



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Local Governmental Immunity in Wisconsin

The governmental immunity statute confers immunity for intentional torts and discretionary acts on units of government and their officers. Section 893.80 of the Wisconsin Statutes sets forth the general principles of governmental immunity in Wisconsin, including notice requirements, immunity for intentional and discretionary acts, and limits on damages. This Information Memorandum describes the historical development of the immunity defense and discusses current law on governmental immunity in Wisconsin, including exceptions to immunity established in case law.

#### **HISTORY OF LOCAL GOVERNMENTAL IMMUNITY**

##### ***SOVEREIGN IMMUNITY***

Generally, sovereign immunity is a defense that belongs to the state and its agencies. The concept arises from the Wisconsin Constitution, which provides “The legislature shall direct by law in what manner and in what courts suits may be brought against the state.” [Wis. Const. art. IV, s. 27.] Because sovereign immunity may only be claimed by the state, local units of government cannot typically assert this defense in response to a claim seeking to hold them liable for damages. Therefore, this Information Memorandum on local governmental immunity will not further address the sovereign immunity defense.<sup>1</sup>

##### ***LOCAL GOVERNMENTAL IMMUNITY***

Governmental immunity is a defense that confers immunity for intentional and discretionary acts on local units of government, their officers, and their employees. The doctrine “reflects concern for the ‘protection of the public purse against legal action and...the restraint of public officials through political rather than judicial means.’” [*Scott v. Savers Property and Cas. Ins. Co.*, 2003 WI 60, ¶ 35 (citations omitted).] It developed in English common law,<sup>2</sup> and was first adopted by the Wisconsin Supreme Court in 1873. [*Hayes v. The City of Oshkosh*, 33 Wis. 314, 318 (1873).]

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<sup>1</sup> Note that state and local governments may be held liable for certain actions of their officers and employees under federal law. [42 U.S.C. s. 1983.] Because the Wisconsin statute on local governmental immunity does not apply to actions brought against a state or local government under the federal statute, this Information Memorandum will not further address actions brought under federal law.

<sup>2</sup> Common law refers to law derived from custom and judicial precedent, as opposed to written statutory law enacted by a legislative body.

Nearly 100 years later, the Wisconsin Supreme Court partially abolished the common law defense, citing several criticisms of it. [*Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40 (1962).] In *Holytz*, the Court reiterated that the origin of governmental immunity “rests upon a weak foundation” and “seems to be found in the ancient and fallacious notion that the king can do no wrong.” [*Id.* at 33 (citations omitted).] The Court further recognized the injustice of imposing the entire burden of damage resulting from wrongful governmental acts upon the single individual who suffered the injury, rather than distributing it among the entire community without hardship. The Legislature responded to the Court’s holding in *Holytz* by establishing a governmental immunity statute, which is set forth in what is now s. 893.80 (4), Stats.

As the Court noted in *Lister*, providing immunity to local units of government is based on the following public policy considerations:

- The danger of influencing public officers in the performance of their functions by the threat of lawsuit.
- The deterrent effect which the threat of personal liability might have on those who are considering entering public service.
- Eliminating the drain on valuable time caused by such actions.
- The unfairness of subjecting officials to personal liability for the acts of their subordinates.
- The belief that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

## **THE GOVERNMENTAL IMMUNITY STATUTE**

### **OVERVIEW**

Governmental immunity is codified in s. 893.80, Stats. Broadly speaking, the governmental immunity statute addresses: notice requirements, immunity for intentional and discretionary acts, and damages. The sections below briefly describe each aspect of the governmental immunity statute.

### **NOTICE REQUIREMENTS**

Under s. 893.80 (1d), Stats., the plaintiff must serve written notice of the claim upon the governmental entity or its officer within 120 days after the event giving rise to the claim. Failure to give this notice does not bar the claim if the plaintiff can demonstrate that the defendant had actual notice of the claim and was not prejudiced by the lack of written notice.<sup>3</sup>

### **IMMUNITY FOR INTENTIONAL ACTS OF OFFICERS AND EMPLOYEES**

Section 893.80 (4), Stats., provides that “[n]o suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts<sup>4</sup> of its officers, officials, agents, or employees.” Note that the

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<sup>3</sup> Also note that courts will consider the immunity defense waived if the defendant does not raise it in a responsive pleading or by motion. [s. 802.02 (3), Stats.]

<sup>4</sup> A tort is a wrongful act that causes harm to another and may result in civil liability.

statute grants immunity for intentional acts to governmental entities, but not directly to their officers or employees.

### ***IMMUNITY FOR DISCRETIONARY ACTS OF OFFICERS AND EMPLOYEES***

Section 893.80 (4), Stats., states “[n]o suit may be brought against any...[political] corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.” This statutory language has been collectively interpreted by the courts to include any act that involves the exercise of discretion and judgment. [*Lodl v. Progressive N. Ins. Co.*, 2002 WI 71 at ¶ 21.]

Generally, units of government, their officers, and their employees are immune from liability for damages resulting from their discretionary acts. For example, an officer is not liable for damages resulting from a mistake in judgment, provided the officer is specifically empowered to exercise such judgment. [*Lister*, 72 Wis. 2d at 301-02.]

Wisconsin courts have characterized many different types of actions as “discretionary.” This determination depends to a great extent on the particular facts of each case. Examples of the types of actions that have been found to be “discretionary” and therefore within the scope of immunity include:

- Decisions made by a town and its police officer related to the control of traffic during a weather-related power outage. [*Lodl*, 2002 WI 71.]
- A parole agent’s decision to permit a parolee to operate a motor vehicle, despite his previous use of a vehicle to abduct and sexually assault victims. [*C.L. v. Olson*, 143 Wis. 2d 701 (1988).]
- A park planner’s decisions regarding missing-person reports and the use of life jackets. [*Stann v. Waukesha Cnty.*, 161 Wis. 2d 808 (Ct. App. 1991).]
- A benefits specialist’s incorrect advice regarding employee health benefits. [*Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81 (1999).]
- A high school guidance counselor’s incorrect advice regarding a student’s athletic scholarship eligibility requirements. [*Scott*, 2003 WI 60.]

[Corey F. Finkelmeyer et al., *Wisconsin Governmental Claims and Immunities Handbook*, Ch. 3, Pg. 12-19 (3rd ed. 2015).]

### ***DAMAGES***

If immunity does not apply and the court decides in the plaintiff’s favor, the amount of money awarded to the plaintiff will be subject to damages limitations in s. 893.80 (3), Stats.<sup>5</sup> In general, the amount of damages may not exceed \$50,000. In an action against a volunteer fire company

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<sup>5</sup> Municipal entities may also be subject to orders for equitable relief. [*See Lister*, 72 Wis. 2d at 304; *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶ 33 (citing *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 352 (Ct. App. 1996)); and *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 63.] Equitable relief is generally a non-monetary remedy where the court issues an order to do something or to refrain from doing something.

organized under ch. 181 or 213 or its officers, the amount of damages may not exceed \$25,000. The statute also prohibits the recovery of punitive damages.<sup>6</sup>

Governmental entities are required to indemnify their officers and employees for suits related to acts committed within the scope of their employment. [s. 895.46, Stats.] Thus, it is possible for a plaintiff to indirectly recover damages from a unit of government by filing suit directly against an officer or employee.

## **EXCEPTIONS ESTABLISHED IN CASE LAW**

### **OVERVIEW**

There are four narrow exceptions to governmental immunity that have been established in Wisconsin case law. These exceptions allow units of government or their officers or employees to be held liable for an action or inaction undertaken in the scope of employment. The exceptions balance “the need of public officers to perform their functions freely [and] the right of an aggrieved party to seek redress.” [*Lister*, 72 Wis. 2d at 300.] Specifically, there is no immunity against liability associated with:

- The performance of ministerial duties imposed by law.
- Known and compelling dangers that give rise to ministerial duties.
- Discretionary medical decisions.
- Malicious, willful, and intentional acts.

[*Lodl*, 2002 WI 71 at ¶ 24.]

The following sections describe these exceptions to governmental immunity. If the facts warrant the application of one of these exceptions, then immunity is not granted and that unit of government or its officers or employees may be held liable.

### **PERFORMANCE OF MINISTERIAL DUTIES EXCEPTION**

Governmental actions are either discretionary or ministerial, so that a non-discretionary act may generally be described as ministerial. This distinction is important because s. 893.80, Stats., does not grant immunity for ministerial duties as it does for discretionary acts. In *Lodl*, the Wisconsin Supreme Court stated, “[t]he ministerial exception is not so much an exception as a recognition that immunity law distinguishes between discretionary and ministerial acts, immunizing the performance of the former but not the latter.” [2002 WI 71 at ¶ 26.]

A ministerial duty is more than just a generalized duty to act. Rather, it is a duty that “is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that *nothing remains for judgment or discretion.*” [*Lister*, 72 Wis. 2d at 301 (emphasis added).] Thus, a duty is ministerial if:

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<sup>6</sup> Punitive damages exceed simple compensation and are awarded to punish the defendant.

- The duty to perform has been explicitly imposed by law.
- The duty to perform has specific requirements in terms of the time, mode, and occasion of performance.
- The duty to perform under the specified conditions does not depend upon the exercise of judgment or discretion.

The Wisconsin Supreme Court has recognized that under this definition of ministerial duty, “many governmental actions, even those done under a legal obligation, qualify as discretionary because they implicate some discretion.” [Scott, 2003 WI 60 at ¶ 28.] Where a duty has been expressly defined by a written law or policy, a court will look to that language to evaluate whether there is room for discretion. [Pries v. McMillon, 2010 WI 63 at ¶ 26.] The Wisconsin Supreme Court has not expressly defined the source of law that is sufficient to establish a ministerial duty, but has assessed a wide variety of materials to determine whether a ministerial duty existed, including an employee policy manual, a police department operations policy, and an employee job description. [Id. at ¶ 31 (citations omitted).]

Examples of the types of actions that courts have deemed ministerial, and thus outside the scope of immunity, include:

- Following an employer’s long-standing, written instructions containing mandatory language that describes a nondiscretionary procedure for dismantling structures on the employer’s premises. [Pries, 2010 WI 61.]
- Installing a water main at the depth required by the governing administrative code provision. [DeFever v. City of Waukesha, 2007 WI App 266.]
- Truthfully representing the condition of property in a sale. [Major v. County of Milwaukee, 196 Wis. 2d 939 (Ct. App. 1995).]
- Complying with an administrative code provision regarding safety railings on stadium platforms. [Umansky v. ABC Ins. Co., 2008 WI App 101.]
- Seeking a court order for the removal or destruction of a vicious animal in accordance with a city ordinance. [Turner v. City of Milwaukee, 193 Wis. 2d 412 (Ct. App. 1995).]

[Corey F. Finkelmeyer et al., *Wisconsin Governmental Claims and Immunities Handbook*, ch. 3, pg. 19-20 (3rd ed. 2015).]

The Wisconsin Supreme Court has acknowledged the possibility that public officers and employees may become bound by a ministerial duty to act in a certain manner once they make a discretionary decision to act. [Bicknese v. Sutula, 2003 WI 31, ¶ 26; see also Kierstyn, 228 Wis. 2d 81 at 93.] In such cases, the officers and employees do not initially have to act, but once they choose to act, they face “a specific legal obligation to do so in a prescribed manner.” [Kierstyn, 228 Wis. 2d at 93.]

#### ***KNOWN AND COMPELLING DANGERS EXCEPTION***

The known and compelling dangers exception is “a narrow, judicially created exception that arises only when there exists a danger that is known and compelling enough to give rise to a ministerial duty on the part of a municipality or its officers.” [Lodl, 2002 WI 71 at ¶ 4.] It was

first recognized by the Wisconsin Supreme Court in 1977. [See *Cords v. Anderson*, 80 Wis. 2d 525 (1977).] The known danger must be of such quality that the officer or employee has an “absolute, certain and imperative” ministerial duty to act. [*Lister*, 72 Wis. 2d 282 at 301.] Thus, the hazardous circumstances must require more than just any action in order for the known danger exception to apply. The “danger must be compelling enough that a self-evident, particularized, and non-discretionary municipal response is required.” [*Lodl*, 2002 WI 71 at ¶ 40.]

Unlike the ministerial duty exception, in order for the known and compelling danger exception to apply, it is not necessary that the duty to act be prescribed and defined by law. Instead, for the exception to apply, the *circumstances* must give rise to a particularized duty because the known and compelling danger “is of such force that the public officer has no discretion not to act.” [*Lodl*, 2002 WI 71 at ¶ 34.] For example, in *Cords*, the Supreme Court of Wisconsin held that a sharp drop into a deep gorge just inches away from a public hiking trail created a ministerial duty to warn hikers of the nearby danger.

Generally, if liability is premised upon the negligent performance (or non-performance) of a ministerial duty that arises by virtue of a known and compelling danger, then immunity will not apply. However, case law indicates that not every dangerous situation will give rise to a ministerial duty and destroy immunity. [*Lodl*, 2002 WI 71 at ¶ 40.] Therefore, courts evaluate each immunity claim on a case-by-case basis.

#### ***MEDICAL DISCRETION EXCEPTION***

This exception only applies to cases involving medical discretion, where public officers or employees (such as medical examiners) have made discretionary medical decisions. Although there is immunity for discretionary governmental decisions, this immunity does not extend to discretionary medical decisions.

This exception was first recognized in *Scarpaci v. Milwaukee County*, where the Wisconsin Supreme Court held a medical examiner liable for negligently performing an autopsy. [96 Wis. 2d 663, 686 (1979).] In *Scarpaci*, the Court explained that even though the medical examiner was a municipal employee making a discretionary decision, immunity did not apply because the policy considerations underlying the creation of governmental immunity were not relevant to the exercise of normal medical discretion.

Although this exception is sometimes referred to as the “professional discretion exception,” it has only been applied in a total of three cases, all involving discretionary medical decisions. [*Scott*, 2003 WI 60 at ¶ 31.] In *Stann*, the Wisconsin Court of Appeals explicitly limited the exception to the medical context. [161 Wis. 2d 808 at 818.]

#### ***MALICIOUS, WILLFUL AND INTENTIONAL ACTS EXCEPTION***

As previously stated, units of government, their officers, and their employees are generally immune from liability for damages resulting from discretionary acts. However, immunity is not granted if the action or inaction was the result of malicious, willful, and intentional conduct.

Although the exception has occasionally been applied to malicious, willful, or intentional conduct, most courts have declined to apply the exception unless the act was malicious, willful, and intentional. [*Bicknese*, 2003 WI 31 at ¶ 18.] The Wisconsin Supreme Court reasoned that because most actions are done intentionally, mere intent alone is not sufficient for the exception

to apply. The inclusion of the terms “malicious” and “willful” indicates that “the exception should apply only to ill-intended acts, as opposed to all ‘intentional’ actions.” [*Id.* at ¶ 19.]

### **IMMUNITY UNDER PARTICULAR CIRCUMSTANCES**

The Legislature may create immunity-related statutes that address liability for discrete situations. Section 893.80 (5), Stats., allows for other statutes related to governmental immunity to apply instead of s. 893.80, Stats.

For example, s. 893.83, Stats., previously addressed municipal liability for damages caused by highway defects. It provided for a municipality to be held liable for damages of up to \$50,000 that “happen to any person or his or her property by reason of the insufficiency or want of repairs of any highway that any town, city, or village is bound to keep in repair.”

However, 2011 Wisconsin Act 132 eliminated the statutory provision under which municipalities could be held liable for damages resulting from the insufficiency or want of repair of a highway the municipality is bound to keep in repair. Therefore, claims for damages caused by highway defects are now subject to the governmental immunity defense created in s. 893.80 (4), Stats. Under current law, s. 893.83, Stats., limits liability for municipalities for damages related to the accumulation of snow or ice. It provides:

No action may be maintained against a city, village, town, or county to recover damages for injuries sustained by reason of an accumulation of snow or ice upon a bridge or highway, unless the accumulation existed for three weeks. Any action to recover damages for injuries sustained by reason of an accumulation of snow or ice that has existed for three weeks or more upon any bridge or highway is subject to s. 893.80.

The history of s. 893.93, Stats., illustrates the relationship between s. 893.80, Stats., and other immunity-related statutes that address liability under particular circumstances.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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