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New Supreme Court Case Expands the Known Danger Exception to Governmental Immunity

Wisconsin law shields local governments from personal injury liability for the discretionary acts of its employees. However, Wisconsin courts have carved out a few exceptions to governmental immunity. Recently, the Wisconsin Supreme Court found that the "known danger" exception to government liability could not shield the City of New Berlin from negligence liability when its employees failed to properly supervise a young girl whom they knew could not swim during a field trip to an aquatic center.

In *Engelhardt v. City of New Berlin*, 2019 WI 2, eight-year-old Lily Engelhardt attended a field trip to Brookfield's Wiberg Aquatic Center organized and run by the New Berlin Parks and Recreation Department. Lily's mother told the coordinator in charge of the field trip that Lily could not swim and questioned whether Lily should go on the trip at all. The coordinator responded that Lily would be safe because her swimming ability would be evaluated at the shallow end or zero depth area of the pool and that she would be limited to the "splash pad" area. Tragically, Lily drowned while staff and other children were changing in the locker rooms and proceeding to the pool deck.

Lily's parents sued New Berlin for negligence and New Berlin sought immunity under Wis. Stat. §893.80(4), which provides liability protection to local governments and their employees for acts done in the exercise of "legislative, quasi-legislative, judicial or quasi-judicial functions." The circuit court denied New Berlin's summary judgment motion, and New Berlin moved for leave to appeal. The court of appeals granted New Berlin's motion and reversed the circuit court's decision.

Wisconsin courts have held that the terms 'quasi-judicial or quasi-legislative' mean 'discretionary," and therefore, governments are immune from liability for the discretionary acts of their employees. *Lifer v. Raymond*, 80 Wis. 2d 503, 508, 259 N.W.2d 537 (1977). Case law distinguishes discretionary acts, which are subject to immunity, and ministerial acts, which are not. A duty is ministerial when the duty is absolute, certain and imperative, involving merely the performance of a specific task and the law specifies the mode of performance with such certainty that nothing remains for judgment or discretion. *Kimps v. Hill*, 200 Wis. 2d 1, 546 N.W.2d 151 (1996). The "law" here implies an act of government, and can include statutes, rules, government contracts, and policies.

In *New Berlin,* the plaintiffs' primary argument was that the staff guidelines were policies which created a ministerial duty and the park staffs failure to follow the guidelines were a breach of the ministerial duty. The Court rejected this argument, explaining that such a ruling would significantly expand the liability of municipalities. Instead, a four-justice majority concluded that the "known danger" exception to governmental immunity applied to the negligence claim against New Berlin.

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Towns Are Not Obligated to Construct Roads to Standards Set Out in Wis. Stat. §82.50

The Wisconsin Court of Appeals recently held that towns are not required to build all roads to the construction standards for "town roads" that are set forth in section 82.50, Wis. Stats. *DSG Evergreen Family Limited Partnership v. Town of Perry*, 2017 AP 2352 (Dec. 20, 2018).

The case arose out of a complex and lengthy history of litigation involving the town's acquisition of part of DSG's agricultural property by eminent domain for a park. Prior to the taking, DSG's access from a county highway was through an approximately 20-foot wide gravel "field road," a term defined in the town's ordinance as a private road used only for agricultural purposes. The town took the portion of the property on which the field road was located. To ensure DSG's access to its remaining property after the taking, the town promised in the petition for condemnation proceedings to construct a replacement "field road" on town land "to the same construction standards as the old field road," which would also serve as access to the new park. DSG argued on appeal that it understood this language to mean that the new field road would be the "substantial equivalent" of the old road in all respects. At trial in the compensation proceedings, DSG introduced an engineering a report stating that a field road constructed in the location designated by the town would, by physical necessity, be steeper, narrower and have poorer sight distances than the old road.

The town constructed the new field road after a judgment was entered in the compensation proceedings. DSG brought a new lawsuit complaining that the new field road was not the substantial equivalent of the old road in many respects including that it was steeper and narrower than the old road. DSG made two claims. First, it sought an order compelling the town to reconstruct the road to the "town road" standards in section 82.50, including a 66-foot right-of-way, and requiring that it be paved in accordance with the standards in the town's "town road ordinance." Second, in the alternative, DSG sought damages due to the difference in physical characteristics of the old and new field roads. The circuit court dismissed both claims on summary judgment. The Court of Appeals affirmed.

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Exception to Governmental Immunity

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Under the known danger exception to governmental immunity, no immunity exists in situations the government employee knows that an imminent danger is present and the danger is so extreme that a required response leaves nothing to the discretion of the employee. *C.L. v. Olson*, 143 Wis. 2d 701, 422 N.W.2d 614 (1988). The known danger creates a ministerial duty to act. The known danger exception is reserved for conditions that are nearly certain to cause injury if not corrected, or in other words, are "accidents waiting to happen."

The Court in *New Berlin* reasoned that Lily's mother communicated her concerns to the coordinator in charge of the day camp program. She told him that Lily could not swim and asked whether Lily should go on the field trip to the Aquatic Center. He responded that it would be all right for Lily to attend the field trip because Lily would be evaluated. However, Lily was not given a swim test, and the coordinator told no other staff members that Lily could not swim. The Court noted that the danger associated with bringing a young child who cannot swim to a busy water park along with 76 other children is apparent. Thus, a ministerial duty was created by the obviously hazardous circumstances presented and New Berlin was not entitled to governmental immunity.

The known danger exception poses difficulty for courts and litigants because its application has been far from consistent. When considering whether a known danger exists, courts often assess whether the government had knowledge of the danger and whether the options for addressing the danger allowed the government employee to exercise discretion. For example, the exception applied in *Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F. Supp. 2d 800 (W.D. Wis. 2007), where officials of a high school had a duty to report to police that a teacher was sexually assaulting a female student, because officials allegedly had actual knowledge of the assaults. Yet, in *Recore v. Cnty. of Green Lake*, 2016 WI App 33, 368 Wis. 2d 282, 879 N.W.2d 131, the known danger exception did not apply to the police department's duty to investigate child sexual abuse allegations when no one actually knew that the abuser was in fact abusing the child.

Despite these guiding factors, inconsistency remains. For example, the known danger exception applied in *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977), where hikers, legally accessing a narrow park hiking trail at night, fell ninety feet into a gorge located on a part of the trail known by the park manager to be particularly hazardous at night. Yet, in *Umansky v. ABC Ins. Co.*, 2009 WI 82, 319 Wis. 2d 622, 769 N.W.2d 1, when a television cameraman was killed at a stadium after falling from a raised platform that had no railings in violation of state regulations, the Court was uncertain that the platform presented the type of "compelling danger that warrants" the exception.

New Berlin likely increases the difficulty in applying the known danger exception. As Justice Dallet notes in her concurring opinion, "[i]n order to apply the known danger exception to the case at hand, the majority opinion must necessarily expand the exception to apply in situations where the danger was not necessarily imminent and where there was discretion in how to respond to the potential danger."

— Kathryn Pfefferle

Do Wedding Barns Need Alcohol Licenses? Conflicting Analyses at Issue in Lawsuit

Whether alcohol licenses are required for wedding barns continues to remain uncertain as a lawsuit is filed against the Evers Administration over the prior administration's conflicting interpretations of Wisconsin's alcohol licensing laws.

Wisconsin's rural communities are seeing a growing demand by land owners and visitors to have barns converted into wedding venues—so called "wedding barns." While weddings inside barns may be a new trend, the consumption of alcohol at weddings is a long tradition. With limited and conflicting guidance from the state, the determination about whether or not state law requires a wedding barn to hold an alcohol license has been delegated to the local municipality. However, recent events suggest that a definitive answer, whether from the executive, judicial, or legislative branch of state government, may be coming.

On November 16, 2018, former Attorney General Brad Schimel issued an informal letter analyzing whether event venues rented for private events must seek an alcohol license to allow the consumption of alcohol beverages at the venue. Specifically, the AG was asked to interpret whether the term "public place" under Wis. Stat. § 125.09(1) includes an "event venue" that may be rented for a "private event (e.g., a wedding, birthday party, or retirement party)," ostensibly a reference to wedding barns. With limited exceptions, consumption of alcohol beverages at an unlicensed "public place" is prohibited. In an *informal and nonbinding analysis* of the statute, the AG concluded that these event venues likely qualify as "public places" under Wis. Stat. § 125.09(1). This interpretation, if adopted by the Wisconsin Department of Revenue (DOR) or local enforcement authorities, would expose owners and possibly renters of unlicensed wedding barns where alcohol is served or consumed to enforcement actions and penalties.

However, on December 28, 2018, the then DOR Secretary Richard Chandler responded to a clarification request from Representative Rob Swearingen. In his response, Secretary Chandler stated that AG Schimel's "informal analysis is different from the longstanding application of the statutes" by the DOR. According to Secretary Chandler, DOR's position has been that if an event is private, "meaning attendance is limited to invited guests, it is not a public event" and the location is not a "public place" *at the time of the event* and does not require an alcohol license *for that event*. Secretary Chandler concluded "[i]n short, if a place is rented for an event that is a private event, and if there is no sale of alcohol there, a liquor license is not required." Due to the coming changes in the executive branch of state government, then Secretary Chandler did not change DOR's position or enforcement policy based on AG Schimel's letter. Secretary Chandler recognized that the new administration will be able to "continue or change DOR's position in this area."

Recent Fact Sheets published by the DOR still detail that consumption of alcohol beverages in an unlicensed public place is prohibited, but they do not describe what venues qualify as a "public place." Consumption of carry-in alcohol on an already licensed premise remains prohibited and an owner of a licensed premise must legally purchase any alcohol consumed on premises from an authorized source. This sets up a situation where a licensed wedding barn cannot allow carry-in consumption, but an unlicensed wedding barn may be able to.

In a new twist, on January 14, 2019, a group of wedding barn owners represented by the Wisconsin Institute for Law and Liberty sued Governor Tony Evers, Attorney General Josh Kaul, and Peter Barca, the secretary-designee of the DOR, over the regulation of wedding barns. In *Farmview Event Barn, LLC, et al. v. Tony Evers, et al.* (Dunn County Circuit Court, 19-CV-9), the plaintiffs argue that wedding barns are "Private Event Venues" that are exempt from regulation as "public places" under Wisconsin's alcohol beverage licensing laws. Citing AG Schimel's and Secretary Chandler's competing interpretations, the plaintiffs in *Farmview Event Barn, LLC* seek a declaratory judgment from the court to resolve the dispute. While the Tavern League of Wisconsin (TLW) has not issued a statement as of this writing, the TLW has previously supported AG Schimel's analysis in statements made to the press.

As of this writing, the Evers Administration, AG Kaul, and Secretary-designee Barca have not stated a position on the dispute. Local municipalities remain the principal issuers of retail alcohol licenses and enforcers of Wisconsin's retail alcohol license laws. With conflicting guidance from the state, local municipalities are still left to determine whether or not to require wedding barns to obtain alcohol licenses and whether or how to enforce existing ordinances. Municipalities with wedding barns, or potential wedding barns, should pay attention to this issue as it continues to unfold.

— Jared Walker Smith

Towns Not Obligated to Construct Roads to Standards

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With respect to the first claim, the court of appeals held that there is nothing in section 82.50, or more broadly Chapter 82, imposing an obligation on towns to build all roads to the standards in section 82.50. Nor was there any language in the town's ordinance compelling all roads to be constructed to ordinance standards for "town roads." Consequently, neither the statutes nor the ordinance created a private right of action that could be enforced by private parties.

The court held that the second claim was barred by the doctrine of claim preclusion. DSG was aware at the time of trial in the compensation proceedings that the new field road could not be equivalent to the old road in all respects. Accordingly, it could have sought damages attributable to the different physical characteristics. The doctrine of claim preclusion precludes a party from asserting a claim in a subsequent lawsuit that could have been made in an earlier case. It was irrelevant whether DSG actually asserted the claim in the first case, because it had knowledge of the facts and the ability to do so.

— Mark J. Steichen

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