WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

September 2011 Special Session Assembly Bill 22	Assembly Substitute Amendment 1
Memo published: **October 28, 2011**	*Contact*: **Jessica Karls-Ruplinger, Senior Staff Attorney (266-2230)**

Under current case law, Wisconsin courts have recognized that a possessor of land generally has no duty of care with respect to a trespasser, other than to refrain from willfully or intentionally injuring the trespasser. However, courts have recognized that a possessor owes a duty of reasonable care to child trespassers in certain circumstances.

September 2011 Special Session Assembly Bill 22

The bill provides that a private property owner owes no duty of care to a trespasser on his or her property and may not be found liable for an act or omission relating to a condition on his or her property that causes injury or death to a trespasser. The bill creates the following definitions:

> Private property owner: an owner, other than a governmental body or nonprofit organization, of property, and includes a lessee, tenant, or other lawful occupant.
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> Property: real property and buildings, structures, and improvements thereon.
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> Trespasser: a natural person who enters onto the property of another without the express or implied consent of the private property owner.

However, the bill provides that a private property owner may be liable if the private property owner intentionally caused the injury or death. This exception does not apply if the owner used reasonable and necessary force for the purpose of self-defense or the defense of others or used reasonable and necessary force for the protection of property.

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The bill also provides that a private property owner may be liable if the person who is injured or killed was a child and all of the following apply:

- The injury or death was a result of an artificial condition on the property.
- The private property owner knew or should have known that the artificial condition presented an unreasonable risk of death or serious bodily harm to children.
- The private property owner knew or should have known that a child or children were likely to trespass at the location of the artificial condition.
- The child injured or killed did not discover the artificial condition or realize the risk involved with the artificial condition until after the child came within the area made dangerous by the artificial condition.
- The utility to the private property owner of maintaining the artificial condition and the burden of eliminating the danger were slight as compared to the risk to the injured or killed child.
- The private property owner failed to exercise reasonable care to eliminate the danger or otherwise protect the injured or killed child.

Further, the bill provides that in determining whether a person has implied consent to enter onto the property of a private property owner, a trier of fact must consider all of the circumstances existing at the time the person entered onto the property, including: (a) whether the private property owner acquiesced to previous entries by the person or by other persons under similar circumstances; (b) the customary use, if any, of the property by other persons; (c) whether the private property owner represented to the public that the land may be entered for particular purposes; and (d) the general arrangement or design of any buildings, structures, or improvements on the property.

Lastly, the bill provides that the provisions of the bill do not create or increase any liability on the part of a private property owner for circumstances not specified in the bill and do not affect any immunity from or defenses to liability available to a private property owner under common law or another statute.

Assembly Substitute Amendment 1

Assembly Substitute Amendment 1 makes several changes to the bill. First, the substitute amendment replaces "private property owner" with "possessor of real property" and defines "possessor of real property" as an owner, lessee, tenant, or other lawful occupant of real property. Further, the definition of "possessor of real property" does not specifically exclude governmental bodies and nonprofit organizations. The definition of "private property owner" in the bill excludes governmental bodies and nonprofit organizations.

Second, the substitute amendment does not contain a definition of "property."

Third, the substitute amendment defines "trespasser" as a natural person who enters ***or remains*** upon property in possession of another without express or implied consent. The bill does not define "trespasser" to include a person who remains on the property.

Fourth, the substitute amendment does not include language that is in the bill regarding acts or omissions relating to a condition on the property.

Fifth, the substitute amendment provides that a possessor of real property may be liable for injury or death to a trespasser if the possessor ***willfully, wantonly, or recklessly*** caused the injury or death. The bill refers to intentional acts, and not willful, wanton, or reckless acts.

Sixth, the substitute amendment modifies the exception relating to child trespassers and provides that a possessor of real property may be liable for injury or death to a trespasser if the person injured or killed was a child and all of the following apply:

- The possessor of real property maintained, or allowed to exist, an artificial condition on the property that was inherently dangerous to children.
- The possessor of real property knew or should have known that children trespassed on the property.
- The possessor of real property knew or should have known that the artificial condition he or she maintained or allowed to exist was inherently dangerous to children and involved an unreasonable risk of serious bodily harm or death to children.
- The injured or killed child, because of his or her youth or tender age, did not discover the condition or realize the risk involved in entering onto the property, or in playing in close proximity to the inherently dangerous artificial condition.
- The possessor of real property could have reasonably provided safeguards that would have obviated the inherent danger without interfering with the purpose for which the artificial condition was maintained or allowed to exist.

Seventh, the substitute amendment does not include the provisions relating to implied consent that are in the bill.

Lastly, the substitute amendment provides that nothing in the bill creates any duty of care or ground of liability toward any person who uses another's property for a recreational activity. Under current law, the duty of care and liability with respect to recreational activities is governed by s. 895.52, Stats.

Legislative History

Assembly Substitute Amendment 1 was offered by Representative Kuglitsch. On October 27, 2011, the Assembly Committee on Judiciary and Ethics recommended adoption of the substitute amendment on a vote of Ayes, 7; Noes, 1. The committee then recommended passage of the bill, as amended, on a vote of Ayes, 7; Noes, 1.

JKR:ksm