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WCJC Supports the Trespasser Responsibility Act *Special Session SB 22/AB 22*

Wisconsin has long maintained clear and sound rules regarding the liability of land possessors to those who trespass on their property. Like most other states, Wisconsin provides that a land possessor owes no duty of care to a trespasser, except in a few narrow and well-defined circumstances.

Special Session [AB 22/SB 22](#) simply puts into statutes these traditional common law rules. This legislation preempts courts from adopting a liberal provision in the new *Restatement Third of Torts: Liability for Physical and Emotional Harm* that would dramatically expand trespassers' rights to sue landowners and impose costly burdens on property owners, potentially leading to higher homeowner insurance premiums. Giving trespassers new rights to sue is bad public policy.

Current Wisconsin Law Pertaining to Trespasser Liability

Wisconsin's current trespasser liability law is based on case law, and therefore is not written in the statutes. Wisconsin courts distinguish between trespassers and non-trespassers in deciding liability when a person suffers an injury on the premises. A trespasser is a "person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."ⁱ

Like most other states, Wisconsin courts currently follow what is known as the *Restatement (Second) of Torts*, which provides that if the person is a trespasser the landowner only has a duty to refrain from willful and intentional injury.ⁱⁱ

As a general rule, a landowner is *not* liable for injury to trespassers caused by his or her failure to exercise "reasonable care" to put the land in safe condition for the trespasser. Nor is a landowner required to refrain from operations or activities that might cause injury until the trespasser is discovered. However, landowners do have a duty to warn known trespassers of highly dangerous conditions.

The Need to Codify Existing Wisconsin Trespasser Liability Law

Wisconsin's current case law has been in place for a very long time and continues to be fair, workable, and predictable.

However, the newly rewritten Restatement of Torts reverses the traditional rule as it relates to trespassers. The new *Restatement of the Law Third Torts: Liability for Physical and Emotional Harm* (§51) **imposes on landowners a duty to exercise reasonable care to all entrants, including unwanted trespassers**. The only exception to this new broad duty would be harms to "flagrant trespassers"—a concept that is not defined.

The new "flagrant trespasser" concept would undoubtedly generate substantial litigation over its meaning. Ultimately, if Wisconsin courts were to adopt the new Restatement of Third of Torts, this exception could be sharply limited, barring recovery only for a very narrow category of trespassers, such as armed burglars.

If adopted by the courts, the new landowner liability provision in the Restatement Third of Torts could subject landowners to greater liability and increase insurance premiums. The new rules would also impose undue burdens on landowners, forcing

them to take precautionary measures to deter trespassers from coming onto their land and protecting them from injury when they are unlawfully on the property.

What the Trespasser Liability Act (Special Session AB 22/SB 22) Accomplishes

In order to keep existing Wisconsin trespasser liability law in place and to preempt the courts from adopting the new Restatement Third of Torts, Special Session AB 22/SB 22 codifies the current case law as it exists today. The proposed legislation does the following:

- Follows Wisconsin's longstanding rule that a possessor of real property owes no duty of care to a trespasser except to refrain from willfully, wantonly, or recklessly injuring the trespasser.
- A possessor of real property may be liable for harm to a child trespasser caused by a dangerous artificial condition on the land that the child was too young to appreciate but was known to the possessor. This exception is referred to as the attractive nuisance doctrine and has been part of Wisconsin case law since at least the 1930s.
- Clarifies that the legislation does not create or increase the liability of any possessor of real property and does not affect any immunities from or defenses to liability established by another section of the statutes or available at common law to which a possessor of real property may be entitled under circumstances not covered by the legislation.

Conclusion

Special Session AB 22/SB 22 simply codifies current case law and protects landowners from potential liability due to injury to trespassers.

ⁱ *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 843, 236 N.W.2d 1 (1975) (adopting the *Restatement (Second) of Torts* 2d § 239 (1965) (definition of trespasser).

ⁱⁱ *Szafrański v. Radetzky*, 31 Wis. 2d 110, 125-26, 141 N.W.2d 902 (1966).