



de la Mora & de la Mora
ATTORNEYS AT LAW

MEMORANDUM

To: Village of Elm Grove Recreation Committee
From: Hector de la Mora & Christopher T. Koehnke
Date: July 3, 2014
Re: Tennis Court Usage

At the June 18, 2014 Recreation Committee meeting, the Committee discussed the current usage of Village tennis courts by a group of seventeen (17) families, involving approximately twenty-one (21) children as instructional participants. This group uses the Village tennis courts every other Saturday morning for two 45 minute session. The group has stated that their instructions are not for compensation, but merely an attempt to bring children together to participate in the sport of tennis.

At the June 18th meeting, the Committee voted to pose specific questions to our office so that we could provide a legal opinion to committee members. This memo seeks to answer the concerns raised by the Committee on June 18th. Specifically, this memo addresses three questions:

It is our understanding that Elm Grove charges no fees of any type for this usage.

1. Can the Village be held liable for any injury that may occur while this group utilizes the village tennis courts?
2. Does this use by the group constitute a "tennis lesson" as that term is used in Section 204-9 of the Village Code?
3. Would this group's association with the Elm Grove Tennis Club resolve the above-mentioned issues?

Exposure of Liability to the Village

Perhaps the most concerning issue to the Committee is whether the Village or its officials are exposed to any liability for injuries that occur while individuals are engaged in recreational activities while on municipal property.

Section 895.52ⁱ of the Wisconsin Statutes, commonly referred to as the "recreational immunity" statute, provides property owners, including municipal governments, with immunity against liability for any injury to a person engaged in recreational activity on the owners property.

The recreational immunity statute is intended 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. The legislature intended the recreational

immunity statute to be liberally construed in favor of property owners. *See* 1983 Wis. Act 418 § 1.

To that end, Wis. Stat. 895.52 provides that no owner, officer, employee or agent of an owner owes 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; or
3. A duty to give warning of unsafe condition, use or activity on the property.

Wis. Stat. 895.52 does have two exceptions to the general recreational activity immunity.

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 government body for recreational activities.

Under the statute, "recreational activity" is broadly defined as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity." In enacting the statute, the legislature noted that it was impossible to specify every activity which might constitute a recreational activity, but provided an extensive list of the kinds of activities that are meant to be included within the term.

However, there is an important exclusion contained in the last sentence of the definition. That sentence provides that "recreational activity" specifically excludes any organized team sport activity *sponsored* by the owner of the property on which the activity takes place.

When determining if the recreational immunity statute is applicable, a court needs to 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 needs to consider the totality of the circumstances surrounding the activity, including the intrinsic nature, purpose, and consequences of the activity. A court needs to apply a reasonable person standard to determine whether the person entered the property to engage in a recreational activity. Finally, a court needs to consider whether the activity in question was undertaken in circumstances substantially similar to the circumstances of recreational activities set forth in the statute. *See Auman v. School District of Stanley-Boyd*, 248 Wis.2d 548, 635 N.W.2d 762 (2001).

Given the language found in Wis. Stat. 895.52 and case law interpreting the statute, it is unlikely that the Village would face liability for an injury that may occur on Village property by an

individual or group that is utilizing the tennis courts for recreational purposes under the circumstances described in this memorandum. However, if the Village were to engage in the sponsorship of activities taking place at the tennis courts, the Village would likely not be able to avail itself of recreational immunity as provided for under Wis. Stat. 895.52.

Does This Use Constitute a “Tennis Lesson” under Section 204-9 of the Village Code?

In an attempt to prohibit the use of Village tennis courts for private tennis instruction, the Village amended its Code in November of 2013 to create Section 204-9. Section 204-9 states:

No private tennis instruction for *compensation* shall be permitted on Village property other than that provided by the Elm Grove Recreation Department. An exception to this policy may be made at the recommendation of the Recreation Committee and approval of the Village Board on an individual basis, as requested. (Emphasis added).

Whether the use of the tennis courts by this group constitutes tennis lessons or instruction matters less under the ordinance than whether individuals are being compensated for the giving of instruction. Under the current ordinance, the Village only prohibits private tennis instruction on Village property when it involves compensation. The group in question contends that their activities are not for compensation and only an attempt to bring children together to enjoy the sport of tennis. Without evidence of the receipt of compensation for instruction, Section 204-9 does not prohibit the use of the tennis courts by this group.

The Village may wish to consider requiring the group to reserve space at the Village tennis courts if it intends to continue its regular use of the tennis court facilities. Section 204-4(A) of the Village Code states that “a permit shall be obtained from the Village Clerk in order to reserve any park facility for personal, business, or nonprofit use.”

Having the group reserve the tennis courts will require the group to notify the Village in advance of the dates and times it intends to use the tennis courts. Requiring reservations will also give the Village the opportunity to post the date and times the group will be using the courts as to notify others who would like to use the Village’s tennis courts. Posting the date and times that the group has the courts reserved may also serve as a means of enforcement to ensure that the group does not use more courts than it has reserved, or use the courts for a longer period of time than they had reserved.

Should the Village Require the Group be Associated With the Elm Grove Tennis Club?

It is unlikely that requiring the group to be associated with the Elm Grove Tennis Club would greatly impact the other concerns first brought up by the Recreation Committee on June 18, 2014.

First, considering that the Village is currently immune from any potential liability for an injury that may occur while the group utilizes the tennis courts, requiring the group to be associated with the Elm Grove Tennis Club would not likely improve the liability outlook for the Village.

As discussed above, a court will look to the sponsorship of the property owner when evaluating the recreational immunity statute. For the purposes of the Wis. Stat. § 895.52, a sponsor is a person or an organization that pays for or plans and carries out a project or activity. *Humpf v. City of Appleton*, 165 Wis.2d 215, 222, 477 N.W.2d 69 (Ct.App. 1991).

Unless the Village undertakes some sponsorship activity with either the group in question or the Elm Grove Tennis Club, it is not probable that a court would find the recreational activity by either the group or the Elm Grove Tennis Club were provided pursuant to any arrangement agreement or other relationship with the Village, thereby negating the protection provided by Wis. Stat. § 895.52.

As previously discussed, the defining characteristic of a prohibited private tennis lessons is *compensation*.

Administrative Recommendations

Although the Village may enjoy the benefits of recreational immunity, nothing precludes the Village from requiring groups that engage in organized activities on a regular basis on Village property from obtaining insurance coverage for the group with the further requirement that the Village, its officers, employees and agents be named as an additional insured.

If this is required, it could help the Village avoid the burden and cost of extracting itself from any litigation where its recreational immunity can be raised as a defense.

In addition, nothing precludes the Village from requiring as a condition of usage that groups engaged in organized activities on Village property on a regular basis:

- A. Provide current rosters of the participants and instructors, their addresses and contact information which can be used in the event of an emergency;
- B. Provide a certain ratio of adults to minors when a large group of minors are participating to assure a reasonable level of supervision;
- C. Limit the number of participants to assure access by other members of the public to certain Village facilities at times of strong usage demand.

Conclusion

So long as the Village does not engage in sponsorship activity with the group, it is likely that the Village could claim immunity from any liability as the result of an injury to a member of the group while using Village tennis courts. Furthermore, this immunity is unlikely to improve if the group were to be associated with the Elm Grove Tennis Club.

Section 204-9 of the Village Code prohibits private tennis lessons on Village property only when they are conducted for *compensation*.

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ⁱ **895.52 Recreational activities; limitation of property owners' liability.**

(1) DEFINITIONS. In this section:

(ag) "Agricultural tourism activity" means an educational or recreational activity that takes place on a farm, ranch, grove, or other place where agricultural, horticultural, or silvicultural crops are grown or farm animals or farmed fish are raised, and that allows visitors to tour, explore, observe, learn about, participate in, or be entertained by an aspect of agricultural production, harvesting, or husbandry that occurs on the farm, ranch, grove, or other place.

(ar) "Governmental body" means any of the following:

1. The federal government.

2. This state.

3. A county or municipal governing body, agency, board, commission, committee, council, department, district or any other public body corporate and politic created by constitution, statute, ordinance, rule or order.

4. A governmental or quasi-governmental corporation.

5. A formally constituted subunit or an agency of subd. [1.](#), [2.](#), [3.](#) or [4.](#)

(b) "Injury" means an injury to a person or to property.

(c) "Nonprofit organization" means an organization or association not organized or conducted for pecuniary profit.

(d) "Owner" means either of the following:

1. A person, including a governmental body or nonprofit organization, that owns, leases or occupies property.

2. A governmental body or nonprofit organization that has a recreational agreement with another owner.

(e) "Private property owner" means any owner other than a governmental body or nonprofit organization.

(f) "Property" means real property and buildings, structures and improvements thereon, and the waters of the state, as defined under s. [281.01 \(18\)](#).

(g) "Recreational activity" means any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "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, participating in an agricultural tourism activity, sport shooting and any other outdoor sport, game or educational activity. "Recreational activity" does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place.

NOTE: Par. (g) is shown as affected by [2013 Wis. Acts 269](#) and [318](#) and as merged by the legislative reference bureau under s. [13.92 \(2\) \(i\)](#).

(h) "Recreational agreement" means a written authorization granted by an owner to a governmental body or nonprofit organization permitting public access to all or a specified part of the owner's property for any recreational activity.

(hm) "Recreational aviation" means the use of an aircraft, other than to provide transportation to persons or property for compensation or hire, upon privately owned land. For purposes of this definition, "privately owned land" does not include a public-use airport, as defined in s. [114.002 \(18m\)](#).

(i) "Residential property" means a building or structure designed for and used as a private dwelling accommodation or private living quarters, and the land surrounding the building or structure within a 300-foot radius.

(2) NO DUTY; IMMUNITY FROM LIABILITY.

(a) Except as provided in subs. [\(3\)](#) to [\(6\)](#), no owner and no officer, employee or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:

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1. A duty to keep the property safe for recreational activities.
 2. A duty to inspect the property, except as provided under s. [23.115 \(2\)](#).
 3. A duty to give warning of an unsafe condition, use or activity on the property.
- (b) Except as provided in subs. [\(3\)](#) to [\(6\)](#), no owner and no officer, employee or agent of an owner is liable for the death of, any injury 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.
- (3) LIABILITY; STATE PROPERTY. Subsection [\(2\)](#) does not limit the liability of an officer, employee or agent of this state or of any of its agencies for either of the following:
- (a) A death or injury that occurs on property of which this state or any of its agencies is the owner at any event for which the owner charges an admission fee for spectators.
 - (b) A 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 knew, which occurs on property designated by the department of natural resources under s.[23.115](#) or designated by another state agency for a recreational activity.
- (4) LIABILITY; PROPERTY OF GOVERNMENTAL BODIES OTHER THAN THIS STATE. Subsection [\(2\)](#) does not limit the liability of a governmental body other than this state or any of its agencies or of an officer, employee or agent of such a governmental body for either of the following:
- (a) 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.
 - (b) A 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.
- (5) LIABILITY; PROPERTY OF NONPROFIT ORGANIZATIONS. Subsection [\(2\)](#) does not limit the liability of a nonprofit organization or any of its officers, employees or agents for a death or injury caused by a malicious act or a malicious failure to warn against an unsafe condition of which an officer, employee or agent of the nonprofit organization knew, which occurs on property of which the nonprofit organization is the owner.
- (6) LIABILITY; PRIVATE PROPERTY. Subsection [\(2\)](#) does not limit the liability of a private property owner or of an employee or agent of a private property owner whose property is used for a recreational activity if any of the following conditions exist:
- (a) The private property owner collects money, goods or services in payment for the use of the owner's property for the recreational activity during which the death or injury occurs, and the aggregate value of all payments received by the owner for the use of the owner's property for recreational activities during the year in which the death or injury occurs exceeds \$2,000. The following do not constitute payment to a private property owner for the use of his or her property for a recreational activity:
 1. A gift of wild animals or any other product resulting from the recreational activity.
 2. An indirect nonpecuniary benefit to the private property owner or to the property that results from the recreational activity.
 3. A donation of money, goods or services made for the management and conservation of the resources on the property.
 4. A payment of not more than \$5 per person per day for permission to gather any product of nature on an owner's property.
 5. A payment received from a governmental body.
 6. A payment received from a nonprofit organization for a recreational agreement.
 7. A payment made to purchase products or goods offered for sale on the property.
 - (b) The death or injury is caused by the malicious failure of the private property owner or an employee or agent of the private property owner to warn against an unsafe condition on the property, of which the private property owner knew.
 - (c) The death or injury is caused by a malicious act of the private property owner or of an employee or agent of a private property owner.
 - (d) The death or injury occurs on property owned by a private property owner to a social guest who has been expressly and individually invited by the private property owner for the specific occasion during which the death or injury occurs, if the death or injury occurs on any of the following:

1. Platted land.

2. Residential property.

3. Property within 300 feet of a building or structure on land that is classified as commercial or manufacturing under s. [70.32 \(2\) \(a\) 2.](#) or [3.](#)

(e) The death or injury is sustained by an employee of a private property owner acting within the scope of his or her duties.

(7) NO DUTY OR LIABILITY CREATED. Except as expressly provided in this section, nothing in this section, s. [101.11](#), or s. [895.529](#) nor the common law attractive nuisance doctrine creates any duty of care or ground of liability toward any person who uses another's property for a recreational activity.