition of "recreational purposes" was to cover all recreational

65. See *Fastow v. Burleigh Cnty. Water Res. Dist.*, 415 N.W.2d 505, 509 (N.D. 1987).

66. *Hovland v. City of Grand Forks*, 1997 ND 95, ¶¶ 10-11, 563 N.W.2d 384, 387.

67. See *House Hearing*, *supra* note 57 (written testimony of Robert Olheiser, State Land Comm'r, dated Feb. 22, 1995); see also *Hovland*, ¶ 16 n.5, 563 N.W.2d at 388 ("Since *Fastow*, the legislature has amended the recreational use statute to include all public lands, as well as private land.").

68. *Olson v. Bismarck Parks & Recreation Dist.*, 2002 ND 61, ¶ 17, 642 N.W.2d 864, 871.

69. *Id.*

70. *Id.* ¶ 2, 642 N.W.2d at 865.

71. *Id.* ¶ 17, 642 N.W.2d at 871.

72. *Id.* ¶¶ 14, 16, 642 N.W.2d at 870-71.

73. 2006 ND 191, 721 N.W.2d 398.

74. *Leet*, ¶ 2, 721 N.W.2d at 401.

activities,⁷⁵ the court noted consideration must be given to the location and nature of the person's conduct when the person was injured.⁷⁶ Thus, "recreational purposes" could not logically include all activities, and Leet's purpose at the site for employment could not be considered "recreational."⁷⁷

The factors from *Leet* were also considered in *Kappenman v. Klipfel*⁷⁸ as the primary analysis in determining whether to apply the recreational use immunity statutes. In *Kappenman*, a thirteen-year-old boy was killed while driving an all-terrain vehicle when it dropped into a washout on land owned by Klipfel.⁷⁹ The North Dakota Supreme Court noted the term "roads" was included within the definition of "land" for purposes of recreational use immunity, but the court stated the legislature could not have intended all roads open for both travel and recreation to be included within the definition.⁸⁰ Because North Dakota cases prior to *Kappenman* held a location must be open for a recreational purpose in order to apply chapter 53-08, and because the section line was held out for purposes of non-recreation and recreation, the recreational use immunity statutes did not apply.⁸¹

The latest case to address recreational purpose under chapter 53-08 was *Schmidt v. Gateway Community Fellowship*.⁸² In that case, Schmidt, a pedestrian, stepped into a hole at a mall parking lot while attending an event sponsored by Gateway Community Fellowship, a local church.⁸³ The purpose of the event was recreational, but there was also a commercial aspect by soliciting vendors and charging a registration fee for contests.⁸⁴ As a result of the "mixed use" of recreational and commercial use, the North Dakota Supreme Court announced that a balancing test of all the social and economic aspects of the activity and a totality of the circumstances standard was necessary to determine whether chapter 53-08 applied.⁸⁵ In order to properly consider all the factors surrounding the activity, including, but not limited to, the user's subjective purpose, the issue of whether recreational use immunity applied was remanded to the trier of fact to decide.⁸⁶

75. *Id.* ¶ 17, 721 N.W.2d at 405 (quoting *House Hearing*, *supra* note 57 (written testimony of Robert Olheiser, State Land Comm'r, dated Feb. 22, 1995)).

76. *Id.* ¶ 20, 721 N.W.2d at 406.

77. *See id.* ¶ 21.

78. 2009 ND 89, 765 N.W.2d 716.

79. *Kappenman*, ¶¶ 2, 4, 765 N.W.2d at 718-19.

80. *Id.* ¶ 23, 765 N.W.2d at 725.

81. *Id.* ¶¶ 28-29, 765 N.W.2d at 727 (emphasis added).

82. 2010 ND 69, 781 N.W.2d 200.

83. *Schmidt*, ¶ 2, 781 N.W.2d at 202.

84. *Id.* ¶ 3.

85. *Id.* ¶¶ 20, 22-23, 781 N.W.2d at 207-08.

86. *Id.* ¶ 24, 781 N.W.2d at 209. The balancing test adopted by the court was not clearly stated in *Schmidt*, but it alluded to consideration of many factors such as "the nature of the

3. *Foreshadowing of School Applicability*

Justice Neumann's concurring opinion in *Olson* indicated his dismay about the wording of other definitions in the recreational use immunity statutes in the context of student injuries occurring on school grounds.⁸⁷ Specifically, he stated his concern was the word "education" included in the definition of "recreational purposes."⁸⁸ According to Justice Neumann, "The statute appears to relieve all school districts of any duty to keep their buildings and other premises safe for use by students who have not paid a fee for the educational use of those premises."⁸⁹ As explained below, Justice Neumann's concern was addressed, and arguably definitively answered, in *M.M.*

III. ANALYSIS

In order to reach its result in *M.M.*, regarding which standard of negligence for which the District was bound, the North Dakota Supreme Court separated its analysis into three different parts. First, the court examined the applicable North Dakota law governing liability for injuries.⁹⁰ Second, the court stated the current analysis for recreational use immunity and addressed whether the recreational use immunity statutes were applicable considering the duties of schools toward students.⁹¹ Third, the court compared the case to other jurisdictions that reached similar outcomes.⁹²

A. CONTROLLING NORTH DAKOTA LAW

Under the North Dakota Century Code, political subdivisions may be liable under recreational use immunity statutes if certain circumstances exist.⁹³ However, the North Dakota Century Code also provides an exception to liability with the recreational use immunity statutes.⁹⁴ In an attempt to "harmonize statutes to avoid conflicts between them," the court analyzed each statute to determine whether recreational use immunity applied and,

property, the nature of the owner's activity, and the reason the injured person is on the property." *Id.* ¶ 22, 781 N.W.2d at 208 (citations omitted). Additional focus may be whether there was emphasis on free recreational use or whether there were more commercial aspects to the activity. *Id.* ¶ 21.

87. *Olson v. Bismarck Parks & Recreation Dist.*, 2002 ND 61, ¶ 22, 642 N.W.2d 864, 872.

88. *Id.*

89. *Id.*

90. *M.M. v. Fargo Pub. Sch. Dist. No. 1*, 2010 ND 102, ¶¶ 9-10, 783 N.W.2d 806, 810-11.

91. *Id.* ¶¶ 13-15, 783 N.W.2d at 812-13.

92. *Id.* ¶¶ 16-17, 783 N.W.2d at 813-15.

93. *Id.* ¶ 9, 783 N.W.2d at 810 (citing N.D. CENT. CODE § 32-12.1-03(1) (2010)).

94. *Id.* ¶ 10, 783 N.W.2d at 811.

ultimately, what standard of negligence applied to the District for injuries that occurred on the District's property.⁹⁵

1. *Political Subdivision Liability—General Negligence Standard*

As the court in *M.M.* noted, North Dakota follows a general negligence standard for premises liability.⁹⁶ That is, a landowner's duty of care to those on his property is 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."⁹⁷ While this principle applies to all lawful entrants on the property, it does not extend to trespassers.⁹⁸ Instead, a landowner must only not harm a trespasser in a willful manner.⁹⁹

This standard applies to political subdivisions when certain circumstances exist, as codified in section 32-12.1-03(1) of the North Dakota Century Code.¹⁰⁰ By virtue of the definition provided for "political subdivision," this statute extends to school districts.¹⁰¹ Not only can a political subdivision be liable for injuries caused by a condition or use of property to the same extent that a private person could be liable for the injury, but a political subdivision can also be held liable for injuries "caused by the negligence or wrongful act or omission of an employee acting within the scope of the employee's employment."¹⁰² Thus, the court concluded a school district could potentially face liability on two separate and independent grounds.¹⁰³

2. *Recreational Use Immunity Statutes—Willful and Malicious Conduct Standard*

An exception to political subdivision liability is the recreational use immunity statutes, if the statutes apply.¹⁰⁴ Under these statutes, the landowner's duty of care may change from the general negligence standard to

95. *Id.* ¶ 12 (quoting *In re Midgett*, 2007 ND 198, ¶ 12, 742 N.W.2d 803, 806).

96. *Id.* ¶ 9, 783 N.W.2d at 810.

97. *Schmidt v. Gateway Cmty. Fellowship*, 2010 ND 69, ¶ 8, 781 N.W.2d 200, 203.

98. *Id.*

99. *Id.*

100. *M.M.*, ¶ 9, 783 N.W.2d at 810.

101. N.D. CENT. CODE § 32-12.1-02(6)(a) (2010) (defining "political subdivision" to include "all . . . school districts . . . which are created either by statute or by the Constitution of North Dakota for local government or other public purposes").

102. *M.M.*, ¶ 9, 783 N.W.2d at 810-11 (quoting *Fastow v. Burleigh Cnty. Water Res. Dist.*, 415 N.W.2d 505, 509 (N.D. 1982)); see also N.D. CENT. CODE § 32-12.1-03(1).

103. See *M.M.*, ¶ 9, 783 N.W.2d at 810.

104. *Id.* ¶ 10, 783 N.W.2d at 811.

no duty of care if the landowner opens his property for recreational purposes.¹⁰⁵ Once the land is open for recreational purposes without charge, the owner owes no duty to keep the premises safe or to warn against any danger present, absent any willful and malicious failure to do so.¹⁰⁶

In *M.M.*, the lower court determined the District's property fell within the definition of "land" and that the activity in which M.M. participated was educational within the definition of "recreational purpose."¹⁰⁷ In deciding that the District and activity semantically fit within the recreational use immunity statutes, the standard applied was whether the District, or Hart as an employee of the District, acted willfully and maliciously in failing to protect M.M.¹⁰⁸ Because the district court determined the conduct did not reach the higher "willful and malicious" standard, the District was found to be immune.¹⁰⁹

The North Dakota Supreme Court disagreed with the lower court's analysis on the applied standard because the recreational use immunity statutes must be read in conjunction with political subdivision liability.¹¹⁰ Without harmonization of the statutes, the legislature's intent may be disregarded and the statutes may be construed to have an "absurd or ludicrous" result.¹¹¹ Thus, the question before the court was whether, in light of political subdivision liability and other duties owed to students, the recreational use immunity statutes should apply, granting no duty to the school district, absent a "willful and malicious" standard.¹¹²

B. APPLICATION OF THE RECREATIONAL USE IMMUNITY ANALYSIS AND THE ROLES OF STUDENTS AND SCHOOLS

The appropriate analysis for recreational use immunity applicability has been set forth in recent North Dakota Supreme Court cases.¹¹³ Despite this authority, the court also considered the legislative intent behind the recreational use statutes and the statutory duties imposed on schools by the

105. *Cf.* N.D. CENT. CODE § 53-08-02.

106. *Id.* §§ 53-08-02, -05(1).

107. *M.M.*, ¶ 11, 783 N.W.2d at 811.

108. *Id.*

109. *Id.*

110. *Id.* ¶ 12, 783 N.W.2d at 811-12.

111. *Id.* at 812.

112. *See id.* ¶¶ 12, 18, 783 N.W.2d at 811, 815.

113. *See id.* *Kappenman v. Klipfel*, 2009 ND 89, ¶ 20, 765 N.W.2d 716, 723 (quoting *Leet v. City of Minot*, 2006 ND 191, ¶ 20, 721 N.W.2d 398) (stating "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").

legislature to determine whether the true purpose of immunity was served by its application in *M.M.*¹¹⁴

1. *Recreational Use Immunity Analysis*

The court, in *M.M.*, utilized the analysis articulated in *Kappenman* as the “proper analysis” to determine recreational use immunity.¹¹⁵ As *M.M.* presumably had no mixed recreational and non-recreational or commercial use, the recent *Schmidt* decision and its additional considerations were inapplicable.¹¹⁶ In other words, consideration must have been given to the location of the accident as well as the injured person’s conduct at the time of the accident.¹¹⁷ While the location of the accident in *Kappenman* technically fell within the definition of “land” for purposes of the recreational use statutes, the court stated the legislature could not have intended a broad interpretation of roads to include the section line used for travel and recreation.¹¹⁸ Thus, the location consideration in *Kappenman* was determinative in holding against applying the immunity.¹¹⁹

Similarly, the court, in *M.M.*, analyzed the definition and intent to interpret “recreational purpose,” but with lesser weight than in *Kappenman*.¹²⁰ While the term includes education, the statutes in North Dakota “do not ‘encourage’ schools to open their doors to students for the ‘recreational purposes’ of ‘education.’”¹²¹ The intent of the statutes, the court noted, was “to encourage landowners to open their land for recreational purposes by giving them immunity from suit under certain circumstances.”¹²² Although the court acknowledged the traditional recreational use immunity analysis by stating the location of the injury was on school grounds and during school hours, the court’s main concern was, instead, whether these facts, along with the school’s other duties of care, warranted the statutes’ application.¹²³

114. *See M.M.*, ¶¶ 14-15, 783 N.W.2d at 812-13.

115. *Id.* ¶ 13, 783 N.W.2d at 812.

116. *See supra* note 86 and accompanying text.

117. *M.M.*, ¶ 13, 783 N.W.2d at 812.

118. *Id.*

119. *Id.*

120. *Id.* ¶ 14.

121. *Id.* at 813 (quoting N.D. CENT. CODE § 53-08-01(4) (2009)).

122. *Id.* ¶ 14, 783 N.W.2d at 812 (quoting *Schmidt v. Gateway Cmty. Fellowship*, 2010 ND 69, ¶ 10, 781 N.W.2d 200, 204).

123. *Id.* ¶ 18, 783 N.W.2d at 815-16.

2. *School Duties of Care*

After utilizing the analysis for the recreational use immunity statutes, the court focused its attention on several statutes that address the role of schools in North Dakota.¹²⁴ These statutes include, among other things, requirements for health, safety, sanitation, testing, curriculum, and attendance.¹²⁵ The court also noted it previously recognized a special relationship between schools and students, thereby applying particular duty standards.¹²⁶ Generally, the duty owed to students by schools is one of “ordinary care.”¹²⁷ The exercise of ordinary care in keeping the premises and facilities safe extends not only to students, but also to minors who may foreseeably be injured.¹²⁸ Despite the standard being “ordinary care,” this standard is actually specified as “such care . . . as a parent of ordinary prudence would observe” and “greater than [the duty] owed an adult,” due to the age and immaturity of a child.¹²⁹

In considering the purpose of the recreational use immunity statutes, along with the established school duties, the court determined the two concepts clashed.¹³⁰ To allow immunity would rule out these duties.¹³¹ This stance—that recreational use immunity statutes were not intended to relieve school duties of care—has been mirrored by other jurisdictions as the predominant view.¹³²

C. OTHER STATE DECISIONS

Other jurisdictions’ rulings influenced the North Dakota Supreme Court’s reconciliation of the recreational use statutes.¹³³ Because the issue in *M.M.* had never been raised in North Dakota, other state cases involving the applicability of recreational use immunity statutes to student injuries on school grounds solidified the court’s decision to follow the majority viewpoint.¹³⁴ In particular, the court relied heavily on the similar, but not

124. *See id.* ¶ 15, 783 N.W.2d at 813; *see also* N.D. CENT. CODE tit. 15.1.

125. *M.M.*, ¶ 15, 783 N.W.2d at 813 (citing N.D. CENT. CODE chs. 15.1-06, -20).

126. *Id.* ¶ 15, 783 N.W.2d at 813.

127. *Id.*; *see also* *Besette v. Enderlin Sch. Dist. No. 22*, 310 N.W.2d 759, 763 (N.D. 1981).

128. *M.M.*, ¶ 15, 783 N.W.2d at 813 (citing *Besette*, 310 N.W.2d at 763).

129. *Id.* ¶ 15, 783 N.W.2d at 813.

130. *Id.* ¶ 18, 783 N.W.2d at 815.

131. *Id.*

132. *Id.* ¶¶ 16-17, 783 N.W.2d at 813-15.

133. *See id.*

134. *Cf. id.* ¶ 16, 783 N.W.2d at 813 (“Numerous courts have refused to apply recreational use immunity statutes to bar suits against school districts brought by students injured on school grounds during the school day.”).

identical, fact pattern and analysis in *Bauer v. Minidoka School District No. 331*,¹³⁵ an Idaho Supreme Court decision.¹³⁶

In *Bauer*, a student tripped over a sprinkler and injured himself while playing on his school's football field shortly before classes began for the day.¹³⁷ The trial court found recreational use immunity statutes shielded the school district from liability.¹³⁸ On appeal, the Idaho Supreme Court disagreed and determined while the student was engaging in a recreational activity, he was not the type of recreational user contemplated by the recreational use statutes.¹³⁹ Rather, there was a special relationship between the school district and students that would be compromised by enabling immunity when a student is legitimately on school grounds.¹⁴⁰

Other state courts from Nebraska, Massachusetts, Wisconsin, Rhode Island, and Washington have declared similar outcomes from cases involving school district liability.¹⁴¹ In all the cases cited by the court in *M.M.*, the recreational use immunity statutes served the same purpose of creating no duty to recreational users who were not charged to be on the property for recreational purposes.¹⁴² However, using the same process of statutory interpretation the North Dakota Supreme Court utilized, the cases held no immunity should be granted to the schools.¹⁴³

135. 778 P.2d 336 (Idaho 1989).

136. *M.M.*, ¶ 16, 783 N.W.2d at 813.

137. *Bauer*, 778 P.2d at 337.

138. *Id.* Just as in North Dakota, the recreational use immunity statutes in Idaho are in place "to encourage owners of land to make land and water areas available to the public without charge for recreational purposes by limiting their liability toward persons entering thereon for such purposes." *Id.* at 337-38.

139. *Id.* at 339.

140. *Id.* at 338-39.

141. *M.M.*, ¶ 17, 783 N.W.2d at 814.

142. See *Alter v. City of Newton*, 617 N.E.2d 656, 661 (Mass. App. Ct. 1993); *McIntosh v. Omaha Pub. Schs.*, 544 N.W.2d 502, 508 (Neb. 1996), *overruled on other grounds by Bronsen v. Dawes Cnty.*, 722 N.W.2d 17, 20 (Neb. 2006); *Morales v. Town of Johnston*, 895 A.2d 721, 725 (R.I. 2006); *Home v. North Kitsap Sch. Dist.*, 965 P.2d 1112, 1115 (Wash. Ct. App. 1998); *Auman v. Sch. Dist. of Stanley-Boyd*, 635 N.W.2d 762, 766 (Wis. 2001).

143. *Alter*, 617 N.E.2d at 661 (although the student's injury occurred after track practice, she was legitimately on the premises as a student; thus, the school owed her a duty of care); *McIntosh*, 544 N.W.2d at 508 (a student who was part of an athletic clinic program was not barred from bringing suit for his injury because the field was not open to members of the public as contemplated by the state's recreational liability statute); *Morales*, 895 A.2d at 730-31 (a student athlete injured during a soccer game was owed a special duty and was not the type of recreational user contemplated by the recreational use immunity statutes); *Home*, 965 P.2d at 1117 (because the football game where the football coach was injured was not open for members of the public as the recreational use immunity statutes suggested, North Kitsap was not immune under the recreational use statute); *Auman*, 635 N.W.2d at 768 (a student's injury during recess was a non-recreational activity under the state's recreational use immunity statutes because the student's attendance was mandatory under state law). *But see Lanning v. Anderson*, 921 P.2d 813, 820 (Kan. Ct. App. 1996) (a student injured during track practice was barred from bringing suit against the school

IV. IMPACT

The decision of *M.M.* will undoubtedly affect future school liability with regard to students recreationally on school grounds during school hours.¹⁴⁴ What was left unexplained by the court, however, was the issue of trespass on school grounds.¹⁴⁵ Furthermore, judicial narrowing of the application of the recreational use immunity statutes may have subverted the legislative intent behind the 1995 amendments by increasing future liability.¹⁴⁶

A. ISSUE OF TRESPASS UNRESOLVED

The opinion in *M.M.* follows an assumption that M.M. was legitimately on school grounds in his capacity as a student despite the questionable use of the premises, the ambiguous permission provided to the students, and the time at which the accident occurred.¹⁴⁷ Because the court relied upon this assumption in determining the outcome, the issue of trespass was not discussed.¹⁴⁸ In fact, the court mentioned in dicta, *M.M.* “snuck into the auditorium,” but dismissed the allegation as a possible defense to address on remand.¹⁴⁹ Some cases from other jurisdictions cited by the North Dakota Supreme Court, however, potentially allude to the use of recreational use immunity statutes in a case of trespass on school grounds.¹⁵⁰

In *Alter v. City of Newton*,¹⁵¹ one case cited by the court in *M.M.*, the Appeals Court of Massachusetts emphasized the student’s presence at the school, while slightly past school hours for track practice, was legitimate for purposes of her status as a student.¹⁵² Because her use of the premises was legitimate at the time of her injury, the special relationship between the school and student remained to impose a duty of care and no recreational

because the Kansas Tort Claims Act applied to school-sponsored activities as well as playground areas).

144. *M.M.*, ¶ 18, 783 N.W.2d at 816 (stating a school district cannot use recreational use immunity statutes to escape liability from certain student injuries).

145. *See id.*

146. *See House Hearing, supra* note 57 (written testimony of Robert Olheiser, State Land Comm’r, dated Feb. 22, 1995).

147. *See M.M.*, ¶¶ 3-5, 18, 783 N.W.2d at 809, 815-16.

148. *See generally id.* Trespass in North Dakota’s recreational use immunity statutes is only mentioned in section 53-08-04, with reference to leased lands to the state or to political subdivisions. N.D. CENT. CODE § 53-08-04 (2007) (“The provisions of this section apply whether the person entering upon the leased land is an invitee, licensee, *trespasser*, or otherwise.”) (emphasis added).

149. *M.M.*, ¶ 18, 783 N.W.2d at 816.

150. *See Alter*, 617 N.E.2d at 661; *Morales*, 895 A.2d at 732.

151. 617 N.E.2d 656 (Mass. App. Ct. 1993).

152. *Alter*, 617 N.E.2d at 661.

use immunity.¹⁵³ While still unclear from the court's holding, lack of permission for the student to be on the premises may have been grounds for relieving the school of its duty of care.

In a similar case cited by the *M.M.* court, *Morales v. Town of Johnston*,¹⁵⁴ a student was injured while playing an organized, school-sponsored soccer game, which made the student a permitted user of the field at that time.¹⁵⁵ The Supreme Court of Rhode Island held that the recreational use immunity statutes could not be applied in that situation because there was a special duty to the student.¹⁵⁶ Yet, the court also mentioned, “[I]f [the] plaintiff had come to the . . . soccer field to play a soccer game that was not organized or sanctioned by the school district, [the town of] Johnston may have been immune under the recreational use statute.”¹⁵⁷

Because these cases were presented with facts absent evidence of trespassing, it is unclear how the rulings would have changed if the students had trespassed. Based on North Dakota precedent, however, if an individual trespasses, as opposed to legitimately uses school premises during school hours, recreational use immunity may apply should the individual have a “recreational purpose.”¹⁵⁸ In the end, the trespass and recreational use immunity statute standard of care would be the same: no duty except for willful and malicious acts.¹⁵⁹

While the issue remains whether an individual, who may be a student, engages in recreational activities after school hours on school grounds would be able to bring a personal injury suit in light of the recreational use immunity statutes, such was not the case from the facts stated in *M.M.*

153. *Id.*

154. 895 A.2d 721 (R.I. 2006).

155. *Morales*, 895 A.2d at 731.

156. *Id.*

157. *Id.* at 732 n.11.

158. *See, e.g., Cudworth v. Midcontinent Commc'ns*, 380 F.3d 375, 380 (8th Cir. 2004) (noting regardless of invitee, licensee, or trespasser status, recreational use immunity statutes apply to property used for public, recreational use).

159. N.D. CENT. CODE § 53-08-05 (2007) (providing a recreational use immunity statute exception for failure to warn against dangerous conditions); *Cudworth*, 380 F.3d at 379 n.4 (“North Dakota has abolished the common law distinction between licensee and invitee and the elaborate permutations of each, but still recognizes that lesser duties are owed to trespassers.”); *see also* 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 236 (2010) (“An exception to a municipality’s statutory recreational use immunity is that a municipality owes the same duty to recreational users of its facilities that a private person owes to trespassers.”). *Compare* *Schmidt v. Gateway Cmty. Fellowship*, 2010 ND 69, ¶ 8, 781 N.W.2d 200, 203 (citing *O’Leary v. Coenen*, 251 N.W.2d 746, 748-52 (N.D. 1977)) (stating the standard for trespassers has been retained in North Dakota that no duty is owed to them, but a landowner must not harm a trespasser in a willful and wanton manner), *with* *Prokon v. Indep. Sch. Dist. No. 625*, 754 N.W.2d 709, 714 (Minn. Ct. App. 2008) (quoting MINN. STAT. § 466.03(6)(e)) (noting “[r]ecreational-use immunity is subject to the exception that it does not provide immunity ‘for conduct that would entitle a trespasser to damages against a private person’”).

Therefore, following North Dakota precedent and statutes, the outcome of *M.M.* was congruent with these principles.

B. LEGISLATIVE INTENT COMPROMISED

With the passage of the recreational use immunity statutes, the legislature has acted toward reducing liability of landowners in certain circumstances and has reacted toward extending these statutes when faced with judicial pronouncements. An interesting juxtaposition has resulted over the years that pit the legislature's efforts of expanding recreational use immunity against the judiciary's narrower interpretation of the terms within the statutes.¹⁶⁰ Fundamentally, by limiting the bounds of recreational use immunity, more liability—which was sought to be reduced by amending the statutes in 1995—could result from the *M.M.* decision.¹⁶¹

Yet, despite the court's prior admonishment of creating public policy by judicially expanding liability in *Stokka*,¹⁶² the court's decision in *M.M.* was more in line with current, established school duties of care to students rather than mere legislative intent.¹⁶³ If the decision in *M.M.* is, in fact, contrary to the legislature's intent for recreational use immunity statutes, the next course of action for the legislature may be the familiar amendment process to change or adapt the statutes.

V. CONCLUSION

In *M.M.*, the North Dakota Supreme Court held a school district may not seek shelter under the recreational use immunity statutes when a student was injured on school grounds during school hours.¹⁶⁴ In the forty-five year history of the recreational use immunity statutes, the statutes have faced judicial scrutiny in relation to political subdivisions,¹⁶⁵ have been developed through the use of specific analysis,¹⁶⁶ and have undergone legislative

160. *See, e.g.*, *Leet v. City of Minot*, 2006 ND 191, ¶ 27, 721 N.W.2d 398, 407 (Crothers, J., dissenting) (“[T]he Legislature has never retreated from [the goal of opening property to the public for recreational use] by narrowing the scope of the recreational use immunity statutes.”).

161. *See House Hearing, supra* note 57 (written testimony of Robert Olheiser, State Land Comm'r, dated Feb. 22, 1995) (“With the loss of sovereign immunity through the recent North Dakota Supreme Court decision, we have been carefully considering the exposure of the Board of University and School Lands relative to the land that it administers.”).

162. *Stokka v. Cass Cnty. Elec. Coop.*, 373 N.W.2d 911, 914 (N.D. 1985).

163. *See generally* *M.M. v. Fargo Pub. Sch. Dist. No. 1*, 2010 ND 102, 783 N.W.2d 806.

164. *Id.* ¶ 18, 783 N.W.2d at 815.

165. *See generally* *Hovland v. City of Grand Forks*, 1997 ND 95, 563 N.W.2d 384 (stating original recreational use immunity statutes in North Dakota only encompassed private, and not public, lands).

166. *See* *Leet v. City of Minot*, 2006 ND 191, ¶ 20, 721 N.W.2d 398, 406 (“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.”).

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amendments.¹⁶⁷ Despite this long history, the result in *M.M.* was driven by a harmonization of political subdivision liability with recreational use immunity, ultimately leading to the conclusion that a school's duty to students precludes immunity under chapter 53-08 in these circumstances.¹⁶⁸ Rather than hinging on legislative history or the plain meaning of the statutes, the *M.M.* decision holistically considered the specific facts of the case, the recreational use immunity statutes' purpose, and established duties of care. Although the decision may be contrary to legislative intent, it falls in line with the prevailing view of other jurisdictions.¹⁶⁹

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167. See *House Hearing, supra* note 57 (written testimony of Robert Olheiser, State Land Comm'r, dated Feb. 22, 1995); see also *Hovland*, ¶ 16 n. 5, 563 N.W.2d at 388 ("Since *Fastow*, the legislature has amended the recreational use statute to include all public lands, as well as private lands.").

168. *M.M.*, ¶¶ 12, 18, 783 N.W.2d at 811-12, 815.

169. *Id.* ¶¶ 16-17, 783 N.W.2d at 813-15.

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