

**CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511**

November 1, 1999

OPINION 99-011

TO: Mayor Susan J.M. Bauman and Common Council

FROM: Eunice Gibson, City Attorney

SUBJECT: **LEGAL LIABILITY FOR UNGUARDED CITY SWIMMING BEACH**

We have been asked whether the City could incur legal liability for death or personal injury resulting from recreational use of a swimming beach at which a lifeguard is not provided, or is provided for only part of the time the beach is open. The City would be immune from legal liability in such circumstances, pursuant to Sec. 895.52, Wis. Stats., which provides immunity to the City from liability for death or personal injury caused by the use of a City owned beach for the recreational activity of swimming. The immunity from liability supplied by this statute has only two exceptions. The immunity does not apply if the death or injury occurs at an event at which an admission fee for spectators is charged, or if the death or injury is 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.

Section 895.52(2), Wis. Stats., states:

- (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:
 - 1. A duty to keep their 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.

(The two exceptions applicable to cities, charging an admission fee for spectators, and a malicious act or a malicious failure to warn against a known unsafe condition, are set forth in Sec. 895.52(4), Wis. Stats.)

In Ervin v. City of Kenosha, 159 Wis.2d 464 (1991), the Wisconsin Supreme Court held that pursuant to the recreational use immunity statute the City of Kenosha was immune from liability for the drowning of two minors that occurred at a beach owned and operated by the City of Kenosha. The minors drowned after encountering unmarked dropoffs. The Supreme Court construed the malicious act or malicious failure to warn exception to recreational use immunity in this case. The Supreme Court held that a malicious act or a malicious failure to warn under the recreational use immunity statute is limited to acts which are the result of hatred, ill-will, a desire for revenge, or acts which are inflicted under circumstance where insult or injury is *intended*. The Supreme Court held that wilful conduct or reckless disregard for safety would not constitute malice under the recreational use immunity statute. Thus, the failure to provide a lifeguard or lifeguards even in dangerous beach circumstances, would not trigger the malicious act or malicious failure to warn exception to the immunity from liability provided by the recreational use immunity statute.

In Shannon v. Shannon, 150 Wis.2d 434 (1989), a three year old child sustained extensive brain damage and permanent and extensive disability when she wandered to a neighbor's property and nearly drowned in a lake. Suit was brought against various parties for her injuries. In that case, the Wisconsin Supreme Court held that the "random wanderings" of a three year old child did not constitute the use of property for the recreational activity of swimming and held that the recreational use immunity statute did not protect property owners from liability for the child's injuries.

However, in Stann v. Waukesha County, 161 Wis.2d 808 (1991), decided by the Wisconsin Court of Appeals a week after the Supreme Court's decision in the Ervin v. City of Kenosha case, the court held that Waukesha County was not liable for the drowning of a three year old girl at a beach in a park owned and operated by the County. The court held that Waukesha County was immune from liability pursuant to the recreational use immunity statute. The child's mother had brought the child to the beach for swimming.

As a general rule, the City would be immune from legal liability for death or injury arising from the use of a City-owned swimming beach for the recreational activity of swimming, subject to the two exceptions to this immunity, set forth above. Providing or not providing lifeguards does not affect

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this immunity. The City would not incur liability for not providing a lifeguard. This opinion is limited to the issue of legal liability, which is one aspect of the larger issue of public safety.

Eunice Gibson
City Attorney

EG:REO:sob
cc: City Clerk

SUMMARY: Pursuant to Section 895.52; Wis. Stats., the City would be immune from legal liability for death or injury sustained as a result of swimming at an unguarded City-owned beach.

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bcc: City of Madison Home Page - IS Simle and IS Sweeney (via e-mail attachment) with
a copy to AT Group - minus this page
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