

## Wisconsin's Recreational Immunity Statute: How far does it go in protecting county government?

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With the seasons changing from winter to spring and the outdoor temperature rising, many communities experience a marked increase in people enjoying outdoor spaces. While county officials are no doubt pleased to see citizens utilizing the outdoor areas that counties devote substantial resources to improve and maintain, the use of these outdoor spaces is not without peril.

Unquestionably, any injury that occurs on county land is unfortunate. Nonetheless, it is important to realize that Wis. Stats. § 895.52, Wisconsin's recreational immunity statute, provides individuals and governmental bodies (including counties) with immunity from claims of negligence in the maintenance and repair of their property, so long as the injured party was engaged in "recreational activity" on the property at the time of the injury.

Specifically, Wis. Stat. § 895.52 provides that no owner, officer, employee, or agent of an owner owes to any person who enters the owner's property to engage in recreational activity:

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

However, the immunity that is provided by Wis. Stat. § 895.52 is not absolute. Immunity is present only if the individual was engaged in "recreational activity" at the time they sustained their injury. Additionally, the owner of the land where the injury occurred was not engaged in a profit-making spectator venture or acted maliciously toward the injured party. Conduct is considered "malicious" when it is the result of hatred, ill will, or revenge, or is undertaken when insult or injury is intended.<sup>1</sup>

### What is Considered "Recreational Activity"?

Despite the fact that many of the specific terms found in Wis. Stat. § 895.52 are defined within the statute, there is no portion of the recreational immunity statute that has been scrutinized by the courts more than the definition of "recreational activity." Under the statute, "recreational activity" is defined as: "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity," such as "hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, 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."

Clearly, the Legislature has identified an extensive laundry list of activities that it believes qualify as recreational activity hoping to clarify the many types of different activity that it believes should qualify as recreational activity. However, in an apparent acknowledgment that it cannot possibly compile a complete list off all the different possible types of recreational activity, the Legislature has indicated that where substantially similar circumstances or activities exist, Wis. Stat. § 895.52 should be liberally construed in favor of property owners to protect them from liability for injuries occurring on their land.<sup>2</sup> In upholding the intent of the Legislature, courts have held that a governmental entity 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 governmental property, even if this supervision is performed in a manner that is alleged to be negligent.<sup>3</sup>

Still, courts have had difficulty differentiating between recreational and non-recreational activities. In *Linville v. City of Janesville*,<sup>4</sup> the Court was faced with the issue of "involuntary" versus "voluntary" participation in recreational activity. The facts of *Linville* dealt with the plaintiff and her four-year old son who were allegedly taken to a city park against their will so that the plaintiff's boyfriend could show the plaintiff and her son where he was going to be taking them fishing the next day. Some point after arriving at the park, the van became stuck in the mud in close proximity to the pond. The plaintiff got out of the van and attempted to push the van out of the mud. This process resulted in the van jumping forward into the pond and sank with the plaintiff's boyfriend and son still inside, both of whom drowned. To address the issue of "involuntary" or "voluntary" participation in recreational activity, the Court articulated the proper test to apply when determining whether someone was engaged in recreational activity at the time of being injured. The Court stated that:

*The test requires examination of all aspects of the activity. The intrinsic nature, purpose and consequence of the activity are relevant. While the injured person's subjective assessment of the activity is relevant, it is not controlling. Thus, whether the injured person intended to recreate is not dispositive, but why he was on the property is pertinent.*<sup>5</sup>

Essentially, the Court in *Linville* outlined a totality of the circumstances test that must be utilized when a court is determining whether or not an individual was engaged in recreational activity for determining immunity from liability for any resulting injury. A court must consider the nature of the property, the nature of the owner's activity, the reason the injured person is on the property, as well as the intrinsic nature, purpose, and consequences of the activity.

### **The Limits of Immunity Under Wis. Stat. § 895.52**

Considering the extensive list of activities encompassed by the definition of "recreational activity" found under Wis. Stat. § 895.52, it is noteworthy that the Legislature specifically excluded from the definition any organized sporting activity sponsored by the owner of the property on which the activity takes place.

In *Hupf v. City of Appleton*,<sup>6</sup> the Court held that an individual traveling directly from an organized softball game, through a park, to his vehicle in the parking lot, could sue the city even though the injury occurred in a park – an area dedicated to recreational activity. The court held that the city was not immune from liability because it was the “sponsor” of the softball league within the meaning of Wis. Stat. § 895.52. The Court found that the city was a sponsor of the game even though it did not have a profit motive for the games because it took team registrations, maintained the grounds, and provided umpires, scoreboards, bases, and softballs for the games. Furthermore, the Court looked to the fact that the participants of the softball games at the city park were required to sign an exculpatory contract which claimed to release the city from any damage claims and explicitly referred to the city parks and recreation department and school district as “sponsoring” the softball league.

In reaching this decision, the Court also noted that “the Legislature did not intend a landowner to gain immunity when a participant in an organized team sport travels directly to and from the activity. In other words, walking to or from an immune activity does not alter the landowner’s status, and walking to or from a non-immune activity does not alter it either.”<sup>7</sup>

Municipal beaches and swimming pools have also been the unfortunate location of many injuries that have been the subject of cases evaluating the recreational immunity statute. In *Ervin v. City of Kenosha*,<sup>8</sup> the Wisconsin Supreme Court held that the recreational immunity statute immunized the city from liability for the negligence of its lifeguards, as well as its own negligence, in failing to properly train the lifeguards. In *Ervin*, two swimmers drowned at a public beach after wading off a “drop off.” The plaintiffs unsuccessfully argued that the city should be held responsible because the recreational immunity statute only applied to “passive” negligence, and that the negligence of the lifeguards and the city was “active” and amounted to “malicious” conduct, thereby subjecting the city to liability under the statute.

The Court held that the statute makes no distinction between “active” and “passive” negligence. Regardless of whether the plaintiffs’ injuries arose as a result of the condition of the beach or the actions of a city employee, recreational immunity still provides a shield from liability.<sup>9</sup> In finding that neither the city nor the lifeguards acted maliciously, the court stated:

*. . . the conduct of the City in negligently hiring and failing to train the lifeguards, the conduct of the lifeguards in negligently giving rescue attempts, and the conduct of both the City and the lifeguards in maintaining and failing to warn of the unsafe drop-off did not rise to the level of ‘malicious’ in this case. Although this conduct may have been negligent or in reckless disregard of the youths’ safety, there is no evidence that the deaths were the result of hatred, ill-will, a desire for revenge or inflicted under circumstances where insult or injury was intended.*<sup>10</sup>

It is clear that the determination of whether activity is considered “recreational activity,” and whether a statutory exception applies, is done on a case-by-case basis. It must also take into account the purpose and nature of the activity, together with an assessment of the injured individual’s subjective belief as to whether he or she was engaged in a “recreational activity.”

Despite the long history of Wisconsin’s recreational immunity statute, the courts continue to have difficulty establishing a bright-line rule that can be applied easily in all cases. This is due to what the Wisconsin Supreme Court describes as the “seeming lack of basic underlying principles in the statute.”<sup>11</sup>

*Auman v. School Dist. of Stanley-Boyd* exemplifies the difficulty with which the recreational immunity statute is applied.<sup>12</sup> In *Auman*, the Supreme Court expanded on the totality of the circumstances test that was previously set forth in *Linville*. *Auman* involved a plaintiff elementary school student who was injured at recess while sliding down a snow bank. The Court refused to immunize the school district after conducting a thorough analysis of whether the injured student was engaged in a “recreational activity” at the time of being injured.

After reviewing the totality of the circumstances, the Court found that because the injured student was required by law to attend school and the injuries occurred during a mandatory outdoor recess period, the student’s activities were not substantially similar to the voluntary recreational activities enumerated in the statute. Essentially, the Court determined that whether the injured person voluntarily engaging in recreational activity or was only doing so because they were compelled to do so by law must be taken into account when reviewing the totality of the circumstances that led to the injury.

That said, this “voluntary test” should not drastically change the analysis courts must undertake when determining if the recreational immunity statute applies. It appears that this “voluntary test” has been narrowly crafted by courts to include only those activities that have been mandated by law.

In keeping with the Legislature’s intent to liberally construe the recreational immunity statute in favor of protecting property owners from liability, the Court of Appeals issued a decision on February 28, 2017 where it concluded that “‘supervising’ other persons, who are themselves engaged in recreational activities, is a ‘recreational activity’ within the meaning of Wis. Stat. § 895.52.”<sup>13</sup>

The Court of Appeals based this conclusion on the fact that the terms “practice” and “instruction” are both listed among the enumerated recreational activities found in Wis. Stat. § 895.52, and “are substantially similar in meaning to ‘supervising’ an activity ...”

<sup>14</sup> This decision is yet another example of the intensely fact-driven inquiry that must be made to determine if a property owner is immune from liability under Wisconsin’s recreational immunity statute.

## **Conclusion**

While Wisconsin’s recreational immunity doctrine provides counties with immunity against liability for injuries to persons engaged in recreational activity on property owned by a county, it must be understood that such immunity is not absolute. An evaluation of the specific facts of each incident must be done on a case-by-case basis to determine if the recreational immunity doctrine applies. Thankfully for counties and other property owners, courts continue to hold that the recreational immunity statute should be liberally construed and interpreted in favor of finding that immunity exists.

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<sup>1</sup> *Ervin v. City of Kenosha*, 159 Wis.2d 464, 464 N.W.2d 654 (1991).

<sup>2</sup> 1983 Wis. Act 418, sec. 1 contains the following language: “Legislative intent. The legislature intends by this act to limit the liability of property owners towards others who use their property for recreational activities under circumstances in which the owner does not derive more than a minimal pecuniary benefit. While it is not possible to specify in a statute every activity which might constitute a recreational activity, this act provides examples of the kinds of activities that are meant to be included, and the legislature intends that, where substantially similar circumstances or activities exist, this legislation should be liberally construed in favor of property owners to protect them from liability. The act is intended to overrule any previous Wisconsin supreme court decisions interpreting [the prior rule] if the decision is more restrictive than or inconsistent with the provisions of this act.”

<sup>3</sup> 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).

<sup>4</sup> 184 Wis.2d 705, 516 N.W.2d 427 (1994).

<sup>5</sup> *Id.* at 716.

<sup>6</sup> 165 Wis. 2d 215, 477 N.W.2d 69 (Ct. App. 1991).

<sup>7</sup> *Id.* at 221-222.

<sup>8</sup> 159 Wis.2d 464, 464 N.W.2d 654 (1991).

<sup>9</sup> *Id.* at 477-78.

<sup>10</sup> 159 Wis. 2d at 484-85. See also *Stann v. Waukesha County*, 161 Wis. 2d 808, 468 N.W.2d 775 (Ct. App. 1991)(immunity attached to situation involving drowning death of three-year-old child at county beach); *Johnson v. City of Darlington*, 160 Wis. 2d 418, 466 N.W.2d 233 (Ct. App. 1991)(city was immune from suit for injuries resulting from alleged negligence of lifeguards in failing to prevent drowning).

<sup>11</sup> *Auman v. Sch. Dist.*, 2001 WI 125, 248 Wis.2d 548, 635 N.W.2d 762.

<sup>12</sup> *Id.*

<sup>13</sup> *Wilmet v. Liberty Mutual Ins. Co.*, 2015AP002259 (Feb. 28, 2017).

<sup>14</sup> *Id.*

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