Discretionary Immunity in Slip and Fall Case

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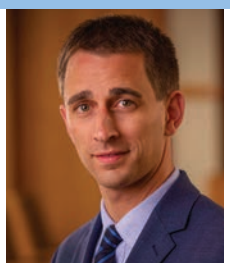

The Court of Appeals has recommended for publication an opinion resulting from a permissive interlocutory appeal sought by Stafford Rosenbaum on behalf of the City of Monroe. The City sought the appeal after the trial court denied the City's motion for summary judgment asserting absolute and governmental immunity in response to a slip and fall complaint. As explained below, the Court of Appeals reversed and remanded with directions to enter summary judgment in favor of the City dismissing the complaint. See *Knoke v. City of Monroe et. al.*, No. 2019AP2003 (Wis. Ct. App. Dec. 3, 2020).

Background on Governmental Immunity

Governmental immunity is often a key issue in tort claims against municipalities. In cases involving snow and ice accumulations, two types of immunity are at issue – an initial three-week period of absolute immunity under Wis. Stat. § 893.83, and then "discretionary" immunity under Wis. Stat. § 893.80 applies to accumulations that exist for three weeks or more.

Wisconsin Stat. § 893.80(4) provides immunity to a municipal actor "for acts done in the exercise of its legislative, quasi-legislative, judicial or quasi-judicial functions." Recognizing the separation of powers pitfalls implicated by permitting private parties to litigate the wisdom of public policy decisions of elected bodies (e.g., town and village boards, city councils, etc.), the Court has long interpreted Wis. Stat. § 893.80 to provide immunity for the "discretionary" decisions of municipal actors.

However, there are two main exceptions to discretionary immunity – one for ministerial duties and another for known and present dangers. Duties are ministerial for the purposes of governmental immunity when a duty is "absolute, certain and imperative, involving merely the performance of a specific task" imposed by law. This exception to discretionary immunity applies when statutes, ordinances, or policies obligate the municipality to take a specific action. Where there is no discretion, then there is no immunity. For example, the Court has held that where regulations require railings on a stadium's camera stand, there is no discretion to place the railings, and therefore no immunity from claims to recover damages caused by the failure to install such railings.

The second exception, the known-and-present-danger exception, applies only "where the danger is so severe and so immediate" that a response is demanded. Once again, because there is no discretion, there is no immunity. However, application of this judicially created exception is narrow and very fact-specific. For example, the seminal case involves a fall, arguably caused by a park ranger's failure to give warning that a path passed within inches of a partially concealed 90-foot drop.

Case Background for the *Knoke* Decision

Knoke fell on January 12, 2017. His fall occurred in the curb and/or gutter area adjacent to his law offices in Monroe, Wisconsin. Knoke sued the City and its insurer alleging claims of negligence and nuisance. The parties completed discovery and briefed the City's summary judgment motion to the trial court. The City argued that it exercised its discretion in enacting a snow and ice policy and that it was undisputed that it complied with the policy. The policy provided in relevant part:

> The City of Monroe Street and Park Departments endeavor to maintain adequate traction for pedestrians and vehicles. This does not mean that bare, dry pavement or walks should be expected after each snowfall or ice storm. ***Furthermore, this does not mean the streets will be free of ice and snow.***

Ultimately, the trial court denied the City's motion for summary judgment. The gravamen of the trial court's reasoning is as follows:

> [S]o I'm basically saying that there's the three weeks that all the governmental bodies have where they do enjoy the immunity, and then after the three weeks, essentially, they have a specific, […] duty to remove snow and ice.

The City petitioned the Court of Appeals for an interlocutory appeal which was granted to review the application of Wis. Stat. §§ 893.80 and 893.83 to the facts of this case.

Court of Appeals Opinion

In a decision recommended for publication, the Wisconsin Court of Appeals reversed and remanded with directions to enter summary judgment in favor of the City of Monroe.

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As explained by the Court, Wis. Stat. § 893.83 – commonly referred to as the "highway defect statute" – was originally enacted to *allow* suits against governmental entities for injuries caused by "insufficiency or want of repairs of any highway." The highway defect statute operated as potential exception, or ministerial duty, to the discretionary immunity afforded under the related statute Wis. Stat. § 893.80(4).

However, the Legislature subsequently enacted 2011 WI Act 132 which not only retained the three-week period of absolute immunity for snow and ice accumulations, but eliminated the defect language ("insufficiency of want and repair") from the statute (eliminating Wis. Stat. § 893.83 as a source of ministerial duty), before ***also*** expressly subjecting claims for snow and ice accumulations that exist 3 weeks or more to "discretionary" immunity under Wis. Stat. § 893.80.

Here, the Court of Appeals rejected Knoke's arguments relying on *Morris v. Juneau County*, 219 Wis. 2d 543, 579 N.W.2d 690 (1998), with the Court clarifying that 2011 WI Act 132 eliminates any reliance upon *Morris* for the proposition that snow and ice accumulation cases are subject only to the procedures (notice of claim, etc.) and not the grant of "discretionary" immunity under Wis. Stat. § 893.80(4). Because 2011 WI Act 132 expressly subjects claims – without reservation – to Wis. Stat. § 893.80, the grant of "discretionary" immunity under subsection (4) also applies.

The Court summed up the relationship between the statutes as follows:

The first sentence of § 893.83 grants municipalities a period of "absolute immunity" for claims based on snow and ice accumulations that have existed less than three weeks […]. And the second sentence of § 893.83 clarifies that immunity is not absolute if the snow or ice accumulation has existed for three weeks or more – under such circumstances, a claim is "subject to § 893.80," like any other tort claim against a municipality.

After resolving that "discretionary" immunity under Wis. Stat. § 893.80 applied to slip and fall claims involving snow and ice accumulations, the Court continued on to reject Knoke's arguments seeking an exception to this grant of immunity based on the facts of the case.

The Court first rejected Knoke's reliance on *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 421, 400 N.W.2d 493 (Ct. App. 1986). Here, the Court noted that Hillcrest had been overruled by the Wisconsin Supreme Court in *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶59, n. 17. Instead, the Court clarified that nuisance claims – like other tort claims – are barred under "discretionary" immunity if they are "predicated on negligent acts that are discretionary in nature," but they may proceed if predicated on "acts performed pursuant to a ministerial duty." Because the City complied with its snow and ice policy, discretionary immunity applied.

In addition to rejecting multiple fact-specific arguments Knoke made regarding the application of the City's snow and ice policy and shoveling ordinance, the Court concluded by rejecting Knoke's arguments that the "known and compelling danger" exception applied. Here, the Court called into question whether "constructive notice" is sufficient for the known and compelling danger exception. However, even assuming constructive notice/knowledge of the danger was sufficient, the Court reasoned that the danger was far less severe and immediate than the dangers contemplated by this exception. Here the Court noted, "it is beyond dispute that even the best-maintained Wisconsin roadways are, at least at times, icy and slippery in the winter." In rejecting Knoke's arguments, the Court emphasized:

> To conclude otherwise would ignore the realities that Wisconsin pedestrians are accustomed to icy winter conditions and that a Wisconsin municipality will never be able to address every potentially unsafe snow and ice accumulation on its roadways and must instead exercise its discretion in determining how and when to respond to them.

Conclusion

The main takeaway from the decision is to cement the changes made by the Legislature with 2011 WI Act 132, which affords municipalities three weeks of absolute immunity before applying discretionary immunity once the three-week mark has passed. A couple smaller notes include that the Court questioned whether "constructive knowledge" is sufficient for the purposes of the "known danger exception," and reaffirming that discretionary immunity applies to nuisance claims.

Municipalities can avoid creating "ministerial" duties in ordinances and policies by reviewing whether they impose mandatory action(s) (rather than leaving discretion). Common issues can arise with trip and fall suits regarding sidewalk policies and their requirements regarding inspection and/or repair. Finally, when notified of a potential snow and ice claim, the municipality should seek to preserve weather and maintenance records to help address whether an accumulation existed three weeks or less.

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This decision from the Court of Appeals correctly applies the changes made by the Legislature in 2011 and reflects the realities of Wisconsin winters to prevent municipalities from serving as insurers every time snow flies or ice forms.

About the Authors:

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Kyle's briefing experience includes successfully dismissing a mass tort claim for carbon monoxide poisoning at a hockey rink and authoring an amicus brief on behalf of the League of Wisconsin Municipalities addressing Wisconsin's governmental immunity law – a matter Kyle also argued before the Wisconsin Supreme Court. Contact Kyle at kengelke@staffordlaw.com

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