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Issue: When do municipal policies negate the immunity defense under sec. 893.80(4), Stats.?

Conclusion: Policies drafted in a manner that require municipal employees to carry out duties in specific ways and do not allow for any discretion and judgment create an exception to immunity and allow for liability for negligent acts. The term "shall" in policies should be avoided because it has been held to create ministerial duties and negate immunity.

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Section 893.80(4), Stats., affords municipal entities, officials and employees immunity for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. *Kimps v. Hill*, 200 Wis. 2d 1, 10 n. 6, 546 N.W.2d 151 (1996); *C.L. v. Olson*, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (1988). Section 893.80(4), Stats., provides in relevant part:

No suit may be brought against any . . . political corporation, governmental subdivision, or any agency thereof . . . or against its officers, officials, agents, or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

The terms "quasi-judicial" and "quasi-legislative" are synonymous with "discretionary". *Johnson v. City of Edgerton*, 207 Wis. 2d 345, 355, 558 N.W.2d 653 (Ct. App. 1996). A quasi-judicial or quasi-legislative or discretionary act involves "judgment and discretion". *Kimps*, 200 Wis. 2d at 15. Negligence is assumed, and immunity has four exceptions, applicable where:

1. the law itself expressly defines the time, mode and occasion for performance of the duty, leaving no room for the exercise of discretion;
2. an existing "known present danger" makes the duty to remedy the danger "so clear and so absolute" that there is no room for discretion
3. the conduct arose out of the performance of "professional" conduct; or
4. the conduct was "malicious, willful and intentional".

*Kierstyn v. Racine Unified School District*, 202 Wis.2d. 290, 299, 550 NW.2d. 103 (1996); quoting *Kimps*, 200 Wis. 2d at 10-11.

Policies and procedures that do not allow for the exercise of judgment and discretion create ministerial duties and negate immunity because the term "law" under the first exception includes "statutes, administrative rules, policies or orders[,] plans adopted by a

governmental unit, and contracts entered into by a governmental unit. *Meyers v. Schultz*, 277 Wis.2d 845, 857, 690 N.W.2d 873 (Ct. App. 2004). In *Estate of Cavanaugh v. Andrade*, 202 Wis.2d 290, 550 N.W.2d 103 (1996), the court held the word "shall" in Sec. 346.03(6), Stats. created a ministerial duty on law enforcement agencies to provide written guidelines for the use of emergency vehicles. *Cavanaugh*, 191 Wis.2d at 254. The statute mandated that law enforcement agencies "shall provide written guidelines for its officers" which "shall consider" specific factors." Sec. 346.03(6), Stats. The court found that the failure to provide such guidelines was a violation of a ministerial duty, that the failure to carry out this duty resulted in a death for which the municipality was liable. The court stated:

Section 346.03(6) imposes a duty on law enforcement agencies that use emergency vehicles to establish written guidelines for high-speed pursuits:

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Every law enforcement agency which uses authorized emergency vehicles shall provide written guidelines for its officers and employees regarding exceeding speed limits . . . and when otherwise in pursuit of actual or suspected violators. The guidelines shall consider, among other factors, road conditions, density of population, severity of crime and necessity of pursuit by vehicle.

We agree with the court of appeals that while the promulgation of guidelines in general involves a great amount of governmental discretion, § 346.03(6) makes the inclusion of certain parts of the policy promulgation ministerial. *Cavanaugh*, 191 Wis.2d at 254. The statute mandates that law enforcement agencies "shall provide written guidelines for its officers" which "shall consider" specific factors. These actions are "absolute, certain and imperative, involving merely the performance of a specific task." *Kimps*, 200 Wis.2d at 10. Accordingly, the City is not immune from liability for damages caused by a breach of the ministerial duty set forth in § 346.03(6).

On the other hand, policies, procedures and administrative rules that allow for or require the exercise of judgment do not create ministerial duties. An example of the kinds of policies that do not create ministerial duties or negate immunity is found in *Ottinger v. Pinel*, 215 Wis.2d 266, 572 N.W.2d 519 (Ct.App. 1997) (overruled on another point of law.) The plaintiff was attempting to cross Sheridan Road in Kenosha County when he was struck by a state-owned van operated by Christopher J. Melik. Melik was attempting to escape from the Kenosha Correctional Center (the facility), a minimum security correctional facility.

The plaintiff argued that the guards who allowed Melik to escape were not entitled to

immunity under Sec. 893.90(4), Stats, because the Department of Corrections Securities Policies and Procedures Manual clearly outlined the procedures for escape and apprehension. The manual provided in part:

F. When inmates escape from minimum security facilities, staff have the dual responsibility to give proper notification to authorities and to attempt to apprehend the escapee. Dependent upon the circumstances such as:

1. How long the inmate has been gone;
2. Did you observe the inmate run toward the door;
3. The available staff to pursue and apprehend and yet have staff stay and safely supervise the remaining inmates.

G. Pursuit of inmates should be coordinated with law enforcement. Normally the County Sheriff's Department will take the key role. Staff from minimum security facilities are not authorized to carry or use firearms.

J. Staff are to make every reasonable effort to apprehend inmates attempting to escape.

M. If an inmate escapes there is a duty to notify and also to apprehend if possible, however it is of paramount importance that other inmates at the facility are properly accounted for and supervised so other inmates don't get escape fever.

The court held that the policies did not create ministerial duties, because they were "written in discretionary terms." The court stated: "None are absolute, certain and imperative, involving merely the performance of a specific task prescribed by the law such that nothing remains for judgment or discretion. Despite the general duty to prevent an escape, correctional officers are given wide latitude in determining how to handle an escape, how much force, if permitted, is necessary to prevent an escape and at what point to stop the pursuit. Not only do the guards have a duty to prevent and/or pursue an escapee, they have a specific and competing duty to maintain order in the facility by supervising the remaining, nonescaping inmates. Such duties require quick judgment by the guards on the appropriate action to take and, therefore, are not ministerial." *Ottinger*, 215 Wis.2d at 274.

To avoid creating policies that negate immunity, policies should be drafted in a manner that requires municipal employees to exercise discretion and judgment in carrying out their duties, and avoids imposing mandatory duties. The term "shall" in statutes and policies should be avoided because it has been held to create ministerial duties and negate

immunity.