North Dakota Law Review

Volume 92 | Number 1 Article 11

1-1-2016

Agriculture—Agricultural Exhibitions and Fairs: The North Dakota Supreme Court Upholds County Fair's Assertion of Recreational Use Immunity Woody v. Pembina Cnty. Annual Fair & Exhibition Ass'n, 2016 ND 56, 877 N.W.2d 70

Santana Royer

AGRICULTURE—AGRICULTURAL EXHIBITIONS AND FAIRS: THE NORTH DAKOTA SUPREME COURT UPHOLDS COUNTY FAIR'S ASSERTION OF RECREATIONAL USE IMMUNITY

Woody v. Pembina Cnty. Annual Fair & Exhibition Ass'n, 2016 ND 56, 877 N.W.2d 70

ABSTRACT

In *Woody v. Pembina County Annual Fair & Exhibition Association*, the North Dakota Supreme Court *held* that the Pembina County Fair was immune from liability under North Dakota's "recreational use immunity" statutes found in North Dakota Century Code Chapter 53-08. In July of 2013, the Plaintiff, Audra Woody, attended a free fireworks show at the Pembina County Fair in Hamilton, North Dakota. While trying to find a place to sit for the fireworks show, Woody fell through rotten boards at the Pembina County Fair's grandstand, sustaining injuries. The North Dakota Supreme Court found that because the event was free of charge to the public, and it was held on public land by a public entity, the Pembina County Fair could claim recreational use immunity. While the North Dakota Legislature's original intent for recreational use immunity was to encourage landowners to open their land to individuals for recreational purposes, this goal may be counterproductive if individuals choose not to utilize this land because they have little or no recourse for potential injuries. Furthermore, still unclear are the sections in North Dakota Century Code Chapter 53-08 pertaining to the amount in which a public entity or individual can charge for recreational use and still retain immunity, and, due to the important public policy implications of these sections, each may deserve a second look by the Legislature.

I. FACTS

At any given moment, individuals across the state are engaging in recreational activities. These activities may include swimming at a local pool, participating in sports tournaments, collecting candy at parades, and even attending community fundraisers. Landowners may be preparing for individuals to flock to their land, as the hunting seasons approach. And perhaps, most notably, counties across the state may be hosting annual fairs. The Pembina County Fair Board (the "Fair") hosts such an event each year in Hamilton, North Dakota.[1] The Fair offers attractions such as carnival rides, food vendors, concerts, commercial exhibits, and a fireworks show.[2] The Fair offered these specific events during its three-day annual fair on July 4, 2013.[3] The Fair did not charge admission to enter the grounds, nor did it charge any fees to watch the firework show.[4] The only notable events for which the Fair may have imposed a charge were a concert by the band Six Appeal and horse races.[5]

Audra Woody and her family attended the Pembina County Fair on July 4, 2013, with the intention of engaging in some of these activities.[6] While Woody and her family did not ultimately attend many of these events, they did attend the fireworks show at the close of the evening on July 4th.[7] It was during this fireworks show that Woody was injured when she fell through rotten boards on the Fair's grandstand.[8] She sustained personal injuries due to this incident.[9]

Woody sued the Fair on grounds of negligence, asserting specifically that the Fair was negligent in maintaining the grandstand.[10] The Fair answered, asserting that because it was a public entity operating on public lands and it did not charge Woody to attend the fireworks show, it was shielded from liability under North Dakota's recreational immunity statutes.[11] The district court agreed with the Fair and granted the Fair

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1. Appellant's Brief ¶ 7, Woody v. Pembina Cty. Ann. Fair & Exhibition Ass'n, 2016 ND 56, 877 N.W.2d 70 (No. 20150236).
2. Appellant's Brief, *supra* note 1, ¶ 10.
3. *Id.*
4. Brief of Appellee ¶ 6, *Woody*, 2016 ND 56, 877 N.W.2d 70 (No. 20150236).
5. Brief of Appellee, *supra* note 4, ¶ 28.
6. Appellant's Brief, *supra* note 1, ¶ 7.
7. Brief of Appellee, *supra* note 4, ¶¶ 23, 28.
8. *Woody*, ¶ 2, 877 N.W.2d at 71.
9. *Id.*
10. *Id.*
11. *Id.*

immunity.[12] Woody appealed the decision to the North Dakota Supreme Court, which affirmed.[13]

II. LEGAL BACKGROUND

Landowners generally have a duty to keep their property in a "reasonably safe condition" for those who lawfully enter their land.[14] However, there are certain situations in which this duty may not be applicable to certain landowners. One such situation, commonly known as recreational use immunity, has been present in North Dakota since 1965.[15] In general, recreational use immunity provides that a landowner or public entity, which allows another to come onto their land for a recreational purpose, will not be liable for injuries the individual sustains on such land, unless one of the very narrow exceptions applies.[16]

The North Dakota Legislature (the "Legislature") instituted recreational use immunity in an effort to encourage landowners to open their land to the public for recreational purposes.[17] The Legislature made a number of amendments to recreational use immunity over the past few decades to continue to foster this notion. While some of these amendments included broadening terms, the biggest alterations came during the 2011 North Dakota Legislative Session.[18] The Legislature was displeased with the North Dakota Supreme Court's apparent narrowing of recreational use immunity for landowners in a 2006 case, *Leet v. City of Minot*, and a 2010 case, S*chmidt v. Gateway Community Fellowship*.[19] It was in response to these cases, and through major amendments in 2011, that the Legislature again broadened recreational use immunity to apply to more landowners.[20]

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12. *Id.*
13. *Woody*, ¶ 10, 877 N.W.2d at 74.
14. Saltsman v. Sharp, 2011 ND 172, ¶ 11, 803 N.W.2d 553, 558.
15. Limiting Liability of Landowners Act, ch. 337, 1965 N.D. Laws 648-50 (providing for the enactment of limiting liability for landowners).
16. *See* N.D. CENT. CODE. Ch. 53-08 (2016); *see also* "exceptions" found at N.D. CENT. CODE § 53-08-05(1) (2016) (stating this section does not apply to "willful and malicious failure to guard or warn against a dangerous condition, use, structure, or activity"); *see also* N.D. CENT. CODE § 53-08-05(2) (2016) (generally setting total fees that a landowner can charge and still retain recreational use immunity).
17. Leet v. City of Minot, 2006 ND 191, ¶ 14, 721 N.W.2d 398, 404.
18. *See generally* S. B. 2295, 2011 Leg., 62d Sess. (N.D.).
19. *Id.*
20. *Id.*

A. HOW N.D. CENT. CODE § 53-08 WAS INTERPRETED PRIOR TO THE *LEETS* DECISION AND THE 2011 LEGISLATIVE AMENDMENTS

As previously noted, recreational use immunity was enacted for the purpose of encouraging landowners to open their land to individuals for recreational uses.[21] Before 2011, recreational use immunity remained fairly untouched, with only a few alterations and two notable changes.[22] The first of these changes concerned what activities were considered recreational for purposes of recreational use immunity.[23] When first enacted, recreational purpose was defined as "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."[24] In 1995, the Legislature broadened recreational purpose to include "any activity engaged in for the purpose of exercise, relaxation, pleasure, or education."[25] This change to the definition furthered the Legislature's primary purpose of encouraging landowners to open up their land for recreational purposes. This broadening allowed for more activities to be considered recreational, and thus, expanded the protection for landowners.[26] The second change came in 2003, when the Legislature amended Chapter 53-08 to include a section allowing for landowners, who pay property tax, to be allowed to charge up to a certain amount for individuals to utilize their land for recreational purposes without losing immunity.[27] However, despite these efforts to broaden immunity, about a decade later, the North Dakota Supreme Court interpreted these statutes in a way that appeared to narrow recreational use immunity for some landowners.[28]

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21. Limiting Liability of Landowners Act, ch. 337, 1965 N.D. Laws 648-50 (providing for the enactment of limiting liability for landowners).

22. *Id.; see also* School Lands Leasing and Recreational Use Act, ch. 162, sec. 7, § 4, 1995 N.D. Sess. Laws 528, 528-29 (codified as amended at N.D. CENT. CODE § 53-08-01(05)).

23. School Lands Leasing and Recreational Use Act, ch. 162, sec. 7, § 4, 1995 N.D. Sess. Laws 528, 528-29 (codified as amended at N.D. CENT. CODE § 53-08-01(05)).

24. *See generally* Act of March 15, 1965, ch. 337 § 1(3), 1965 N.D. Sess. Laws (providing for the enactment of limiting liability for landowners).

25. School Lands Leasing and Recreational Use Act, ch. 162, sec. 7, § 4, 1995 N.D. Laws 528, 528-29 (codified as amended at N.D. Cent. Code § 53-08-01).

26. *Id.*

27. N.D. CENT. CODE § 53-08-05(2) (2016).

28. *See generally* Leet v. City of Minot, 2006 ND 191, ¶ 14, 721 N.W.2d 398.

B. THE *LEET* DECISION AND ITS MAJOR IMPACT ON THE PUSH FOR AMENDMENTS IN THE 2011 LEGISLATIVE SESSION

In 2006, the North Dakota Supreme Court decided *Leet v. City of Minot*.[29] In *Leet,* the Court denied recreational use immunity to the City of Minot.[30] In 2002, the Minot Auditorium was being set up by different individuals and groups for the annual public "Salute to Seniors" event.[31] The day before the event, Charles Leet, an employee for Experience Works, a company that helps seniors find employment in the community, was setting up the company's booth.[32] While setting up the booth, Leet was injured when he was struck in the head by a falling pipe.[33] Leet sued the City of Minot for personal injuries he suffered from the incident.[34] The City of Minot argued it was immune from liability under North Dakota Century Code ("N.D. CENT. CODE") § 53-08, or recreational use immunity.[35] The centrality of the argument turned on whether Charles Leet's presence at the Minot Auditorium the day before the event constituted a recreational purpose.[36] Minot argued that Leet was at the auditorium for a recreational purpose because "he was preparing for an event that was recreational and for the dissemination of information to seniors."[37] The Court disagreed and reversed, holding that Leet was at the Minot Auditorium for employment purposes, and not for a recreational purpose.[38] The Court stated that the landowner's intent *could not* be the sole control of the analysis of whether someone was on land for a recreational purpose.[39] Rather, the Court held 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."[40] This took away the control of a landowner to determine whether or not someone was permitted on his or her land for a recreational purpose.

In *Leet*, Justice Crothers dissented, as he believed that the majority's new analysis of recreational use immunity was a direct contravention of the

29. *Leet*, ¶ 22, 721 N.W.2d at 407.
30. *Id.*
31. *Id.* ¶ 2, 721 N.W.2d at 401.
32. *Id.*
33. *Id.*
34. *Id.* ¶ 3.
35. *Leet,* ¶ 3, 721 N.W.2d at 401.
36. *Id.* ¶ 11, 721 N.W.2d at 403.
37. *Id.*
38. *Id.* ¶ 22, 721 N.W.2d at 406.
39. *Id.* ¶ 19, 721 N.W.2d at 405.
40. *Id.* ¶ 20, 721 N.W.2d at 405-06.

Legislature's intent behind this Section.[41] Noting that the Legislature's original intent was to open up land to the public, he argued that the control for liability must be given to the landowner to determine who they intended to allow on their land, and if that was for a recreational purpose.[42] He argued that the majority's new analysis took that control aspect away from landowners, as it employed a new balancing analysis.[43] Furthermore, Justice Crothers sent a direct invitation to the North Dakota Legislature to clarify ambiguities in the statute, which the majority may have resolved in a way that pushed against the Legislature's original intent for recreational use immunity.[44]

C. THE 2011 LEGISLATIVE AMENDMENTS DRAMATICALLY ALTERED RECREATIONAL USE IMMUNITY

Heeding Justice Crother's advice, the Legislature, unhappy with the majority's result in *Leet,* made a number of amendments to the recreational use immunity statute in the 2011 North Dakota Legislative Session.[45] The Legislature's main goal was to overturn the North Dakota Supreme Court's new balancing approach in *Leet*, and return the control back to the landowner.[46] Relying on numerous committee discussions and testimony from individuals serving in different representative capacities, the Legislature made changes that achieved this specific goal, among others.[47]

One such change included making clear that the landowner's intent would control in analyzing whether someone was on a landowner's property for a recreational purpose.[48] The Legislature made clear that the Court's decision in *Leet*, where the court employed a balancing analysis to determine if someone was engaged in a recreational purpose on a landowner's property, would be overturned.[49] To make this notion concrete, the Legislature amended the statute to state that recreational use immunity applies "*regardless of* the location and nature of the recreational purposes and whether the entry or use by others is for their own recreational

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41. *Leet,* ¶ 25, 721 N.W.2d at 407.
42. *Id.* ¶ 27.
43. *Id.* ¶ 29. 721 N.W.2d at 408.
44. *Id.* ¶ 19, 721 N.W.2d at 406.
45. *See generally* S.B. 2295, 2011 Leg., 62nd Sess. (N.D.).
46. *Recreational Use Immunity*: *Hearing on S B. 2295 Before the H. Comm. on the Judiciary*, 2011 Leg., 62d Sess. (N.D.) (statements of Rep. Klemin, Member H. Comm. on the Judiciary) [hereinafter *Recreational Use Immunity*].
47. *See generally* S.B. 2295, 2011 Leg., 62d Sess. (N.D.).
48. *Recreational Use Immunity*, *supra* note 46 (statements of Rep. Klemin, Member H. Comm. on the Judiciary).
49. *Id.*

purposes or is directly derived from the recreational purposes of other persons."[50] This change returned the control to the landowner and concretely rejected the balancing approach employed in *Leet*.

The Legislature also held discussions and later conducted statutory revisions, in an attempt to clarify when a landowner could charge a fee and still retain recreational use immunity.[51] The Legislature acknowledged that under the then current statute, landowners could charge a fee to have individuals enter their land, so long as that fee did not exceed a certain amount.[52] Under N.D. CENT. CODE § 53-08-05(2)(a)-(b), a landowner can charge individuals a fee to engage in recreational activities on his or her land, so long as the total charges by the landowner for all recreational uses of his or her land in the previous calendar year were not more than twice the property taxes for the land or four times the amount of property taxes if the land was agricultural.[53] While this portion of the statute remained consistent, the Legislature acknowledged that many public and political subdivisions do not pay the tax discussed in the statute. These entities do, however, sometimes charge fees for activities on such lands.[54] In an effort to ensure that these entities received the broadest possible protection under recreational use immunity, the Legislature clarified, in the amendments, that recreational use immunity would apply to public entities for public purposes, so long as they do not charge a fee for a direct activity.[55] Along with this, the Legislature did acknowledge that these entities sometimes charge minimal fees such as parking, shelter, and the like.[56] The Legislature did not feel that these types of minimal fees should mean that the public entity loses immunity.[57] Therefore, the Legislature defined "charge" in a way that expanded protection to public entities.[58] It did this by amending the definition of charge to *exclude* fees charged for parking,

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50. Act of Apr. 26, 2011, ch. 381, sec. 2, § 2, 2011 N.D. Laws 9, 9-10 (codified at N.D. CENT. CODE § 53-08-02) (emphasis added).

51. *Recreational Use Immunity*, *supra* note 46 (statements of Rep. Klemin, Member H. Comm. on the Judiciary).

52. *Id*.

53. N.D. CENT. CODE § 53-08-05(2) (2016).

54. N.D. CENT. CODE § 53-08-05(2)(a).

55. *See* N.D. CENT. CODE § 53-08-01(2) (stating that "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.").

56. *Id*.

57. *Recreational Use Immunity*, *supra* note 46 (statements of Rep. Klemin, Member H. Comm. on the Judiciary).

58. *See* N.D. CENT. CODE § 53-08-01 (2016) (defining charge as "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.").

shelter, etc.[59] Therefore, under the amended portion of the statute, a public park could charge a minimal fee to use a shelter house, and it would still be able to claim recreational use immunity, so long as it did not charge a direct fee other than the minimal fee for the shelter.[60]

The Legislature also wanted to clarify that recreational use immunity would not apply to those conducting recreational activities for a commercial purpose.[61] This was in response to a 2010 case, *Schmidt v. Gateway Community Fellowship*, decided by the North Dakota Supreme Court.[62] In *Schmidt,* Jacqueline Schmidt sued Gateway Community Fellowship and North Bismarck Associates II for personal injuries she suffered at Gateway Mall.[63] Schmidt and her son stopped at the mall to attend a free outdoor automotive show and skateboarding exhibition.[64] While at the event, Schmidt, who was not charged a fee to attend the event, stepped in a hole in the parking lot, severely injuring her ankle.[65] The defendants claimed recreational use immunity in a summary judgment motion, alleging that Schmidt was engaged in a recreational activity on their land.[66] The Court did not come to such a conclusion, finding that this was a case in which there was a mix of commercial and recreational activity.[67] The Court noted that it would not interpret "recreational use statutes to necessarily provide a commercial landowner immunity where there is a recreational and commercial component to the landowner's operation."[68] The Court also noted that whether an entity is engaged in commercial or recreational purposes would have to be determined by a factually based balancing test.[69] The Court then remanded to the lower court to employ this newly adopted balancing test to determine if the defendant was engaged in a truly recreational or commercial purpose.[70]

In response to the *Schmidt* case, the Legislature also amended the statute to better clarify that if a landowner is engaged in a commercial activity, they would *not* be able to use the recreational use immunity

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59. *Id.*

60. *Recreational Use Immunity*, *supra* note 46 (statements of Rep. Klemin, Member H. Comm. on the Judiciary).

61. *Id.*

62. *Id.*

63. Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶ 3, 781 N.W.2d 200, 202.

64. *Id.* ¶ 4, 781 N.W.2d at 202.

65. *Id.*

66. *Id.* ¶ 5, 781 N.W.2d at 203.

67. *Id.* ¶ 23, 781 N.W.2d at 208.

68. *Id.*

69. *Schmidt*, 2010 ND 69, ¶ 23, 781 N.W.2d at 208.

70. *Id.* ¶ 24, 781 N.W.2d at 209.

statutes as a shield from liability.[71] To accomplish this, the statute was amended to preclude application to owners "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."[72] This amendment may have closed the gap left open by *Schmidt* concerning those entities that attempted to use recreational use immunity as a shield for conducting activities with a commercial purpose.[73]

The Legislature also added to the Section that recreational use immunity would not apply to "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."[74] This may have closed the gap left open by *Leet*. As the Legislature offered as an example, if an owner of a land invites an individual onto their land to string lights for an upcoming event, the landowner could not claim recreational use immunity if the individual was injured.[75]

III. COURT'S ANALYSIS

The North Dakota Supreme Court acknowledged that the recreational use immunity statutes were significantly amended by the Legislature in 2011, as a result of the court's holdings in *Leet* and *Schmidt*.[76] The Court, therefore, applied N.D. CENT. CODE Chapter 53-08, and the 2011 Amendments, to determine if the Fair was appropriately given recreational use immunity.[77] Applying these newly amended statutes, the Court ultimately determined that when Woody fell through rotten boards at a grandstand looking for a seat for a free fireworks show hosted by a public entity on public lands, she was engaged in a recreational activity.[78]

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71. Act of Apr. 26, 2011, ch. 381, sec. 2, § 2, 2011 N.D. Laws 9, 9-10 (codified at N.D. CENT. CODE § 53-08-02(2)).

72. Act of Apr. 26, 2011, ch. 381, sec. 2, § 2, 2011 N.D. Laws 9, 9-10 (codified at N.D. CENT. CODE § 53-08-02(2)(b)).

73. *Recreational Use Immunity*, *supra* note 46 (statements of Rep. Klemin, Member H. Comm. on the Judiciary).

74. Act of Apr. 26, 2011, ch. 381, sec. 2, § 2, 2011 N.D. Laws 9, 9-10 (codified at N.D. CENT. CODE § 53-08-02(2)(a)).

75. *Recreational Use Immunity*, *supra* note 46 (statements of Rep. Klemin, Member, H. Comm. on the Judiciary).

76. *Woody v. Pembina Cnty. Ann. Fair & Exhibition Ass'n*, ¶ 6, 877 N.W.2d 70, 73 (No. 20150236).

77. *Id.*

78. *Id.* ¶ 9, 877 N.W.2d at 73.

Therefore, the Court concluded that the Fair was correctly given recreational use immunity.[79]

A. THE COURT DETERMINED THAT THE FAIR WAS NOT ENGAGED IN A COMMERCIAL PURPOSE, BECAUSE THE FAIR DID NOT CHARGE A DIRECT FEE FOR ANY OF THE EVENTS WOODY ATTENDED

In the Court's analysis of the case, it first turned its attention to whether the Fair was engaged in a commercial purpose when it hosted the fireworks show.[80] To determine this, the Court examined the newly enacted definition of commercial purpose.[81] The Court reiterated that the language from the amended statute states that, "'[c]ommercial 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."[82] The parties had previously stipulated that the Fair was a public entity operating on public lands, so the Court recognized that the Fair's operation would not be considered commercial unless the Fair conducted a "direct activity for which there is a charge for goods or services."[83] Applying the newly amended definition of "charge," the Court pointed out that Woody did not pay any charge to get into the fairgrounds or to the grandstand for the fireworks show itself.[84]

Woody further argued that even though she was not charged a direct fee, the Fair indirectly charged her to attend the fireworks show.[85] Her position was that she, along with other attendees, were "indirectly subject to a "charge," which the Fair's vendors pay on the attendee's behalf."[86] In her brief, Woody alleged that the Fair received a considerable amount of money from third parties, along with the proceeds from the Fair's own events, and that "[t]he Fair opened the fairgrounds to the public for a commercial purpose to encourage the public to spend money on goods and services offered at the fair . . . ."[87] Pushing against this, the Fair noted that, in the past, the Court has held that payments by third parties are not considered

79. *Id*. at 74.
80. *Id*. ¶ 6, 877 N.W.2d at 73.
81. *Id*.
82. *Woody*, ¶ 6, 877 N.W.2d at 73.
83. *Id*. ¶ 7.
84. *Id*.
85. *Id*.
86. *Id*.
87. Appellant's Brief, *supra* note 1 ¶ 32.

charges for purposes of N.D. CENT. CODE Section 53-08.[88] The Fair further pointed out that Woody had conceded that the events at the fair, for which there was a charge to enter, were the direct operation of a third party in which the Fair did not control.[89] The Fair also reiterated that Woody did not attend any of the events for which there was a fee charged.[90]

Overall, the Court seemed to agree with the Fair, and disposed of Woody's assertion that she was indirectly charged a fee for the fireworks show.[91] The Court reiterated that a "commercial purpose results from a '*direct activity* for which there is a charge for goods or services.'"[92] Because of the unambiguous wording of direct activity, the Court rejected Woody's position that the Fair indirectly charged her a fee.[93] The Court, therefore, ultimately determined that the Fair did not employ the fireworks show for a commercial purpose.[94]

B. THE COURT DETERMINED THAT WOODY'S ATTENDANCE AT THE FIREWORKS SHOW WAS FOR A RECREATIONAL PURPOSE BASED ON A NATURAL READING OF THE STATUTE AND ALSO BY GIVING CREDENCE TO SIMILAR FINDINGS FROM OTHER JURISDICTIONS

Determining that the Fair did not engage in a commercial purpose, the Court turned its analysis to whether Woody was engaged in a recreational purpose while attending the fireworks show.[95] The Court reiterated that recreational purpose was to be read to include all recreational activities, not a specific exhaustive list.[96] Applying this broad interpretation, the Court determined that while Woody was looking for a place to sit for the fireworks show, she was engaged in an activity with a recreational purpose.[97] To further lend support for this finding, the Court cited holdings of other courts, which found that plaintiffs looking for seats for firework shows were engaged in recreational activities.[98] The Court ultimately concluded that Woody was engaged in a recreational activity.[99]

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88. Brief for Appellee *supra* note 4 ¶ 18.
89. *Id.* ¶ 28.
90. *Id.* ¶ 18.
91. *Woody*, ¶ 7, 877 N.W.2d at 73.
92. *Id.* (citing N.D. CENT. CODE § 53-08-01(2) (2016)) (emphasis added).
93. *Id.*
94. *Id.*
95. *Id.* ¶ 8.
96. *Id.*
97. *Woody*, ¶ 8, 877 N.W.2d at 73.
98. *Id.* at 74 (citing Caiazza v. Sheeley, 7 Conn. L. Rptr 819, 819 (Conn. Super. 1992) (stating that, "The use of a public park to enjoy the spectacular beauty of a fireworks display

C. THE COURT FOUND THAT THE FAIR DID NOT HAVE A DUTY OF SUPERVISION UNDER N.D. CENT. CODE SECTION 53-03-05(4) BECAUSE RECREATIONAL USE IMMUNITY WILL BE FOUND REGARDLESS OF LOCATION OR THE NATURE OF THE RECREATIONAL PURPOSE

Woody further advanced the argument that the Fair had a duty of supervision to keep the fairgrounds safe under a different North Dakota statute which deals with carnivals, N.D. CENT. CODE § 53-03-05(04).[100] Under this statute, the Fair only has a duty to "[a]id in policing the carnival grounds. . . ."[101] The Court explained that Woody suffered injuries due to a grandstand malfunction and not due to "inadequate crowd control."[102] The Court further stated that this statute only mandated that the Fair provide adequate supervision, not that the Fair be responsible for keeping all areas safe.[103] By quoting directly to a specific portion of the recreational use immunity statute, N.D. CENT. CODE § 53-08-02(1), the Court explained that the Fair did not have a duty to maintain all the fairgrounds in a safe condition.[104] The Court reiterated that "recreational use immunity [applies] '*regardless of the location and nature of the recreational purposes* and whether the entry or use by others if for their own recreational purposes or is directly derived from the recreational purposes of other persons.'"[105] Therefore, the Court found for purposes of this case, that recreational use immunity would not be replaced by the supervision requirement under N.D. CENT. CODE § 53-03-05.[106]

IV. IMPACT OF DECISION

In 1965, the Legislature enacted N.D. CENT. CODE § 53-08 to encourage landowners to open up their lands to individuals for recreational purposes.[107] While the Legislature may have met its goal in opening up

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would certainly appear to come within that definition."); (citing Mason v. Berea Indep. Sch. Dist. Fin. Corp. 2007, Ky. App., No. 2006–CA–002061–MR, 2007 WL 2998510, at *2 (Ky. Ct. App. Oct. 12, 2007) (stating "Mason's action of walking in the parking lot provided for the fireworks display presents such a circumstance.")).

99. *Id.*

100. *Id.* ¶ 9.

101. *See* N.D. CENT. CODE § 53-03-05(4) (2016).

102. *Woody*, ¶ 9, 877 N.W.2d at 74.

103. *Id.*

104. *Id.*

105. *Id.* (emphasis added).

106. *Id.*

107. Limiting Liability of Landowners Act, ch. 337, 1965 N.D. Laws 648-50 (providing for the enactment of limiting liability for landowners).

more land for recreational purposes, by limiting recourse available to individuals who are injured on such land, it may be counterproductive, because individuals may be less likely to utilize the land for recreational purposes. The Legislature may need to find a way to better balance this implication, and it may also need to make further changes or clarifications to when a landowner or public entity may charge a fee and still retain recreational use immunity, as this area of the statute remains unclear.

A. BY EXPANDING IMMUNITY TOO FAR, INDIVIDUALS MAY ENGAGE IN FEWER RECREATIONAL ACTIVITIES FOR FEAR OF NO RECOURSE IF INJURED, AND THEREBY, THE LEGISLATURE'S ORIGINAL INTENT TO EXPAND RECREATIONAL USE MAY BE DIMINISHED

As previously noted, in 1965, the Legislature enacted recreational use immunity in an effort to encourage landowners to open up their land to individuals for recreational purposes.[108] During the 2011 Legislative Session, those in support of the amendments to broaden recreational use immunity argued that without the broadening of the statute, landowners would not have an incentive to open up their land.[109] While landowners may have more of an incentive now to open up their land for recreational purposes, by limiting recourse to individuals who engage in such recreational activities, these lands may coincidentally not be used as intended.

This implication will affect individuals differently. For those who are well traversed in the law and understand the concept of recreational use immunity, this implication may be more prevalent. These individuals may understand that by having the opportunity to enter another's land for a recreational purpose, they are giving up their legal recourse if they are injured. These individuals, in turn, may not take advantage of the open land. For other individuals, the amendments and this case holding may have little effect on how and when they participate in recreational activities on others' land. Many may not have even heard of the concept of recreational use immunity or how it works. Unfortunately, this lack of knowledge may be a painful surprise when someone is injured on another's land, and that individual believed that he or she would be able to recover from the landowner. The question becomes then, should individuals be

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108. *See generally* Limiting Liability of Landowners Act, ch. 337, 1965 N.D. Laws 648-50 (providing for the enactment of limiting liability for landowners).

109. *Recreational Use Immunity*, *supra* note 46 (testimony of Tag Anderson, Director of Risk Management Division at OMB).

warned of this possible ramification prior to entering another's land for a recreational purpose, so that they are truly agreeing to give up their ability for recourse if an injury occurs? This answer remains unclear.

B. WHEN ENTITIES OR INDIVIDUALS CAN CHARGE A FEE FOR RECREATIONAL USE AND STILL RETAIN IMMUNITY REMAINS UNCLEAR AND MAY NEED AMENDMENTS TO BETTER STRIKE A BALANCE BETWEEN PUBLIC POLICY AND IMMUNITY

Despite the 2011 legislative amendments and the *Woody* holding, the question of whether an individual or public entity can charge a fee and still retain recreational use immunity remains muddled. In fact, this confusion is evidenced directly from legislators and witnesses giving testimony during the 2011 Legislative Session.[110] Despite the acknowledgement of confusion within the committee hearings, the fee portion of Chapter 53-08 has remained untouched since its addition in 2003.[111] An unfortunate effect of this confusion is that some individuals may ignore the fee exception all together.

Upon a close reading of N.D. CENT. CODE § 53-08-03, it states that "*[s]ubject to 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" assures the property is safe, owes a duty of care that is typical of licensees or invitees, or assumes liability for injuries.[112] At first glance, it would seem that so long as there is no charge the landowner can assert immunity.[113] However, the "subject to provisions of section 53-08-05" wording *must* be taken into account when determining if a landowner can charge fees and still retain immunity.[114] N.D. CENT. CODE §§ 53-08-05(2)(a), (b)(1)-(2) govern when an individual can charge for recreational use and still retain immunity.[115] Under N.D. CENT. CODE § 53-08-05(2)(a)-(b), if an individual is injured where 1) there was a charge to enter the land and; 2) the amount charged by the landowner for the combined recreational use in the previous year was more than two times the amount of property taxes the landowner paid in the

110. *Recreational Use Immunity*, *supra* note 46 (testimony of Tiffany Johnson, Legal Counsel for the ND Insurance Reserve Fund).

111. Recreational Use Limited Liability Act, ch. 453, 2003 N.D. Laws 22.

112. N.D. CENT. CODE § 53-08-03 (2016) (emphasis added).

113. *See id*.

114. *See also* N.D. CENT. CODE §§ 53-08-05(2)(a), (b)(1)-(2) (2016).

115. *See id*.

previous year or four times the amount if the land was agricultural, the landowner will be unable to assert recreational use immunity.

So, in this sense, landowners who pay property taxes can charge a certain amount for others to enter the land and still retain immunity, while public entities, which are not always subject to the provisions of N.D. CENT. CODE § 53-08-05(2)(b)(2), can only retain immunity if they do not charge a single dollar for a direct activity. To solidify this notion, consider the following example. A landowner could charge individuals to come onto his or her property to snowmobile, so long as that amount did not exceed the amount of his or her property taxes under N.D. CENT. CODE § 53-08-05(2)(b)(2). But, if a public park allowed snowmobilers to enter the public land for even a $2.00 charge, the park would lose immunity. Was the Legislature's intent to create more immunity for private landowners and those who pay property tax, but less for public entities? If so, perhaps it was with reason. Public events arguably draw more crowds than private landowners, and thus, liability is much more likely. But, how should North Dakota balance protecting public entities with the public policy of giving innocent individuals recourse for injuries?

First, considering the public policy side, does North Dakota really want parents sending their children to free recreational activities hosted by public entities on public lands when there is a chance that if the child becomes injured, the public entity will be immune from liability and the parents will be forced to pay for an arguably free event in the long run through medical bills? Consider the following example. During the summer months, most small towns in North Dakota host some type of parade. Children line the city streets to collect candy thrown by individuals driving vintage cars, tractors, and even unique floats. Almost always, this parade is free to the public, and typically, the event is put on by a public entity, such as a municipality. Under the 2011 amendments, so long as the city did not maliciously or willfully fail to guard or warn against some sort of danger or activity, if a child trips in a deep hole while running for candy, the public entity can assert recreational use immunity, and the child will have no remedy for injuries. If, however, the city held the parade at the city's historical society grounds, and it charged $3.00 to attend the event, then the analysis changes. Here, the city, a public entity, hosted a parade on historical society grounds, which are considered public lands, for an activity in which there was a direct charge of $3.00 to enter the grounds for the parade. The city would be unable to assert recreational use immunity, and the child would be able to sue the city for recovery. So from this example, is it legally safer for individuals to only attend public events for which there is a charge, aside from parking or shelter fees? Or do individuals attend

these free events, but realize that if they are injured the entity will not be responsible for any injures? Who will be responsible for warning these individuals?

On the other side of the argument, ensuring that public entitles retain the broadest immunity that N.D. CENT. CODE Chapter 53-08 can afford, perhaps the Legislature would like to consider revisiting the amount that public entitles can charge for recreational activities and still retain immunity. For public entities hosting recreational activities, a few dollars can mean the difference between immunity and liability. Many small town events and activities such races, city street dances, parades, and fairs can retain immunity, so long as they don't charge even one dollar for attendance of any direct activities. This seems to minimize the Legislature's overall goal of incentivizing the opening of land, because if the Legislature did not think that public entities should lose immunity for charging for shelter, vehicle, parking, etc., which are typically small amounts, why would it leave the law to say that if the public entity charged even one dollar to enter the land, it would lose immunity? Perhaps, in the future, the Legislature, if truly feeling that public entities deserve more immunity, will set a ceiling amount for public entities to be able to charge individuals without losing immunity.

While both effects of recreational use immunity have valid reasoning, perhaps the Legislature would consider revisiting N.D. CENT. CODE Chapter 53-08 in an effort to find a better balance between providing immunity to landowners who open up their land to the public for recreational purposes, and ensuring that innocent people are not inequitably injured for simply partaking in recreational events, especially those put on by public entities.

V. CONCLUSION

Audra Woody suffered injuries while attending the Pembina County Fair fireworks show. Because the North Dakota Supreme Court found that the Fair was a public entity operating on public land, and Woody was not charged a direct fee to attend the fireworks show, the Court granted the Fair recreational use immunity. While the public entity wording to commercial purpose was just added in 2011, it is an area that may need to be revisited. As written, if a public entity charged any amount, which did not include parking, shelter, etc., it would lose recreational use immunity. This area of ambiguity may also have sincere implications from a public policy standpoint. However, these are not the only implications of leaving the recreational use statute as it stands. By severely limiting recourse available to individuals that go upon another's land for a recreational purpose and are

injured, these individuals may be less likely to utilize these newly opened lands in the first place. Thus, recreational use immunity may help to open more lands for recreational purposes, but less individuals may utilize these lands to recreate.

*Santana Royer**

*2018 J.D. candidate at the University of North Dakota School of Law. This Case Comment is dedicated to my beloved friends and family, especially my parents, Debbie and Brian. Your unconditional love and support has guided me to where I am today, and for that, I am forever grateful.