WISCONSIN'S RECREATIONAL IMMUNITY STATUTE: HOW MUCH PROTECTION DOES IT OFFER?

By: Claire Silverman, Legal Counsel

Many Wisconsin municipalities own property used to provide residents and visitors with opportunities for recreation. These include municipal parks, playgrounds, pools, beaches, golf courses, tennis courts, skating rinks, hills used for sledding, skateboard parks, and paths and trails used for various activities like biking, running, walking, rollerblading, skiing, and snowmobiling. Municipal officials often inquire whether the municipality or its officials are exposed to liability for injuries that occur while people are engaged in these various activities on municipal property. Generally speaking, the answer is no.

Section 895.52, commonly referred to as Wisconsin's "recreational immunity" statute, provides property owners, including municipal governments, with immunity against liability for any injury to a person engaged in a recreational activity on the owner's property. Although the statute provides broad immunity to municipal property owners, it is not absolute. There are statutory exceptions and some significant cases interpreting the law as it pertains to municipalities and other governmental bodies that a municipality must be aware of. This legal comment attempts to explain the general protections offered by the recreational immunity statute, as well as its limitations.

STATUTORY PURPOSE AND COVERAGE

The legislature enacted Wis. Stat. sec. 895.52 at the same time that it repealed Wisconsin's first recreational use statute because judicial interpretation had created a number of exceptions which rendered the statute ineffective.[1] In enacting the current statute, the legislature expressly stated that it intended to overrule any previous Wisconsin supreme court decisions interpreting the predecessor to 895.52, if the decision was more restrictive than or inconsistent with the provisions of the new act.

The recreational immunity statute was enacted to "limit the liability of property owners toward others who use their property for recreational activities under circumstances in which the owner does not derive more than a minimal pecuniary benefit."[2] To that end, sec. 895.52, Stats., provides that no owner, officer, employee or agent of an owner owes to any person who enters the owner's property[3] to engage in recreational activity:

1. A duty to keep the property safe for recreational activities;
2. a duty to inspect the property; or
3. a duty to give warning of an unsafe condition, use or activity on the property.

The statute further provides that "no owner and no officer, employee or agent of an owner is liable for the death of, any injury[4] to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property or for any death or injury resulting from an attack by a wild animal."

There are two statutory exceptions. Section 895.52(4) provides that the statute does not limit the liability of a municipality or any of its agencies or of an officer, employee, or agent for either of the following:

1. A death or injury that occurs on property of which a governmental body is the owner at any event for which the owner charges an admission fee *for spectators*;
2. death or injury caused by a malicious act or by a malicious failure to warn against an unsafe condition of which an officer, employee, or agent of a governmental body knew, which occurs on property designated by the governmental body for recreational activities.

Conduct is "malicious" when it is the result of hatred, ill will, or revenge, or is undertaken when insult or injury is intended.[5]

STATUTORY DEFINITIONS AND TERMS

Most of the specific terms used in sec. 895.52, Stats., are defined within the statute. "Owner" is defined as "a person, including a governmental body… that owns, leases or occupies property" or that "has a recreational agreement with another owner." The term "governmental body" includes a "municipal governing body, agency, board, commission, committee, council, department" or a formally constituted subunit of any such body.

Of all the terms used in sec. 895.52, "recreational activity" has spawned the most litigation. The statute broadly defines "recreational activity" as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity." Importantly, the term excludes any organized team sport activity sponsored by the owner of the property on which the activity takes place. In enacting the statute, the legislature provided an extensive list of the kinds of activities that are meant to be included within the term but noted that it was impossible to specify every activity which might constitute a recreational activity.[6] Where substantially similar circumstances or activities exist, the legislature intended that sec. 895.52 be liberally construed in favor of property owners to protect them from liability.[7]

(CONTINUED ON PAGE 26)

SIGNIFICANT COURT DECISIONS

Over the years, the recreational immunity statute has spawned litigation. This litigation has involved, among other issues, whether the recreational immunity afforded by the statute is affected when municipalities undertake to provide services they are not obliged to undertake, like supervision, which are then performed inadequately; whether someone was engaged in recreational activity when the injury or death in question occurred; and the limits of the organized sports exception. Although space constraints prevent a comprehensive discussion of the case law interpreting the statute, it's worth noting a few things.

For the most part, the courts have been mindful of the recreational immunity statute's underlying purpose of encouraging property owners to open property to recreational users and, in light of the legislature's clear attempt to overrule judicially created exceptions to the predecessor statute, have not wavered in situations where application of the statute appears harsh because of alleged municipal negligence. The courts have held that a municipality does not lose the protection of the recreational immunity statute by undertaking an obligation that it need not take, such as providing some sort of supervision of recreational activities on municipal property, and performing in a manner that's alleged to be negligent.[8]

The courts have had more difficulty, however, drawing the line between recreational and non-recreational activities in varied fact situations. The Wisconsin Supreme Court has said that it continues to be frustrated in its efforts to state a test that can be applied easily because of the "seeming lack of basic underlying principles in the statute."[9] This difficulty makes it harder to predict with certainty, what the outcome will be in a given case. In determining whether someone is engaged in a recreational activity or not, the courts have held that the injured person's subjective assessment of the activity is pertinent, but not controlling. A court must consider the nature of the property, the nature of the owner's activity, and the reason the injured person is on the property. A court should consider the totality of circumstances surrounding the activity, including the intrinsic nature, purpose, and consequences of the

(CONTINUED ON PAGE 27)

activity. A court should apply a reasonable person standard to determine whether the person entered the property to engage in a recreational activity. Finally, a court should consider whether the activity in question was undertaken in circumstances substantially similar "to the circumstances of recreational activities set forth in the statute."[10]

In some cases, the issue has been whether the intrinsic nature of the activity is commercial rather than recreational so that the recreational immunity statute might be held inapplicable. Profit earned by a governmental body does not, in itself, convert a recreational event into a commercial one for purposes of the recreational use statute.[11]

Other court decisions with significance for municipalities involve cases where the courts have interpreted the exclusion from the definition of "recreational activity" of any organized team sport activity sponsored by the owner of the property on which the activity takes place. In *Hupf v. City of Appleton,*[12] a participant in a recreational softball league sued the city, alleging negligence, after he was struck in the eye by a softball while leaving the city park. The court held that the City was the "sponsor" of the softball league within the meaning of the recreational immunity statute, even if the city did not have a profit motive, where the city took team registrations, maintained the grounds, and provided umpires, scoreboards, bases, and softballs. As further evidence of the City's sponsorship, the court looked to a exculpatory contract signed by participants releasing the city from any damage claims and referring to the city Parks and Recreation department or the school district as "sponsoring" the league.

The City argued that because Hupf was injured while leaving the park and not while participating in the organized sport, the exclusion didn't apply. The court rejected that argument, holding that although a walk in the park for the purpose of exercise, relaxation, or pleasure is an activity for which the owner is immune, "the legislature did not intend to create a corridor of immunity from the ball field to the parking lot when the walk is inextricably connected to a non-immune activity." The court noted that this same logic applies equally when someone is engaged in a recreational activity that is covered by the statute, so that a momentary diversion such as going to the bathroom or taking a brief break from a recreational activity does not remove the protection of the recreational immunity statute.

In another case involving the organized sport exclusion, the Wisconsin Supreme Court held that the exception from landowner immunity extends not only to participants, but to spectators as well.[13]

CONCLUSION

Wisconsin's recreational immunity statute, sec. 895.52, Stats., provides municipalities with broad immunity against liability for any injury to a person engaged in a recreational activity on municipal property. While the immunity is broad, it is not absolute. Municipal officials and municipal attorneys should be aware of statutory exceptions and case law interpretations that might expose a municipality to potential liability so that the municipality can secure the requisite insurance or implement measures to avoid such liability.

Liability 390R1

[1] See 1983 Wis. Act 418, repealing sec. 29.68 which was created in 1963.

[2] 1983 Wis. Act 418, sec. 1.

[3] "Property" means real property and buildings, structures and improvements thereon, and the waters of the state. Section 895.52(1)(f), Stats.

[4] "Injury" means an injury to a person or property. Section 895.52(1)(b), Stats.

[5] *Ervin v. City of Kenosha,* 159 Wis.2d 464, 464 N.W.2d 654 (1991)

[6] "Recreational activity" "includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle or utility terrain vehicle, operating a vehicle, as defined in s. 340.01(74) on a road designated under s. 23.115, recreational aviation, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting and any other outdoor sport, game or educational activity." Sec. 895.52(1)(g), Stats.

[7] 1983 Wis. Act 418, sec. 1.

[8] See *Johnson v. City of Darlington,* 160 Wis.2d 418, 466 N.W.2d 233 (Ct. App. 1991) and *Ervin v. City of Kenosha,* 159 Wis.2d 464, 464 N.W.2d 654 (1991). But cf *Linville v. City of Janesville,* 184 Wis.2d 705, 516 N.W.2d 427 (1994), where a vehicle was accidentally driven into a municipal pond while the occupants were looking at a fishing spot, and the paramedics allegedly were slow to respond or alleged to be negligent in other respects. Wisconsin Supreme Court held that sec. 895.52, Stats., did not afford the municipality immunity for injuries sustained by the recreational land users. The court reasoned that the claims were based on allegedly negligent emergency rescue services provided by the municipality which were unrelated to the municipality's ownership of the recreational land or were based on the allegedly negligent actions of municipal employees whose employment was unrelated to the recreational land.

[9] *Auman v. School Dist. of Stanley-Boyd,* 2001 WI 125, 248 Wis.2d 548, 635 N.W.2d 762.

[10] *Id.*

[11] *Fischer v. Doylestown Fire Dept,* 199 Wis.2d 83, 543 N.W.2d 575 (Ct. App. 1995). But *cf Silingo v. Village of Mukwonago,* 156 Wis.2d 536, 458 N.W.2d 379 (Ct. App. 1990).

[12] *Hupf v. City of Appleton,*165 Wis.2d 215, 477 N.W.2d 69 (Ct. App. 1991).

[13] *Meyer v. School District of Colby,* 226 Wis.2d 704, 595 N.W.2d 339 (1999) (school district was not immune from liability when spectator watching a high school sponsored football game was injured when the bleachers broke under her as she descended following the football game. Although watching a high school football game is a recreational activity, and the school district had not charged spectators admission to watch the game, the organized team sport activity exception to the recreational use statute extends to spectators who are not participants and whose injuries do not arise out of team sport activity or the actions of participants in that activity).

DID YOU KNOW?

197 municipalities have administrator positions, 88 of which are purely administrators and 109 of which combine the position with other titles.