

RISKY BUSINESS

A Publication of the

Miami **V**alley **R**isk **M**anagement **A**ssociation

MAY 2024

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Summer Fun...Summer Risk

By Mark Wendling

Farmer's markets, food truck rallies, festivals, and lazy days at the pool...summer programming is just around the corner. Communities sponsor a wide variety of special events or host them on their properties. While these programs help to make summer great, they come with their own inherent risks. As you and your staff make plans, I encourage you to review your processes. Outlined below are some of the controls you should consider.

Proof of insurance and additional insured status should be obtained in situations where the community is sponsoring an event but contracting portions of the operation to outside vendors. The event sponsor may also want to consider procurement of special event insurance for programs that are not ongoing.

If an event is not sponsored by the community, it should go through a permitting process with the legitimate sponsor of the event being issued a permit. As part of this process, a strong hold harmless agreement should be obtained.

Events that involve the closing of streets (farmer's markets, craft fairs, parades, etc.) should have a traffic plan that has been approved by a qualified engineer. Such a plan will provide design immunity should an allegation of unsafe traffic or ineffective traffic precautions be lodged.

Programs & Events

Farmer's markets have flourished in recent years, and they function as more than just temporary farm-stands. Markets provide the community with a gathering spot where patrons can meet to grab coffee, listen to music, and connect with their favorite farmer. The markets are part of the community fabric and identity, but like every community event there are associated risks. These risks vary depending on how the market is sponsored and managed.

If your community sponsors or hosts the market it will need to secure comprehensive coverage, as should the vendors. This is where a strong market agreement is important. Expectations should be clearly delineated in the agreement, with each side understanding its responsibilities and expected

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FYI- Continued

levels of coverage. A permit from the Ohio Division of Liquor Control, along with liquor liability coverage, will need to be secured if any of the vendors plan to sell or distribute alcohol.

Foods trucks are often integral components of a farmer's market, but they are also a common feature at other community events. Sometimes they are the event...think food truck rallies. Since mobility is a big part of food truck operations, they should possess and offer sound auto liability and physical damage policies (in addition to strong general liability and workers' compensation coverage).

Does your community contract for the operation of its **municipal swimming pool**? If so, there are stipulations that you should secure as part of the contract for operations. First and foremost, it is recommended that the contract name the community as an additional insured on the vendor's contract. The vendor's insurance should also be listed as primary and non-contributory. When it comes to workers' compensation, the vendor should waive subrogation and obtain a proper waiver of subrogation endorsement. Auto liability coverage should be maintained if vehicles are utilized to operate the pool.

MVRMA staff can help you to mitigate these risks and ensure that you have the proper coverages in place. We welcome and encourage you to submit your contracts and agreements for review prior to their execution.

Counselor's Comments

By: Steven M. Riggs, Surdyk, Dowd and Turner

First Amendment Rights and Public Officials

On March 15th, the Supreme Court issued a decision in a case determining the extent to which a public official can block viewers from a page that contains both public and private posts. In 2014, James Freed was appointed city manager for Port Huron, Michigan, and soon thereafter he updated his Facebook profile to reflect the appointment. His posts from that time forward consisted of a variety of personal updates, as well as certain information related to his position as city manager. This included information related to the COVID-19 pandemic and how Port Huron responded with pandemic related policies. A Port Huron resident named Kevin Lindke did not approve of Port Huron or Freed's handling of the pandemic and frequently left critical comments on Freed's Facebook page, which led Freed to block him.

Counselor's Comments Continued

Lindke filed suit 42 U.S.C. § 1983, claiming that Freed had violated his First Amendment rights by restricting his ability to comment on Freed's Facebook page, based on the theory that Freed's Facebook page could correctly be characterized as a public forum. Leading up to the questions posed to the Supreme Court of the United States, the Sixth Circuit applied its "duty and authority" test — a different approach than what is utilized by the Second and Ninth Circuits — and affirmed the district court's grant of summary judgment for Freed. The Sixth Circuit determined that Freed was not acting "under color of law" for purposes of 42 U.S.C. § 1983 because he did not operate the page pursuant to his official duties.

The Supreme Court Decision

Writing for a unanimous court, Justice Barrett observed that "[i]n the run-of-the-mill case, state action is easy to spot . . . [s]ometimes, however, the line between private conduct and state action is difficult to draw." This case exemplified this difficulty because it required the Court to analyze whether a state official was engaged in state action or functioned as a private citizen as opposed to whether a nominally private person engaged in state action for purposes of § 1983. As Justice Barrett explained, the Court has rarely had occasion to consider how the state-action requirement applies in such circumstances. There is a multifaceted issue involved as public officials can certainly act on behalf of the State, but they are also private citizens with their own constitutional rights. As Freed did not relinquish his rights under the First Amendment when he accepted the city manager position for Port Huron, Lindke was not able to simply "hang his hat" on Freed's status as a state employee. If it could be found that Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights; rather, he exercised his own.

The key distinction between private conduct and state action turns on substance, rather than labels. As a result, each instance demands a specific, fact-intensive inquiry. Social media demands a more in-depth review as it can be used "for personal communication, official communication, or both – and the line between the two is often blurred." Undaunted by the potential nuance, and leaning heavily on precedent, the decision articulated clear principles that govern these cases. The Court held that a public official's social media activity constitutes state action under § 1983 only if the official (1) possessed the actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media.

The first prong of this test is grounded in the "bedrock requirement" that the conduct allegedly causing the deprivation of a federal right be "fairly attributable" to the State. "Private action – no matter how 'official' it looks – lacks the necessary lineage." The Supreme Court was in line with the lower courts in rejecting Lindke's argument that the Court should focus on the page's appearance or function. The Court pointed out that "Lindke imagines that Freed can conjure the power of the State through his own efforts . . . the presence of state authority must be real, not a mirage." In order to succeed, Lindke must show that Freed had more than some authority to communicate with residents on behalf of Port Huron. The alleged censorship must be directly connected to speech on a matter within Freed's authority. If the plaintiff cannot meet this threshold, then they cannot establish that it was a state action.

Counselor's Comments—Continued

The second prong required that the government official purported to have exercised that authority when they spoke on social media. The Supreme Court pointed out that Freed's page was not labeled as "personal" or "official," which raised the question of a potential "mixed-use" page— a place where he made some posts in his personal capacity and others in his capacity as city manager. If that were the case, a reviewing court would have to categorize posts individually based on their specific content and function. If there are remaining doubts about a given post there may be some additional factors to guide the court; "for example, an official who uses government staff to make a post will be hard-pressed to deny that he was conducting government business." At any rate, the Court held central that "[l]est any official lose that right, it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts." The Court concluded by vacating the appellate court's judgment and remanding the case for further proceedings consistent with the Supreme Court's opinion.

Moving Forward

This decision provided a clear two-prong test regarding § 1983 actions in the social media context but also provided additional guidance for government officials moving forward. First, there is significance in a label (e.g., "Personal and private page of . . . ") or a clear disclaimer on a page emphasizing the personal nature of the speech on the page and disavowing it as attributable to the state. While not solely dispositive, labels or disclaimers can serve to provide a strong indication of the context of a social media page as being private. These allow for a presumption that all the posts thereon were personal, or the inverse if relevant.

The decision also noted that the nature of the technology or media in question can determine the scope of state-action analysis. Here, Freed took two actions to which Lindke objected: the deletion of comments and blocking from commenting. The deleting of specific comments implicated only those relevant posts, meaning that each individual post with deleted comments was assessed under the standards for state action. On the other hand, blocking someone on a page-wide basis would require a court to consider whether a governmental official was engaging in state action with respect to any post on which a plaintiff intended to comment. This emphasizes how fact-specific this analysis has the potential to be, further bolstering the power of appropriate labeling and disclaiming in social media use. The Court agrees with a clear warning— "[a] public official who fails to keep personal posts in a clearly designated personal account . . . exposes himself to greater potential liability." In light of the decision, the Court has emphasized that clarity is very important in determining whether a public official's social media posts are either private speech or public speech, and that public officials must be mindful of which "hat" he or she is wearing when posting and removing content from social media accounts.

Loss Control Lowdown...

By Starr Markworth

The importance of Accident and Incident Investigation

When a workplace accident or incident occurs, prompt response is one of the most important factors. In order for accurate information to be gathered, the investigation must be completed in a timely manner so that all facts can be gathered while it is still fresh in the minds of both the employees and the witnesses.

Supervisors must ensure an investigation takes place immediately after the accident to discover what caused the accident and correct the problem. Finding out the cause of the accident is the key to preventing it from happening again. Photographs and videos should be taken from several perspectives to preserve the accident/incident scene in case of future legal action.

Please see the MVRMA policies [Claims Reporting, claims management, and claims procedure](#) for more specific information on reporting property or liability claims.

A thorough accident investigation helps:

- Ensure any immediate unsafe conditions are corrected.
- Identify and correct/eliminate any unsafe conditions, acts or procedures that contributed to the accident.
- Determine if there was compliance with applicable safety regulations.
- Review if the response to the incident was sufficient.
- Document any statement from witnesses and employees.

How Do I Conduct an Investigation? The investigation normally includes these six steps:

1. Secure the scene and report the incident to the supervisor.
2. Collect data.
3. Develop a sequence of events.
4. Determine the cause of the accident.
5. Create recommendations to prevent reoccurrence.
6. Write the report. Focus only on accurate facts and information. Do not include subjective information from witnesses or employees.

Once the report is complete, supervisors should take action to implement the recommendations that control or eliminate the conditions that led to the accident or near miss.

For more detailed information, The National Safety Council has a very [comprehensive document](#) that would be a very valuable training tool for employees and supervisors as well as a document with [practical tips](#).

If you have any questions or want more detailed information, please contact the MVRMA staff.



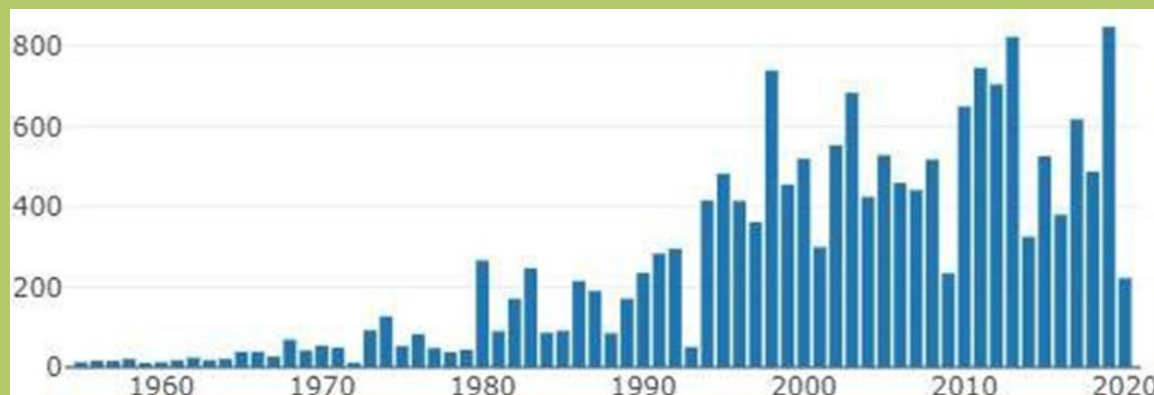
Broker's Beat

WHERE THE WIND BLOWS

Entering mid-April, Ohio has experienced an alarming number of wind, hail, and tornadic events, surpassing all other states in the country. A staggering 80% of these Ohio events have occurred in Southwest Ohio and the Miami Valley.

Severe wind events are not just a statistic; they pose significant risks to your communities, infrastructure, and the economy. This underscores the crucial need for preparedness, mitigation, and timely warnings from meteorological agencies.

Annual Severe Wind Events in Ohio



A severe wind event is characterized by strong, damaging winds that can cause significant impacts on infrastructure, property, and sometimes human life. These events are often classified based on the wind speed or the extent of damage they cause. Here are some common types of severe wind events:

Thunderstorm Winds: Severe thunderstorms can produce strong, gusty, straight-line winds. These winds can result from downdrafts within thunderstorms or from the outflow boundary of a thunderstorm complex. Wind speeds in severe thunderstorm winds often exceed 58 miles per hour (93 kilometers per hour), and they can cause damage like that of a weak tornado.

Derechos: Derechos are widespread, long-lived windstorms associated with a band of rapidly moving showers or thunderstorms. They often produce damaging straight-line winds over a broad area, sometimes spanning hundreds of miles. Derechos can cause extensive damage to trees, power lines, and buildings.

Broker's Beat—Continued

Tornadoes: While tornadoes are distinct from severe wind events, they often accompany severe thunderstorms and can produce extremely strong winds. Tornadoes are characterized by rotating columns of air extending from a thunderstorm to the ground. They can produce some of the strongest winds on Earth, with wind speeds exceeding 200 miles per hour (320 kilometers per hour). Tornadoes can cause catastrophic damage along their paths.

High Wind Warnings: The National Weather Service issues high wind warning when sustained winds of 40 miles per hour (64 kilometers per hour) or greater are expected for at least an hour or when gusts of 58 miles per hour (93 kilometers per hour) or greater are expected for any duration. These warnings indicate the potential for significant property damage and hazardous conditions.

Protecting your community from convective storms involves a combination of preparedness, mitigation measures, and response strategies. Here are some ways to help protect your community:

◇ **Develop and Implement Emergency Plans:**

- Work with local emergency management agencies to develop comprehensive emergency plans that address convective storm hazards. These plans should include procedures for sheltering, evacuation routes, communication strategies, and coordination with first responders.
- Conduct regular drills and exercises to ensure that community members and responders are familiar with emergency procedures and know how to react during severe weather events.

◇ **Install Early Warning Systems:**

- Invest in early warning systems such as sirens, weather radios, and smartphone apps that provide timely alerts for severe weather warnings issued by the National Weather Service.
- Ensure that warning systems are accessible to all members of the community, including those with disabilities and non-English speakers.

Broker's Beat—Continued

◇ **Design and Construct Resilient Infrastructure:**

- Implement building codes and zoning regulations that require structures to be designed and constructed to withstand the impacts of convective storms, including high winds, hail, and flying debris.
- Retrofit existing buildings and infrastructure to improve their resilience to severe weather events, such as installing storm shutters, reinforcing roofs, and securing outdoor objects that could become projectiles in high winds.

◇ **Maintain Vegetation and Landscaping:**

- Regularly trim trees and remove dead branches to reduce the risk of tree damage and falling debris during storms.
- Plant wind-resistant vegetation and avoid landscaping features that could become hazards during high winds, such as loose gravel or decorative stones.

◇ **Educate and Raise Awareness:**

- Provide educational materials and outreach programs to increase awareness of convective storm hazards and promote preparedness measures among community members.
- Encourage residents to create emergency supply kits, develop family communication plans, and stay informed about weather forecasts and warnings.

◇ **Establish Community Shelters:**

- Identify and designate safe shelters, such as community centers, schools, or storm shelters, where residents can seek refuge during severe weather events.
- Ensure that shelters are accessible to all members of the community and equipped with emergency supplies, including food, water, first aid kits, and sanitation facilities.

◇ **Promote Community Engagement and Collaboration:**

- Foster partnerships between local government agencies, community organizations, businesses, and residents to enhance resilience and response capabilities.
- Encourage community members to report severe weather observations and share information with neighbors to promote situational awareness and timely action.

2022 Risk Management Performance Awards

At the March 2024 board meeting members were recognized for their loss control successes.

Members' departments with zero losses for the year receive recognition in the form of a breakfast or other celebration. A total of 39 of our members' departments qualified for this award.

Special recognition is given to departments with three or more consecutive years with zero losses. These departments are presented with a plaque commemorating this achievement. Departments so recognized were:

CITY DEPARTMENT	CONSECUTIVE YEARS ZERO LOSSES
Bellbrook Fire	7
Troy Fire	6
Wilmington Fire	9
Englewood Parks / Rec	5
Madeira Parks / Rec	7
Springdale Parks / Rec	4
Bellbrook Streets / Refuse / PW	5
Tipp City Streets / Refuse / PW	8
Bellbrook Water / Wastewater	10
Englewood Water / Wastewater	5
Tipp City Water / Wastewater	4
Vandalia Water / Wastewater	5

Calendar of Events

Upcoming Training Events

Driver Training—June 13-June 14 and June 24-June 25

Upcoming Board Events

Committee Meetings - Via Zoom:

Risk Management - May 23rd 10:00 AM

Finance - May 23rd 1:30 PM

Board Meeting

June 17th 9:30 AM Home2Suites, Centerville, Ohio

From The Board Room

March 18, 2024

- Approved 2022 Zero Loss Awards
- Approved GAAP/ACFR Preparation Contract
- Approved Office Lease Authority