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Governmental Liability for Recreational Uses of Public Land:
Bronsen v. Dawes County, 273 Neb. 320, 722 N.W.2d 17 (2006)

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I. INTRODUCTION

Although snow had not yet fallen in early December of 2006, Lincoln children's wintertime activities had become momentarily chilled.\(^1\) The city decided that many of the municipally owned sledding areas were too high of a liability risk to open for public use.\(^2\) Lincoln was also re-evaluating whether to keep open other recreational lands it owned, such as skate parks.\(^3\) Lincoln was not alone in this re-evaluat-

\(^1\) Deena Winter, New Rules for Lincoln's Sledders, LINCOLN J. STAR, Dec. 8, 2006, at 1B.
\(^2\) Id.
\(^3\) Id.; Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 57–58 (Neb. 2007) (statement of Lynn Johnson, director of Lincoln Parks and Recreation).
tion of publicly owned recreational land. Nebraska City shut down a skate-park.4 Omaha was in the process of cutting back its recreational facilities and re-allocating its recreational land budget to preventative measures and potential suits.5 In fact, political subdivisions across Nebraska were shutting down and limiting recreational facilities.6

Fifty years ago, the State and its political subdivisions would not have had to worry about potential liability resulting from injuries on government land because the doctrine of sovereign immunity would only allow governmental entities to be sued upon their consent.7 However, in 1969 the Nebraska Legislature passed the Political Subdivisions Tort Claims Act (“PSTCA”)8 and the State Tort Claims Act (“TCA”)9, thereby eliminating sovereign immunity except in a few specified categories. Injuries occurring on recreational lands were not included in the specific exceptions to the Legislature’s waiver of sovereign immunity; therefore, the State and its subdivisions were no longer granted any protection from suits arising out of such injuries.

Four years before this partial waiver of sovereign immunity, the Unicameral passed the Recreational Liability Act (“RLA”), giving immunity to landowners who allowed recreational use of their property free of charge.10 In a subsequent decision, the Nebraska Supreme Court ruled that the State and its subdivisions qualified as landowners under the RLA.11 Relying upon the protection of the RLA, the State of Nebraska, its municipalities, counties, and other political subdivisions allowed the public to use its property for recreational pur-

6. See, e.g., Statement of Intent for LB 564, 100th Leg., 1st Sess. (Neb. 2007) (Principal Introducer: Sen. Mike Friend) (stating generally that sled runs, skate parks, hunting and trail activities all had begun shutting down throughout the State); Editorial, Filibuster Foes Must Stand Up for Recreation, LINCOLN J. STAR, Apr. 13, 2007, at 7B (stating that cities across the State had closed recreational facilities such as sledding hills, skating rings, and skate parks).
poses, and even expended monies for the construction of certain recreational structures.\(^\text{12}\)

In 2006, *Bronsen v. Dawes County*\(^\text{13}\) stripped away the protection which the government had enjoyed under the RLA by overruling twenty-five years of judicial precedent. This complete reversal of liability is what caused sledding hills, skate parks, and other recreational facilities across the State to begin shutting down. Fearing increased liability and insurance premiums, many political subdivisions closed down various publicly owned recreation sites.\(^\text{14}\) Subsequently, a firestorm of debate ensued which inevitably led to new legislation re-granting the government partial immunity.

Part II of this Note focuses on the development of the judicial interpretation of the government’s role in the RLA, beginning with *Watson v. City of Omaha*.\(^\text{15}\) Next, Part III traces the factual and procedural background of *Bronsen*, overviews the case itself, and expounds the legislative reaction. Part IV analyzes the reasoning used by the Nebraska Supreme Court in its pivotal decision in *Bronsen*. Additionally, this Note analyzes the legislative reaction to *Bronsen*, discussing the competing interests to the legislation. Finally, Part V concludes that the reasoning in *Bronsen* is justifiable, but subject to several important counterarguments. However, any attempt to overturn *Bronsen* will likely fail due to new legislative intent. Moreover, the state of the law today is probably a good compromise for all interested parties.

II. THE RECREATIONAL LIABILITY ACT AND ITS INTERPRETATION PRIOR TO *BRONSEN*

Virtually all\(^\text{16}\) states in the United States have enacted some type of statute granting immunity for landowners who allow the public to

\(^{12}\) For example, the director of the Lincoln Parks and Recreation testified that the city had invested in numerous projects specifically in reliance upon the RLA immunity. One example given was two skate parks with a total investment of approximately $200,000. *Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm.*, 100th Leg., 1st Sess. 57–58 (Neb. 2007) (statement of Lynn Johnson, director of Lincoln Parks and Recreation).

\(^{13}\) 272 Neb. 320, 722 N.W.2d 17 (2006).

\(^{14}\) For example, Nebraska City shut down a skate park which had been built through fundraising efforts of area teens. The city felt that the financial risks were too great after losing RLA immunity in *Bronsen*. *Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm.*, 100th Leg., 1st Sess. 44–45 (Neb. 2007) (statement of Jo Dee Adelung, mayor of Nebraska City and president of the League of Nebraska Municipalities).

\(^{15}\) 209 Neb. 385, 312 N.W.2d 256 (1981).

use their land for recreational purposes.\textsuperscript{17} Many of these states, Nebraska included, have based their statutes off of a Model Act promulgated by the Council of State Governments in 1965.\textsuperscript{18} Although each state has adopted a slightly modified version, the Model Act is virtually unchanged in many instances. The general intent of the Act, reiterated in Nebraska’s RLA, is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.\textsuperscript{19}

Under the RLA, an owner who does not charge the recreational users would only be required to restrain from “willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity . . . .”\textsuperscript{20} This willful or malicious standard is even higher than gross negligence.\textsuperscript{21} Furthermore, Nebraska uses a definition of “owner” which is commonly adopted by other states.


\textsuperscript{18} 24 \textit{COUNCIL OF STATE GOVERNMENTS}, \textit{Suggested State Legislation} 150 (1965).

\textsuperscript{19} Nebr. Rev. Stat. § 37-730 (Reissue 2004).


\textsuperscript{21} See discussion \textit{infra} section III.B.
language states that "owner includes tenant, lessee, occupant, or person in control of the premises." However, both the RLA and the Model Act fail to specify whether the State and its political subdivisions qualify as owners.

The Nebraska Supreme Court first addressed whether the RLA included the State and its subdivisions as "owners" in *Watson v. City of Omaha.* In *Watson*, a child fell from a slide in an Omaha city park. The Court concluded that the city was an owner under the RLA and should therefore be held to the willful or malicious standard. The Court reasoned that the city had derivative immunity through a clause in the PSTCA which states:

Except as otherwise provided in the Political Subdivisions Tort Claims Act, in all suits brought under the act the political subdivision shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . .

Because the PSTCA does not address what liability a city would have toward recreational users of its land, the court concluded that "the [city] is entitled to assert the defenses that a private property owner has in like circumstances." Therefore, because the Legislature was presumed to have knowledge of the 1965 RLA when they adopted the 1969 PSTCA, the Court concluded that the Legislature intended to include the State and its subdivisions in the RLA via section 13-908 of the PSTCA. Thus, "the definition of owner . . . is sufficiently broad to cover a public entity."

The *Watson* rule was explicitly upheld by the Nebraska Supreme Court on three occasions. In *Bailey v. City of North Platte*, a man was injured when he stepped in a hole while playing softball at a North Platte city field. In a brief opinion, the Court declined, without reasoning, to overrule *Watson.* In 1987, the Court upheld the *Watson* rule in two separate cases. In one case a boy was injured sledding on

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24. Id. at 836, 312 N.W.2d at 256.
25. Id. at 842, 312 N.W.2d at 259.
26. Id. at 840-41, 312 N.W.2d at 259.
27. NEB. REV. STAT. § 13-908 (Reissue 2004).
29. Id. at 841, 312 N.W.2d at 259.
30. Id. at 841, 312 N.W.2d at 259.
32. Id. at 811, 359 N.W.2d at 767.
land owned by the Omaha Public Power District, and in another case a woman was injured on a slide in an Omaha city park.

However, the Watson rule became suspect after the 2005 decision *Iodence v. City of Alliance*. In *Iodence*, a woman was injured while driving to her son's football game when her car hit a tree stump at a softball complex owned by the city of Alliance. The Court ruled that “spectating” at a youth football game did not qualify as a recreational purpose under the RLA and thus the city was liable. More importantly, in a concurring opinion, Chief Justice Hendry questioned the application of the RLA to public lands under the Watson rule, and expounded several points of reasoning to support this position. However, Chief Justice Hendry’s discussion in *Iodence* was dictum and did not overrule Watson. Therefore, by 2006, twenty-five years of precedent granting the State and its subdivisions the status of “owner”, and thus immunity under the RLA, had been brought into question.

III. BRONSEN AND LEGISLATIVE BILL 564

A. The Case

In July 2002, Carolyn Bronsen decided to attend Fur Trade Days in Chadron, Nebraska with her family. Part of the festivities occurred on the lawn of the Dawes County courthouse, and picnic tables had been set out for people to relax while eating food served at the celebration. Bronsen, who had not previously visited the courthouse lawn, walked with her family to a table to eat lunch. At some point Bronsen was able to feel that the lawn was uneven, and she was aware that her father had previously stepped in a hole in the lawn. After eating, Bronsen picked up her trash and began walking to a trash can in order to throw it away, but stepped in either a hole or some type of uneven ground and broke her ankle.

34. Thies v. City of Omaha, 225 Neb. 817, 408 N.W.2d 306 (1987) (citing prior cases and stating that the case clearly fell in line with such precedent).
35. 270 Neb. 59, 700 N.W.2d 562 (2005).
36. Id. at 60, 700 N.W.2d at 563.
37. Id. at 62–64, 700 N.W.2d at 564–65.
38. Id. at 64–72, 700 N.W.2d at 565–71 (Hendry, C.J., concurring) (using the reasoning which would be adopted by the Nebraska Supreme Court in *Bronsen*).
41. Id. at 322, 722 N.W.2d at 21.
42. Id. at 322, 722 N.W.2d at 21.
43. Id. at 322, 722 N.W.2d at 21.
44. Id. at 323, 722 N.W.2d at 21.
Bronsen filed a lawsuit against Dawes County and Fur Trade Days, Inc. ("FTD"), alleging various theories of negligence. The district court granted summary judgment for both defendants, concluding that the defendants were "owners" under the RLA and thus immune because their actions did not amount to willful or malicious failure to prevent the injury. The Nebraska Court of Appeals affirmed the decision, noting that the Watson rule was still the prevailing law, granting public land immunity under the RLA. Therefore, Bronsen decided to directly challenge the Watson rule in the Nebraska Supreme Court.

In support of her position, Bronsen had a line of dissents stretching back to the Watson ruling in addition to Chief Justice Hendry's concurring opinion in Iodence. The Nebraska Supreme Court found the reasoning expounded in these dissents and the Iodence concurrence convincing and overruled Watson. Specifically, the Court utilized six points of reasoning drawn from the prior dissents and the Iodence concurrence in reaching its conclusion.

First, the Court reasoned that "[a] governmental entity's primary purpose in owning [recreational or park property] is to make it available for public use." Therefore, the governmental entity "needs no incentive to perform this traditional function." Next, the Court believed that including political subdivisions in the RLA would render a nonsensical reading of the statute. Specifically, the Court noted that section 37-733 relieves an owner of land from liability, if such owner leases the land to the State for recreational purposes. Even if the State, as a lessee, charges for the public to use the land, the owner incurs no liability. However, if the State as an owner (assuming the State is an "owner" for RLA purposes) simply charges the public to use the land, then it would lose the protection of the RLA and be liable under an ordinary negligence standard. The Court reasoned that

45. Id. at 322, 722 N.W.2d at 21.
46. Id. at 324, 722 N.W.2d at 22. The court also held that Bronsen's activities qualified as "picnicking" which was a recreational activity triggering the RLA. Id. at 324, 722 N.W.2d at 22.
49. Bronsen, 272 Neb. at 328, 722 N.W.2d at 24.
50. Id. at 328, 722 N.W.2d at 24.
51. Id. at 328, 722 N.W.2d at 24.
52. Id. at 329, 722 N.W.2d at 24–25.
if "owner of land" under § 37-729(2) includes governmental entities, then § 37-733 must be read to authorize a governmental entity to lease land to itself and, by doing so, avoid liability for ordinary negligence.  

The Court believed that this was a nonsensical reading of the statute and therefore the Legislature must not have intended governmental entities to qualify as "owners" under the RLA.  

Third, the Court did not believe the RLA was meant to include governmental entities as owners because at the time of its enactment in 1965 such entities were still protected by sovereign immunity. The TCA and PSTCA waiving such immunity were not passed until 1969. If the entities already had immunity, then granting them immunity under the RLA would have been redundant. Due to this redundancy, the Court did not believe that the Legislature could have intended the State and its subdivisions to be included as "owners" under the RLA.  

Additionally, the Court struggled to justify the divergent outcomes possible under the RLA for parties injured on public land. If a governmental entity were an owner under the RLA, then a person injured using the land for recreational purposes would have no recourse unless the injured party could show willful or malicious failure to prevent the injury on the part of the government. However, an individual using the same land for any non-recreational purpose, which is not granted special treatment by the TCA and PSTCA, would be able to sue the entity upon a showing of ordinary negligence. The Court noted several hypothetical examples, such as a man bicycling to work rather than bicycling for enjoyment, where two people doing essentially the same act would receive different liability treatment. The Court concluded that it was unreasonable to allow "a claimant's fortuitous purpose in using public property to become an outcome-determinative factor in deciding whether to apply the liability standard of the PSTCA or the RLA."  

Furthermore, the Court believed that the concept of derivative immunity was in direct conflict with Nebraska's PSTCA. The PSTCA and TCA grant governmental entities the same immunities afforded private individuals unless specifically provided by the PSTCA and TCA respectively. The Court believed that the PSTCA and the TCA,  

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54. Bronsen, 272 Neb. at 329, 722 N.W.2d at 25.  
55. Id. at 329, 722 N.W.2d at 25.  
56. Id. at 329–30, 722 N.W.2d at 25.  
60. Id. at 331–32, 722 N.W.2d at 25–26.  
61. Id. at 331, 722 N.W.2d at 26.  
in fact, contained such a provision. Section 13-910 of the PSTCA and section 81-8,219(7) provide that the waiver of immunity does not apply to

any claim based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to such political subdivision to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety unless the political subdivision had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety.63

The Court believed that if the Legislature had wanted a governmental entity to enjoy immunity for failing to inspect property it owned or leased, then it could easily have included such a provision in the respective tort claim acts.64 "By excluding public property in this fashion and reading the statute as a whole, the Legislature has shown an intent to be liable for ordinary negligence with respect to publicly owned or leased property."65

Finally, the Court looked to the Model Act on which Nebraska's RLA was based and decided that because that Act was likely meant to include only private lands, the RLA should only include private lands.66 The Court noted that the Model Act contained an introductory commentary which stated that the Act was intended "to encourage availability of private lands . . ."67 Nebraska adopted the Act "almost verbatim;" therefore, the purpose in this introductory commentary should apply to the RLA.68 The Court concluded that "[t]his purpose precludes applying the RLA's immunity to governmental entities through [the PSTCA]."69

In response to these points,70 Dawes County and FTD argued for the Court to recognize legislative acquiescence on the matter and give great weight to stare decisis.71 FTD argued that the Legislature had shown acquiescence by not taking action to alter the Watson rule.72

65. Id. at 333–34, 722 N.W.2d at 28.
66. Id. at 334, 722 N.W.2d at 28.
67. Id. at 334, 722 N.W.2d at 28 (quoting 24 Council of State Governments, Suggested State Legislation 150 (1965)).
68. Bronsen, 272 Neb. at 334, 722 N.W.2d at 28.
69. Id. at 334, 722 N.W.2d at 28.
70. Both Fur Trade Days, Inc. and Dawes County made several other arguments in their briefs relating directly to the court's six points of reasoning. However the court did not directly address these contentions in the case. Section IV.A of this note will address these arguments in the in-depth analysis of the Court's reasoning.
72. Id. at 335, 722 N.W.2d at 28–29.
However, the Court was not bound by such acquiescence because "[i]f legislative acquiescence were applied as a rule in every case involving statutory construction, no judicial construction of a statute could be overruled in the absence of legislative action." Furthermore, FTD argued that stare decisis should be given great weight in this case, especially because governmental entities had relied upon the Watson rule when expending funds on recreational areas. Again, the Court was not persuaded, and justified overruling Watson because that rule was "manifestly wrong." Therefore, after twenty-five years, Watson was overruled and governmental entities no longer fell under the protection of the RLA.

B. Legislative Reaction to Bronsen

With its ruling in Bronsen the Nebraska Supreme Court triggered outcries and preventative reactions throughout Nebraska, especially among municipalities. In reliance upon the Watson rule, the State and its subdivisions had "opened thousands of acres of public land for hunting, fishing, swimming, hiking, biking, and numerous other types of recreational and leisure activities . . . ." In response to the potential increase in liability and insurance costs after Bronsen, many governmental entities began closing down various recreational facilities. These concerns led to several potential bills being intro-

73. Id. at 335, 722 N.W.2d at 28–29.
75. Bronsen, 272 Neb. at 335, 722 N.W.2d at 29.
76. For example, one newspaper article stated that Lincoln city officials believed the court had "thrown open the door to lawsuits," and quoted Lynn Rex, the executive director of the League of Nebraska Municipalities as saying that "[t]his is one of those court cases that, whether the Nebraska Supreme Court recognizes it or not, will have profound impact on whether or not municipalities will continue to offer recreational activities at all." Editorial, Find a Way to Protect City Rec Sites, LINCOLN J. STAR, Oct. 19, 2006, at 7B.
78. See, e.g., Statement of Intent for LB 564, 100th Leg., 1st Sess. (Neb. 2007) (Principal Introducer: Sen. Mike Friend) (stating generally that sled runs, skate parks, hunting and trail activities had begun shutting down throughout the State); Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 26 (Neb. 2007) (statement of Omaha city attorney Paul Kratz) (stating that because of increased insurance costs and potential litigation costs deriving from the Bronsen decision, the city would be forced to begin analyzing cost re-allocation which would likely include shifting money from recreational activities to risk prevention); Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 42 (Neb. 2007) (statement of Wes Sheets, representative of the Izaak Walton League) (discussing the closing of University of Nebraska property at Mead Research Center which was used by the public for hunting, as one example of areas shutting down
duced in the Nebraska Legislature which would essentially change the RLA to reflect the legal landscape before Bronsen.79 One such bill, Legislative Bill 564, advanced from the Judiciary Committee on February 14, 2007, and after extensive debate was adopted by the Legislature in May 2007.80

However, the adopted version of Legislative Bill 564 is substantively different than what was originally introduced. Originally, Legislative Bill 564 was meant only to clarify that “owner” under the RLA included the State and its political subdivisions.81 Amendments by the Judiciary Committee significantly altered Legislative Bill 564 and gave the bill a more limited scope than a simple change in the meaning of “owner” under the RLA.

Instead of amending the RLA, the version of Legislative Bill 564 which came out of the Judiciary Committee amended the PSTCA and the TCA.82 Rather than explicitly granting the State and its political subdivisions “owner” status under the RLA, the new Legislative Bill 564 created another exception to the general waiver of immunity in the PSTCA and the TCA.83 The bill explicitly states that the amended portion of the PSTCA and TCA, rather than the sections dealing with negligent inspections of non-public property by governmental entities, will control in situations involving recreational lands owned or leased by the State and its political subdivisions.84

The main thrust of Legislative Bill 564 was to exclude three distinct situations from the general waiver of sovereign immunity under the TCA and PSTCA. The first situation in which governmental enti-
ties now enjoy immunity is when a claim arises “relating to recreational activities for which no fee is charged . . . resulting from the inherent risk of the recreational activity.”\(^{85}\) The bill further defines inherent risk of recreational activities as “those risks that are characteristic of, intrinsic to, or an integral part of the activity.”\(^{86}\)

Several examples of injuries which would result from inherent risks of recreational activities are specifically discussed in the legislative history of Legislative Bill 564. For instance, if an individual playing baseball on land owned by the State is struck by the ball and injured, such injury would be inherent to baseball and thus the State would not be liable. But if the person is “running through the outfield and . . . fall[s] into a hole up to [his] knee, that's not an inherent [t]hat is a condition of the land, and . . . would be governed by a different provision in this bill.”\(^{87}\) Furthermore, while a knee injury or spinal cord injury resulting from tackling someone in a football game is an inherent risk, having the fence which surrounds the field fall on an individual is not.\(^{88}\) However, the most salient inherent risks discussed during Legislative Bill 564’s adoption include the broken bones, spinal injuries, and other injuries common to participants in skate parks.\(^{89}\)

The second situation where Legislative Bill 564 grants the State and its political subdivisions immunity is when an injury results from some defect on the premises. Immunity exists if the injury results from a recreational activity for which no fee is charged and arises

out of a spot or localized defect of the premises unless the spot or localized defect is not corrected by the political subdivision leasing, owning, or in control of the premises within a reasonable time after actual or constructive notice of the spot or localized defect.\(^{90}\)

Furthermore, the State or political subdivision “shall be charged with constructive notice only when the failure to discover the spot or localized defect of the premises is the result of gross negligence.”\(^{91}\) Gross negligence is defined as “the absence of even slight care in the performance of a duty involving an unreasonable risk of harm.”\(^{92}\)

Therefore, if the State or political subdivision fails to use even slight care in its inspections of the land, it will be liable for injuries resulting from defects that an adequate inspection would have discov-

\(^{85}\) LB 564, 100th Leg., 1st Sess. (Neb. 2007).

\(^{86}\) Id.

\(^{87}\) Transcript of Floor Debate on LB 564, 100th Leg., 1st Sess. 26 (Neb. 2007) (statement of Sen. Lathrop).

\(^{88}\) Id. at 22–23.

\(^{89}\) See, e.g., Transcript of Floor Debate on LB 564, 100th Leg., 1st Sess. 6–30 (Neb. 2007).

\(^{90}\) LB 564, 100th Leg., 1st Sess. (Neb. 2007).

\(^{91}\) Id.

\(^{92}\) Id.
ered. This standard produces a different result than if Legislative Bill 564 would have amended the RLA. Under the RLA, the landowner only loses immunity in this situation for willful or malicious failure to guard or warn against the dangerous defect. The willful or malicious failure standard is higher than gross negligence because it requires conscious knowledge of the danger coupled with either intentional or reckless failure to prevent the harm. As a result, under the current state of the law, an injured plaintiff bringing an action against a governmental entity-landowner will have a lower standard to prove to overcome immunity protections.

Finally, the third situation where immunity is granted under Legislative Bill 564 is when the design of a skate park or bicycle motocross park is the cause of the injury. However, to qualify for the immunity, the skate or bicycle motocross park must be "constructed for purposes of skateboarding, inline skating, bicycling, or scooter-ing." Additionally, the park must be "constructed or reconstructed, reasonably and in good faith, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction or reconstruction." With the adoption of Legislative Bill 564, these three categories encompass the entire scope of protections the State and its political subdivisions enjoy with regard to users of recreational land.

IV. ANALYSIS

The Court's reasoning for overruling Watson in Bronsen can be disputed in several different ways. However, the recently adopted legislation has addressed the issues in Bronsen in such a way as to likely exclude any overruling of the case. Despite the fact that Bronsen would likely survive a challenge, the new legislation is a good compromise for all interested parties and the state of the law is well justified and supports good public policy.

A. The Court's Reasoning in Bronsen

In ruling that Watson was no longer the law, the Nebraska Supreme Court relied upon six main points of reason. The Court used these six points in an attempt to interpret the intent of a forty-year-old piece of legislation which had only a small amount of legislative

95. LB 564, 100th Leg., 1st Sess. (Neb. 2007).
96. Id.
97. See discussion supra section III.A.
Further complicating the Court's job, the legislative history which existed granted very little access into the minds of the adopting legislators. Although the Court gave compelling and justifiable arguments for its six points of reason, for each point an equally, if not more compelling argument can be made counter to the Court's ruling. In most instances the Court failed to adequately address these arguments, and only gave nominal treatment to other additional arguments. Therefore, the Court's reasoning should not be adopted or viewed as the strong, sole reasoning it is portrayed to be. It appears that the Court made a much closer call than its opinion depicts.

The first line of reasoning in Bronsen promulgated was that the State and its political subdivisions need no motivation to open, or keep open, lands to the public for recreational purposes because such entities either have duties to create recreational facilities or it is part of their traditional function. The stated policy for the RLA is to "encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability . . . ." Therefore, Bronsen reasoned that the RLA was never intended to include the State and its political subdivisions.

Although it is true that some governmental entities generally have a duty to make land available to the public, and some subdivisions will still maintain recreational facilities because it is their traditional function, the Court in Bronsen assumed too much in concluding that the government needs no motivation. As FTD pointed out in its brief, numerous governmental or quasi-governmental subdivisions likely do


99. See supra note 98. The small amount of legislative history which exists only generally discusses what the bill does. There is no real indication whether the legislators intended the State and its subdivisions to be included.

100. Because this Note has discussed the Court's reasoning in section III.A, Part IV will only expound such reasoning to the extent necessary to understand the counterarguments.


102. NEB. REV. STAT. § 37-730 (Reissue 2004).

103. 272 Neb. at 328–29, 722 N.W.2d at 24.

104. See, e.g., NEB. REV. STAT. § 2-3229 (Reissue 1997) (stating that one of the purposes of natural resources districts was the development and management of recreational and park facilities).
need motivation to open, and keep open, recreational lands. For instance, the Central Nebraska Public Power District and the Nebraska Public Power District own large tracts of land with lakes and other waterways which are attractive for hunting and fishing. These entities have often allowed recreational activities on this land despite not having a duty to do so. However, such entities appear to allow recreational use of the land in large part because they are protected by RLA immunity. Numerous other entities—including natural resource districts which have a general duty to develop recreational facilities—appeared poised to limit or eliminate recreational lands they had held open in reliance upon the RLA. If these entities did not have protection from liability, it is much more likely that


106. Id.; see also Nebraska Public Power District, Irrigation and Recreation, http://www.nppd.com/About_Us/Energy_Facilities/facilities/irrigation.asp (discussing several of the different tracts of land the NPPD opens to the public for recreational purposes) (last visited June 23, 2008).

107. Id. There is no general statutory duty mandating public power districts (or most other subdivisions such as municipalities) to open or maintain recreational areas. Individual cities or other subdivisions such as public power districts may have specific requirements in local ordinances, operating/cooperative agreements, provisions in transferring instruments, or other relevant particularized authority depending on their individual respective positions. However, there is no overarching or consistently present duty. Neb. Rev. Stat. section 13-304 (Reissue 1997) grants political subdivisions the power to implement and maintain recreational facilities, but does not require such activity. Furthermore, even where municipal codes or cooperative agreements required an effort to open recreational facilities, the RLA immunity gave such entities the freedom to expand the scope of facilities offered because of a reduced fear of liability.

108. See Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 74 (Neb. 2007) (statement of Chris Dibbern, representative of the Nebraska Power Association which represents numerous public power districts) (testifying that Bronsen may limit the ability of public power districts to keep open lands for recreational use).

109. See, e.g., Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 62 (Neb. 2007) (statement of Glenn Johnson, general manager of the Lower Platte South Natural Resources District) (testifying that that district would be ending public recreational use of many of its tracts of land ordinarily used for hiking, hunting, fishing, bicycling, picnicking, camping, and horseback riding due to Bronsen); Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 75-76 (Neb. 2007) (statement of Joel Pedersen, University of Nebraska representative) (discussing the potential restricting impact of Bronsen upon land owned by the University which is open for recreational purposes); Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 67-69 (Neb. 2007) (statement of John Bonaiuto, executive director of Nebraska Association of School Boards) (discussing the negative ramifications of Bronsen upon playgrounds and other land owned by school districts which is used during non-school hours).
they would restrict the public from using such land for recreational purposes.\textsuperscript{110} 

In fact, the response to \textit{Bronsen} by many political subdivisions across the State in shutting down or limiting their recreational areas should be proof enough that such entities need some type of motivation. One example involves a skate park in Nebraska City. Responding to a city ordinance which banned skateboarding in the downtown area of Nebraska City, local youths raised $150,000 to build a professionally designed skate park in the city park.\textsuperscript{111} After \textit{Bronsen}, the city decided to lock up the skate park because of the potential for increased liability and higher insurance premiums.\textsuperscript{112} Thus, even though the city still provides a park for its citizens, any activities involving the skate park are no longer available. Similarly, Omaha closed some sledding hills and began discussing the closing of BMX parks\textsuperscript{113} and skateboarding parks.\textsuperscript{114} Numerous other communities either closed down or deferred construction of recreational facilities after \textit{Bronsen}.\textsuperscript{115}

The response to \textit{Bronsen} clearly shows that the State and its political subdivisions often do need motivation to construct recreational facilities and open land to the public for recreational purposes. Having no liability protection will, at a minimum, constrain the scope of recreational facilities made available to the public, often to the detriment of potential users. Therefore, the idea that the Legislature intended the RLA to include governmental entities to help motivate them to open up and keep open recreational land and facilities is logical and \textit{Bron-}

\textsuperscript{110} See supra note 109.

\textsuperscript{111} Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 44 (Neb. 2007) (statement of Jo Dee Adelung, mayor of Nebraska City).

\textsuperscript{112} Id. at 44-45.

\textsuperscript{113} BMX parks are parks designed for a specific type of bicycle known as a BMX bicycle. According to Merriam-Webster On-line, BMX stands for "bicycle motocross." Furthermore, Merriam-Webster On-line states that such bicycles are differentiated from other bicycles because they are used in "racing that resembles motocross with dirt tracks and jumps," which needs such "special heavy-duty bicycles." Merriam-Webster On-line, http://www.m-w.com/dictionary/BMX (last visited June 23, 2008).

\textsuperscript{114} Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 34 (Neb. 2007) (statements of Omaha City Attorney Paul Kratz and Sen. Lathrop).

\textsuperscript{115} See, e.g., Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 58 (Neb. 2007) (statement of Lynn Johnson, parks and recreation director for Lincoln) (testifying that at least eleven other municipal members of the Nebraska Recreation and Parks Association had closed or deferred construction of recreational facilities).
sen’s contrary conclusion on this point should be severely weakened, if not dismissed.\footnote{116}

The Court in Bronsen also believed that including governmental entities in the RLA led to a nonsensical reading of the statute because such entities could circumvent liability via section 37-733 while charging for use of the land.\footnote{117} It is true that, in theory, the State or its political subdivisions could avoid ordinary negligence by leasing the land to itself. However, it could be argued that the legislature intended to allow political subdivisions to lease to the State and other political subdivisions and gain the same immunity as private landowners leasing to the State. For instance, public power districts often hand over management of their lands to the Nebraska Game and Parks Commission.\footnote{118} Allowing such a political subdivision to avoid liability when it leases land to another political subdivision is not necessarily nonsensical. This arrangement seems fair. If the lessee subdivision maintains control over the premises, why should the owner subdivision be liable? Therefore, allowing political subdivisions to gain immunity when they lease their property to other political subdivisions should not negate the purpose of the RLA. These political subdivisions can fit within the statute without resulting in a “nonsensical” reading. The one issue with this argument is that such a construction could allow public landowners to manipulate the rules by leasing to themselves. However, as the FTD brief emphasized, there have been no reported cases of such activity in Nebraska.\footnote{119} Furthermore, such a deceptive transaction to avoid liability would easily be ascertained by courts and justifiably ignored.\footnote{120}

\footnote{116. Other courts have equally dismissed this reasoning. See, e.g., Olson v. Bismarck Parks & Recreation Dist., 642 N.W.2d 864, 870 (N.D. 2002) (stating that “the principle of encouraging landowners to open their land by limiting potential tort liability applies with equal force to the Government as to other landowners... [because the Government maintains] the power to close or severely limit the use of its land to the public” (internal citation omitted)).

\footnote{117. 272 Neb. 320, 329, 722 N.W.2d 17, 24–25 (2006). For further explanation of the Court’s reasoning on this point, see discussion supra section III.A.


\footnote{120. Id. Such a result may be compared with Veskerna v. City of West Point, 254 Neb. 540, 578 N.W.2d 25 (1998), overruled by Bronsen v. Dawes County, 272 Neb. 320, 722 N.W.2d 17 (2006), where the Court decided that the intent of the RLA did not include allowing a city to avoid liability when continuously open non-recreational land temporarily hosted a recreational activity. This would be similar because the Court could decide that the intent of the RLA did not include allowing political subdivisions to lease to themselves rather than to other public entities. Such
Next, the Court in *Bronsen* argued that because the State and its political subdivisions enjoyed sovereign immunity when the RLA was passed, the legislature could not have contemplated granting such entities immunity because it would have been redundant.\(^{121}\) However, the Court failed to adequately address a compelling counterargument, which was, in fact, the basic reasoning in *Watson*.\(^{122}\) Even if the 1965 Legislature did not (because of sovereign immunity) explicitly intend to include governmental entities, nothing the Legislature did affirmatively indicates that such entities should not be included through derivative immunity in the TCA and PSTCA.

The TCA and PSTCA maintain certain enumerated areas of immunity, but waive sovereign immunity for all other areas. Consequently, the State and its political subdivisions have the same liabilities and immunities as a private individual under the circumstances.\(^{123}\) During the adoption of the TCA and PSTCA, the Legislature did not enumerate any exceptions for recreational use of public land.\(^{124}\) Due to this lack of action, it can be assumed that the Legislature intended the State and its subdivisions to be liable, *and immune*, to the same extent as private individuals. Thus, even under the assumption that the RLA was not (because of sovereign immunity) originally intended for governmental entities, the derivative provisions of the TCA and PSTCA should grant such entities RLA status.

In fact, several other states judicially construe recreational use statutes to apply to governmental entities through a derivative provision in their tort claim acts.\(^{125}\) Furthermore, courts have explicitly rejected the argument which *Bronsen* made on this point of reasoning. One South Carolina court responded to the redundant immunity argument by stating that “[s]tatutes must be updated functionally to reflect changes in... the legal landscape... [the court must give] effect to legislative intent in light of the purposes the statute was meant to achieve.”\(^{126}\) That court went on to reason that the redundant immunity argument was not persuasive because nothing in the

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\(^{121}\) 272 Neb. at 329–30, 722 N.W.2d at 25.

\(^{122}\) *See* *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981).


language of the recreational use statute explicitly limited "landowner" to non-governmental entities.\textsuperscript{127} Additionally, the Oklahoma Supreme Court stated that the redundant immunity argument was "fatally flawed for its failure to recognize the overarching principle of legislation modifying the doctrine of sovereign immunity."\textsuperscript{128} Therefore, granting the State and its political subdivisions ownership status for the RLA is well received in several states, despite redundant immunity arguments. In light of such support, Bronsen's third point of reasoning should at least be viewed skeptically.

\textit{Bronsen}’s next point of reasoning attempted to justify the Court’s exclusion of the derivative provisions in the TCA and PSTCA. The Court attempted to do this by establishing that the Legislature in fact contemplated immunizing recreational use public land when it amended the enumerated sovereign immunity exceptions of the TCA and PSTCA.\textsuperscript{129} Specifically, \textit{Bronsen} pointed to section 13-910(3) of the PSTCA, which maintains immunity for the political subdivisions for negligent failure to inspect "property other than property owned by or leased to such political subdivision."\textsuperscript{130} Thus, the Court believed that the Legislature contemplated and rejected the idea of granting the State and its political subdivisions immunity for negligent failure to inspect their recreational use property.

Once again, it appears \textit{Bronsen} may have assumed too much. The enumeration in the PSTCA and TCA was adopted by Legislative Bill 262 in 1992.\textsuperscript{131} \textit{Bronsen} assumed that this bill was adopted by a Legislature which contemplated situations that would be covered by the RLA and intentionally negated the government from qualifying for such immunity. There is no indication in the legislative history that anyone involved with the bill contemplated whether a governmental entity which opens its land for recreational purposes should be immune.\textsuperscript{132} Rather, there is a clear indication that the only reason for

\begin{enumerate}
\item \textit{Brooks}, 489 S.E.2d at 651 n.8; see also Stone Mountain Mem’l Ass’n v. Herrington, 171 S.E.2d 521, 523 (Ga. 1969) (holding that governmental entities were owners under a recreational use statute very similar to Nebraska’s RLA because there was no indication from the wording of the statute that the legislature only meant for private individuals and entities to be included).
\item Hughey v. Grand River Dam Auth., 897 P.2d 1138, 1142 n.12 (Okla. 1995).
\item See Bronsen v. Dawes County, 272 Neb. 320, 332–33, 722 N.W.2d 17, 27 (2006).
\item See also Neb. Rev. Stat. § 81-8,219(7) (Cum. Supp. 2007) (utilizing the same language but with reference to the State rather than political subdivisions).
\end{enumerate}
this particular amendment, and the only contemplation by the Legislature which adopted it, was far from any situation applicable to the RLA. The State and political subdivisions had enacted laws and ordinances which establish minimum standards for certain structures and allowed the public entities to inspect and shut down non-compliant structures. However, governmental entities were concerned that one of these inspections might be performed negligently and an injured individual could sue the State or its political subdivisions based upon such negligent inspection. The result of the bill was that the owners of the facilities which were inspected maintained liability, but the State no longer incurred liability for negligent inspection.

It appears that Bronsen interpreted the term "inspection" to include the general idea of landowners examining their land, thereby knowing whether the land and facilities thereon were safe. The Legislature does not appear to mean inspection of property in this sense. Instead, it appears that the Legislature was contemplating the type of inspection performed by specifically designated city or State inspec-


134. See supra note 133.
tors in order to ensure that private facilities meet minimum statutory or regulatory standards.135 The examples given by the Legislature include municipal inspectors examining elevators and electrical work in private homes and businesses.136 These examples and the discussion in the legislative history do not appear to comport with Bronsen's understanding of "inspection," which included maintenance workers at a county courthouse examining the lawn to see if it had holes.137 It is entirely possible that compromises and drafting outside the purview of documented legislative history took place. However, the legislative history which exists portrays Legislative Bill 262 as a narrow reaction to a specific problem, rather than a broad, sweeping amendment as Bronsen assumed.

Furthermore, it is just as likely that the legislators adopting Legislative Bill 262 knew the Watson rule, and thus felt that RLA-type situations involving the State and its political subdivisions were adequately protected. In such case, there was no need to extend any specific enumerated immunity for recreational-related injuries on public land. Therefore, Bronsen was wrong in concluding that the Legislature addressed the immunity of the State and its political subdivisions with regard to the RLA. First, the enumeration in question was adopted without any apparent contemplation of RLA-type situations and with different intentions than Bronsen assumed. Second, it can just as easily be assumed that the Legislature knew the Watson rule and consequently felt that governmental entities were adequately protected.

Bronsen next struggled to justify the two classes of liability which are produced by the RLA. For example, the Court presented a hypothetical of two individuals walking up the steps of the Nebraska State Capitol.138 One individual is a student on a field trip, while the other is an individual coming to testify at a legislative hearing.139 If a piece of the Capitol breaks off and hits both of the individuals, they will be treated differently under the Watson rule.140 The individual testifying is not at the Capitol for a recreational purpose and would be able to sue the State under an ordinary negligence standard.141 On the other hand, the student is attending for a recreational purpose and would be forced to prove willful or malicious failure of the State under the RLA.142

135. See supra note 133.
136. See supra note 133.
138. Id. at 331, 722 N.W.2d at 26.
139. Id. at 331, 722 N.W.2d at 26.
140. Id. at 331, 722 N.W.2d at 26.
141. Id. at 331, 722 N.W.2d at 26.
142. Id. at 331, 722 N.W.2d at 26.
It is true that inequitable results may stem from the application of the RLA, but the Court missed two key points. First, as FTD argued, most cases involving the RLA do not rely on the subjective intent of the injured. Rather, these cases generally rely on the activity itself.\footnote{143} The RLA specifically lists activities such as hunting, fishing, swimming and boating,\footnote{144} and the relevant cases generally involve activities such as sliding on a slide,\footnote{145} playing softball,\footnote{146} and sledding.\footnote{147} These activities are all clearly recreational and the subjective intent of the actor does not play a part. Therefore, subjective intent of the actor should not be a factor in most cases.

Additionally, cases where subjective intent is important, such as Bronsen's State Capitol hypothetical, seem to simply be a byproduct of the RLA and will apply to private landowners as well as the State and its political subdivisions. For instance, if the private owner of a historical monument allows tours of the monument and a member of a tour is injured by a defect in the property, the landowner enjoys RLA immunity.\footnote{148} However, if the same defect injures an individual who is attending an open house of the property in order to determine whether to purchase the monument, the landowner is under an ordinary negligence standard.\footnote{149} Hypothetical examples can be endlessly conjured, establishing the dual categories of liability which the RLA produces.\footnote{150} However, this dichotomy exists for private landowners as


\footnote{144} NEB. REV. STAT. § 37-729 (Reissue 2004).


\footnote{148} See NEB. REV. STAT. § 37-729 (Reissue 2004) (listing "visiting, viewing, or enjoying historical ... sites" as a recreational purpose).

\footnote{149} Regardless of whether the individual was an invitee or licensee, the landowner owes a duty of reasonable care. See Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51 (1996).

\footnote{150} This is especially the case due to the Nebraska Supreme Court's holding in Holden v. Schwer, 242 Neb. 389, 495 N.W.2d 269 (1993) that the RLA can take effect in situations where the land is only open to some of the public, some of the time, rather than the entire public, all the time. Therefore, many other situations can be thought of which demonstrate that this basic liability dichotomy exists for private landowners. For example, a farmer might allow neighbors to use all-terrain vehicles on his or her land for recreational purposes. The same farmer might later request the help of a neighbor with some matter, requiring such neighbor to traverse the farmer's land on an all-terrain vehicle. Claims for injuries incurred by the neighbor coming to help the farmer with a task would not be barred by the RLA, yet claims for injuries incurred by the neighbor while using the land for recreational purposes would be barred.
well as the State and its subdivisions.\textsuperscript{151} Therefore, such an inequitable result should not have been used to militate the Court's ruling against including governmental entities in the RLA. If the Legislature intended to create such a result for private landowners, it should not be too difficult to believe they intended the result for governmental landowners as well.\textsuperscript{152}

Finally, Bronsen reasoned that because the RLA was based off of the Model Act, the intentions of the Model Act should control the intentions of the RLA.\textsuperscript{153} The Model Act contains a preamble which specifically states that the Act is “designed to encourage availability of private lands.”\textsuperscript{154} In support of this argument, the court cited decisions from four states which interpreted recreational use statutes not to include governmental entities as owners, at least partially because of reliance upon the preamble of the Model Act.\textsuperscript{155}

Two main issues arise with Bronsen's reasoning on this point. First, several state recreational use statutes have been interpreted to exclude governmental entities.\textsuperscript{156} However, several other state recreational use statutes, which are also based on the Model Act, have been judicially interpreted to include governmental entities.\textsuperscript{157} Consequently, Bronsen cannot establish that a majority of courts fall in line

\textsuperscript{151} In situations where land is continuously held open for both non-recreational as well as temporary recreational purposes, subjective intent is most pronounced and thus the dichotomy presents itself most fully. Such a situation certainly occurs in the public sector on a much more frequent basis than for private landowners. Therefore, it is more difficult to justify allowing the state to be an owner at all under the RLA when viewed from this narrow situation. However, it is important to note once again that this situation has not occurred with any frequency in the time since \textit{Watson}. Furthermore, this situation—public lands continuously held open for recreational and non-recreational purposes—is at least partially remedied by \textit{Veskerna v. City of West Point}, 254 Neb. 540, 578 N.W.2d 25 (1998), overruled by \textit{Bronsen v. Dawes County} 272 Neb. 320, 722 N.W.2d 17 (2006). In \textit{Veskerna}, the Court held that public land which was always held open to the public (a public street), could not be temporarily immunized under the RLA when a recreational activity (a car show) was occurring on the land. 254 Neb. at 543, 578 N.W.2d at 27. Therefore, instead of overruling \textit{Watson}, the Court in \textit{Bronsen} could have come to the same result by extending \textit{Veskerna} to this situation where someone was injured at a temporary recreational activity taking place on the courthouse lawn which is continuously held open for non-recreational use.

\textsuperscript{152} In furtherance of this proposition, almost half of the states have created this dichotomous result by explicitly stating in their recreational use statutes that the State and its subdivisions qualify for the immunity under the act.

\textsuperscript{153} 272 Neb. 320, 334, 722 N.W.2d 17, 28 (2006).

\textsuperscript{154} 24 \textsc{Council Of State Governments, Suggested State Legislation} 150 (1965).


\textsuperscript{156} \textit{See supra} note 155.

with its reasoning. Furthermore, none of the states which interpret their recreational use statutes to include governmental entities have been amended to exclude such entities. On the other hand, states with judicial rulings excluding governmental entities from recreational use statutes have seen legislative amendments specifically including the State and its political subdivisions.

The second main issue Bronsen overlooked on this point of reasoning was that the preamble of the Model Act was not adopted with the RLA. The purpose of adopting the statute is expounded in section 37-730, as an encouragement to "owners of land to make available to the public land and water areas for recreational purposes." This purpose does not limit the RLA to private landowners in any way. The Legislature may have intentionally left out the preamble in order to open the RLA to all landowners, public or private. Assuming that the Legislature intentionally left out the preamble is just as easy as assuming that it intended to implicitly incorporate the preamble. Thus, Bronsen's conclusion that the preamble to the Model Act should bind the application of the RLA is suspect.

Therefore, unlike Bronsen's overall conclusion, it is certainly not clear that the Legislature intended to exclude governmental entities from the RLA. Even if the Legislature did not intend to affirmatively include such entities, the State and its political subdivisions should qualify under the TCA and PSTCA derivative immunity provisions. Furthermore, because the actual intent of the Legislature in adopting the RLA is questionable, Bronsen should have granted more weight to two additional arguments made by Dawes County and FTD.

First, Bronsen noted (as FTD argued) that "ordinarily, where a statute has been judicially construed and that construction has not evoked an amendment from the Legislature, it will be presumed that the Legislature has acquiesced in the court's determination of its intent." The Court then proceeded to summarily dismiss such an argument, essentially reasoning that acquiescence by the Legislature in

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160. See also Klepper v. City of Milford, 825 F.2d 1440 (10th Cir. 1987) (making this same point in reasoning that governmental entities are included in Kansas' recreational use statute).

favor of a prior ruling should not absolutely preclude a subsequent court from determining the prior interpretation invalid. Thus, the Court apparently gave no weight to this argument. Bronsen was likely correct in not viewing legislative acquiescence as an absolute, or even determinative factor when deciding whether to overturn a prior interpretation of a statute. However, because the correct interpretation of the RLA is highly questionable, and legislative acquiescence is a valid tool of statutory construction, Bronsen should have given such acquiescence more weight than it did. Therefore, the legislative acquiescence following Watson adds one more valid argument to the side of the scale weighing in favor of interpreting the RLA to include governmental entities.

Second, Bronsen dismissed FTD’s argument that stare decisis should be given great weight in this case.

The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. Bronsen concluded that Watson was manifestly wrong, and accordingly, stare decisis should not perpetuate an erroneous decision.

As previously noted, there are numerous valid concerns as to whether Watson in fact was incorrectly decided. Therefore, the Court’s nominal discussion of stare decisis and quick conclusion that Watson was manifestly wrong is disconcerting. Additionally, not only was it unclear whether “more harm than good [would] result” from maintaining the Watson rule, but it was arguable that “more harm than good would result” from overruling the decision. By overruling Watson, Bronsen caused the State and its political subdivisions to stop supplying many new facilities and lands for recreational use, and close numerous existing facilities. Clearly, Bronsen had a widespread and far-reaching negative effect on large segments of the

162. Id. at 335, 722 N.W.2d at 28.
163. See discussion supra section IV.A.
165. 272 Neb. at 335, 722 N.W.2d at 29.
166. Id. at 335, 722 N.W.2d at 29.
167. Id. at 335, 722 N.W.2d at 29.
168. See discussion supra section IV.A.
169. The Nebraska Supreme Court has, on many occasions, emphasized the importance of stare decisis. See, e.g., State v. Burlison 255 Neb. 190, 196, 583 N.W.2d 31, 36 (1998) (emphasizing that stare decisis is “the bedrock of our common-law jurisprudence,” and should only be discounted if the earlier precedent was “clearly incorrect”); Holm v. Holm, 267 Neb. 867, 678 N.W.2d 499 (2004) (same language).
170. Bronsen, 272 Neb. at 335, 722 N.W.2d at 29.
171. See, e.g., supra notes 12, 14, & 78.
population. Such a foreseeable result should have caused the Court to take stare decisis into consideration with substantial weight. Bronsen appears to have completely dismissed stare decisis and thereby dismissed a valid public policy consideration of great weight supporting the inclusion of governmental entities in the RLA.

B. Compromise by the Legislature

In response to reactions across the State, the Nebraska Legislature adopted Legislative Bill 564, granting certain immunities to the State and its subdivisions with regard to public recreational land.\textsuperscript{172} Although many individuals viewed the legislative overruling of Bronsen as a necessary event to protect important recreational lands and facilities, competing interests believed that simply adding the State and its political subdivisions to the definition of "owner" in the RLA would have disadvantages. A series of compromises between these two sides amended the TCA and PSTCA to grant limited immunities in three distinct situations to the State and its subdivisions, rather than granting the wider immunity enjoyed under the RLA.\textsuperscript{173} Overall, the compromises which led to the adopted version of Legislative Bill 564 did not give either side everything it wanted, but rather created a bill which was sufficiently balanced, and supportive of good public policy.

One policy objection to simply redefining "owner" in the RLA was that the RLA is too high of a standard of liability to require injured parties to establish. The willful or malicious standard necessary to impose liability under the RLA requires a conscious knowledge of the danger coupled with either intentional or reckless failure to prevent the harm.\textsuperscript{174} Furthermore, under the TCA and PSTCA, intentional torts are barred.\textsuperscript{175} Consequently, some interests believed that the area between intentional torts, and willful or malicious failure, was too small to adequately protect parties injured on public land, and encourage governmental entities to maintain safe facilities.\textsuperscript{176} The adopted version of Legislative Bill 564 chose to adopt a gross negligence standard with regard to its broadest category of injuries, those

\textsuperscript{172} For a full discussion of the current legal landscape with regard to Legislative Bill 564, see supra section III.B.

\textsuperscript{173} Transcript of Floor Debate on LB 564, 100th Leg., 1st Sess. 68 (Neb. 2007) (statement of Sen. Lathrop) (stating that this bill, as it was later adopted, was a compromise between the competing interests to the legislation).

\textsuperscript{174} See, e.g., Bronsen v. Dawes County, 272 Neb. 320, 326–27, 722 N.W.2d 17, 23 (2006).

\textsuperscript{175} NEB. REV. STAT. § 13-910(7) (Supp. 2007); NEB. REV. STAT. § 81-8,219(4) (Supp. 2007).

\textsuperscript{176} See, e.g., Change the Recreational Liability Act: Hearing on LB 564 Before the Judiciary Comm., 100th Leg., 1st Sess. 82–86 (Neb. 2007) (statement of Maren Chaloupka, Bronsen’s attorney).
arising from localized defects. If the State or political subdivision is found to be grossly negligent in their duty to locate and correct defects, then such entity is liable. Therefore, Legislative Bill 564 chose to broaden the area between recreational use immunity and intentional tort immunity, allowing injured individuals a greater ability to sue and further encouraging safe maintenance of public lands.

Opponents of Legislative Bill 564 also voiced concerns that users of the government-owned recreational land would not know of the increased standard of liability they would need to establish if they were injured. Proposals were made supporting a requirement upon the State and its political subdivisions to display a sign informing users of the land the protections which Legislative Bill 564 offered to governmental owners. These proposals were only accepted after a compromise specified that an absence of the sign would not lead to the governmental owners of the recreational land losing the protections Legislative Bill 564 grants. This compromise played a major role in the acquiescence of Legislative Bill 564's opponents.

As a further consolation to concerned parties, the proponents of the bill defined the limits of the governmental recreational use immunity as three distinct areas in the amended Legislative Bill 564, rather than a broad, relatively undefined, scope of immunity which governmental entities would enjoy under the RLA. Under the RLA, an owner is protected from any injury occurring during recreational use of the land, unless willful or malicious failure to prevent the injury exists. On the other hand, Legislative Bill 564 only grants immunity in three distinct situations: 1) injuries resulting from the inherent risk of the recreational activity; 2) injuries arising out of a spot or localized defect, with the governmental entity under a gross negligence standard to locate and correct such defects; and 3) injuries arising out of the design of a skate park or bicycle motocross park, if such park is

177. LB 564, 100th Leg., 1st Sess. (Neb. 2007).
178. See, e.g., Transcript of Floor Debate on LB 564, 100th Leg., 1st Sess. 22–83 (Neb. 2007) (detailing extensive debate regarding whether or not to require a warning sign at recreational facilities owned by the State and its political subdivisions in order to inform users of their legal relationship under the new legislation).
179. See id.
180. See, e.g., Transcript of Floor Debate on LB 564, 100th Leg., 1st Sess. 73 (Neb. 2007) (statement of Sen. Lathrop) (explaining the compromise regarding the posting of signs and their impact upon liability to the State and its political subdivisions).
181. The main opponent to the bill, Senator Ernie Chambers, relented his filibuster of the legislation upon completion of this compromise. Sen. Chambers stated that "[t]he signage requirement is a small price to pay for what [the proponents of Legislative Bill 564] are getting in return." Anna Jo Bratton, Deal with Chambers lets bill to shield cities advance, LINCOLN J. STAR available at http://journalstar.com/articles/2007/05/02/news/politics/doc4638f1452bd68574903110.txt.
not designed and constructed in accordance with generally recognized engineering or safety standards.\textsuperscript{183} These three provisions include virtually all of the potential situations where the State and its political subdivisions would have protection under the RLA. However, by defining the situations in greater detail than found in the RLA, Legislative Bill 564 should give clearer guidance to courts and help contain possible extensions of immunity which may occur under the relatively undefined language of the RLA.

Therefore, Legislative Bill 564 appears to be a good compromise for all interested parties. On one hand, the bill grants a more limited and well defined scope of immunity to the State and its political subdivisions, thereby extending greater relief to injured parties, as well as encouraging a high level of maintenance for public recreational land. At the same time, Legislative Bill 564 gives back to the State and its political subdivisions the pre-\textit{Bronsen} protections necessary to maintain and increase numerous recreational lands and facilities. Overall, Legislative Bill 564 should be viewed as a solid compromise which supports good public policy and puts the state of the law in a well justified position.

V. CONCLUSION

After twenty-five years of judicial precedent, \textit{Bronsen} stripped the State and its political subdivisions of immunity for injuries occurring on recreational lands, thereby unleashing a firestorm of debate and legislative reaction. However, the reasoning which \textit{Bronsen} relied on is not immune to dissent. While \textit{Bronsen} made valid points, numerous counterarguments are just as, if not more, persuasive. At the very least, \textit{Bronsen}'s lack of discussion regarding these counterarguments is unsettling.

However, after \textit{Bronsen} the Nebraska Legislature acted in response to an outpouring of concerns from municipalities and other governmental entities. Legislative Bill 564 is a compromise which is more limited and specific than the immunity found under the RLA, but grants enough protection to governmental entities that recreational lands and facilities should remain available. As a consequence to enacting Legislative Bill 564, the Legislature effectively closed the door on any overruling of \textit{Bronsen}. Although the immunity granted in Legislative Bill 564 is distinct from that found in the RLA, Legislative Bill 564 is most likely the on-point legislative intent which \textit{Bronsen} believed section 13-910(3) to be.\textsuperscript{184} Therefore, because Legislative Bill 564 directly addresses the immunity of the State and its political subdivisions within the TCA and PSTCA, the Court will most likely no

\textsuperscript{183} LB 564, 100th Leg., 1st Sess. (Neb. 2007).

\textsuperscript{184} See 272 Neb. 320, 333, 722 N.W.2d 17, 27 (2006).
longer entertain arguments that governmental entities should be included in the RLA. Luckily, by enacting Legislative Bill 564 the Legislature reached a good compromise between interested parties, and made the state of this area of the law healthy and justifiable.