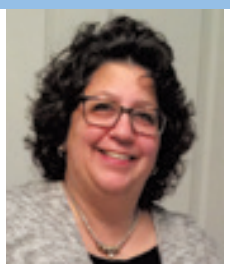
Court Declines Invitation to Revamp Governmental Immunity



Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

Municipalities lost the battle but won the war in a tragic case involving the drowning of an 8-year-old girl, Lily, while she attended a municipal summer camp field trip to an aquatic center. In *Engelhardt v. City of New Berlin*, 2019 WI 2, the Wisconsin Supreme Court ruled that the City of New Berlin was not entitled to governmental immunity for its negligence in supervising Lily because the "known danger" exception applied.

Lily attended a camp operated by the City's Parks and Recreation department. The camp planned an outing to an aquatic center in a neighboring municipality. Lily's mother informed the camp director that her daughter could not swim and questioned whether her daughter should go on the optional field trip. The director assured the mother that her daughter would be safe, that staff would evaluate her swimming ability at the pool, and that she could be restricted to a splash pad area. When the 77 campers arrived at the busy aquatic center, they were divided by gender and went into the locker rooms to change. The camp director never informed camp staff that Lily could not swim, and camp counselors failed to follow protocol outlined in guidelines given to them. Although new campers who had not been given a swim test were instructed to find a leader before getting into the pool, they were not directed to go to any specific location to find a leader, and no leaders were stationed at the locker room door to direct them. Lily drowned while staff and other campers were changing in the locker rooms before heading out to the pool area.

At issue was whether the City was immune under Wis. Stat. sec. 893.80(4), which bars lawsuits against municipalities and their employees for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." The courts have long interpreted that language as providing immunity for discretionary acts or functions. Plaintiffs argued that written materials including the camp brochure, staff handbook and guidelines given to camp counselors created a ministerial duty, and therefore immunity was not available. The League was greatly concerned by plaintiffs' suggestion that the Wisconsin Supreme Court should use this case as a vehicle to reimagine and restrict municipal immunity. In a joint amicus brief, the League of Wisconsin Municipalities, Wisconsin Towns Association and Wisconsin Counties Association urged the court to reject that invitation.

The Wisconsin Supreme Court ruled that the City was not entitled to governmental immunity under Wis. Stat. sec. 893.80(4) because the "known danger" exception applied. The known danger exception to governmental immunity applies when "an obviously hazardous situation known to the public officer or employee is of such force that a ministerial duty to correct the situation is created." *Engelhardt*, 2019 WI 2, ¶5. The court said the "danger to which Lily was exposed at the Aquatic Center as an eight-year-old non-swimmer was compelling and self-evident." The court continued, "Drowning was a known danger. Under the circumstances present here, [the camp director] and other camp staff had a ministerial duty to give Lily a swim test before allowing her near the pool. They did not perform this ministerial duty." *Id.* ¶ 6.

Importantly, the Court declined plaintiff's invitation to adopt an interpretation of the governmental immunity statute that would reverse longstanding precedent and open municipalities to lawsuits in more circumstances than currently allowed. Writing for the majority, Justice Abrahamson said that doing so would "effectively pull the rug out from under municipalities and other governmental entities that have managed their affairs relying upon our decades-old interpretation of the governmental immunity statute." *Id.* ¶ 27. Justice Abrahamson wrote, "It is unwise for a court to frequently call into question existing and long-standing law. Doing so gives the impression that the decision to overturn prior cases is 'undertaken merely because the composition of the court has changed.'" *Id.* ¶ 28.

Justice Dallet, joined by Justices R. Bradley and Kelly, concurred in a separate opinion agreeing that the City was not protected by governmental immunity but stating it was not because of the known danger exception; rather, it was because of the plain language of sec. 893.80(4) which they say was intended to protect legislative decisions rather than decisions involving the exercise of discretion.

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