In response to the COVID-19 pandemic, many municipalities are contemplating how to approach summer/fall sports leagues and recreational opportunities they typically offer. In addition to navigating the public health concern, municipalities are concerned about potential liability if recreational users contract COVID-19 while engaging in recreational activity on municipal property. In most cases, municipalities opening their property for recreational use should be protected by recreational immunity, subject to its existing exceptions. The following legal comment attempts to explain recreational immunity's general protections, as well as its limitations.

**Statutory Purpose and Coverage**

The legislature enacted Wis. Stat. § 895.52 and simultaneously repealed Wisconsin's first recreational use statute because judicial interpretation had created several exceptions rendering the statute ineffective.1 With the current statute, the legislature expressly stated it intended to overrule any previous Wisconsin supreme court decisions interpreting the predecessor to § 895.52 that were more restrictive than or inconsistent with the new act's provisions.

Section 895.52 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 Accordingly, § 895.52 provides that no owner, officer, employee or agent of an owner owes to any person entering the owner’s property to engage in recreational activity, a duty to: 1. keep the property safe for recreational activities; 2. inspect the property; or 3. 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 injury4 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) doesn’t limit the liability of a municipality or any of its agencies, officers, employees, or agents for either of the following:

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

Conduct is “malicious” when it results from hatred, ill will, or revenge, or is undertaken when insult or injury is intended.5

**Statutory Definitions and Terms**

Section 895.52 defines most of the specific terms used 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 thereof.

Of all the terms used in § 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 where the activity takes place. In enacting the statute, the legislature provided an extensive list of the kinds of activities meant to be included within the term but noted it was impossible to specify every activity that might constitute recreational activity. Where substantially similar circumstances or activities exist, the legislature intended that § 895.52 be liberally construed in favor of property owners to protect them from liability.7

**Significant Court Decisions**

Litigation over recreational immunity has involved, among other issues, whether the recreational immunity afforded by the statute is affected when municipalities provide services they are not obliged to, 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 applicable case law, it’s worth noting a few things.

Generally, courts have been mindful of the 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 applying the statute appears harsh because of alleged municipal negligence. The courts have held that municipalities don’t lose recreational immunity by undertaking an obligation they 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 difficulty, however, distinguishing between recreational and non-recreational activities in varied fact situations. The Wisconsin Supreme Court has said 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 makes it harder to predict, with certainty, what the outcome will be in a given case. In determining whether someone is engaged in recreational activity, 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 activity’s intrinsic nature, purpose, and consequences. A court should apply a reasonable person standard to determine whether the person entered the property to engage in 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 activity’s intrinsic nature is commercial rather than recreational so that the recreational immunity statute might be held inapplicable. A governmental body earning profit does not, in itself, convert a recreational event into a commercial one for purposes of § 895.52.11

Other significant court decisions 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,*2 a participant in a recreational softball league sued the city, alleging negligence, after a softball struck him in the eye while he was leaving the city park. The court held that the city was the softball league’s “sponsor” within the meaning of § 895.52, 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 an exculpatory contract participants signed releasing the city from any damage claims and referencing 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, versus 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 when someone is engaged in a recreational activity that is covered by the statute; momentary diversions such as going to the bathroom or taking a brief break from a recreational activity don’t remove the protection of § 895.52.

In another case involving the organized sport exclusion, the Wisconsin Supreme Court held that the exception from landowner immunity extends to spectators as well as participants.13
Conclusion

Wisconsin’s recreational immunity statute, § 895.52, provides municipalities with broad immunity against liability for injuries to people engaged in recreational activity on municipal property. However, that immunity 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 mitigate such liability.

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1. See 1983 Wis. Act 418, repealing sec. 29.68 which was created in 1963.
3. “Property” means real property and buildings, structures and improvements thereon, and the waters of the state. § 895.52(1)(f).
4. “Injury” means an injury to a person or property. § 895.52(1)(b).
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.” § 895.52(1)(g).

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