



BY JOHN A. BECKER

As I See It:

Does Governmental Immunity Relieve a Governmental Entity from Liability for a Safe Place Violation?



Liability for governmental entities for safe-place-statute violations is unclear because of conflicting opinions from the Wisconsin Supreme Court and the Wisconsin Court of Appeals. The supreme court can restore harmony on the topic but only if and when it accepts review of a case involving a person injured in a public building owned by a governmental entity.

The Wisconsin Supreme Court, going back almost 100 years, has held that governmental immunity does not protect a governmental entity from liability when there is a violation of the safe place statute. However, the most recent supreme court decision was in the 1960s. The most recent published Wisconsin Court of Appeals decision, from 1997, is in direct conflict with the supreme court decisions.

Safe Place Statute

Wisconsin’s safe place statute, part of Wis. Stat. section 101.11, imposes a higher duty of care on owners of places of employment and public buildings and requires owners and employers to maintain their premises as reasonably safe as possible:

101.11(1) ... Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

Wis. Stat. chapter 101 defines some of the key terms, including “safe” and “safety”:

101.01(13) “Safe” or “safety”, as applied to ... a public building, means such freedom from danger to the life, health, safety or welfare of employees or frequenters, or the public, ... as the nature of the ... public building, will reasonably permit.

A violation of the safe place statute constitutes negligence.¹

Governmental entities (and other nonprofit entities) do not have liability under the safe place statute as owners of places of employment. That is because place of employment is defined as, “every place ... where ... industry, trade or business is carried on ... and where any person is ... employed by another for direct or indirect gain or profit.”² Because governmental entities and nonprofit organizations usually do not operate for gain or profit, the premises are generally not considered

to be places of employment.³

Such entities, however, can be owners of public buildings under the statute. *Public building* is defined as “any structure ... use(d) by the public or 3 or more tenants.”⁴ “Owner means any person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations”⁵

Governmental Immunity

Before 1962, governmental immunity relieved governmental employees and governmental entities of liability when an employee was negligent. An exception to that rule was that liability could apply if the employee was performing a ministerial function. *Holytz v. City of Milwaukee* supposedly made liability the rule and immunity the exception. In *Holytz*, the Wisconsin Supreme Court stated the following:

“By reason of respondeat superior a public body shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body.

“Perhaps clarity will be afforded by our expression that henceforward, so far as governmental responsibility for torts is concerned, the rule is liability – the exception is immunity. In determining the tort liability of a municipality it is no longer necessary to divide its operations into those which are proprietary and those which are governmental....

“This decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions.”⁶

Holytz was then codified in Wis. Stat. section 893.80.⁷ However, even before *Holytz*, when immunity was the rule and not the exception, governmental immunity did not excuse entities or their employees from complying with the safe place statute.

Governmental Immunity Before *Holytz*

Before *Holytz*, which was decided in 1962, the supreme court had consistently held that the safe place statute applied to governmental entities as owners of public buildings, and governmental immunity did not relieve them of liability for a safe place violation. The most recent supreme court case that directly addressed this issue was in 1966.⁸ The problem is that a 1997 Wisconsin Court of Appeals decision, *Spencer v. County of Brown*,⁹ directly contradicts the earlier supreme court decisions.

Supreme Court Decisions Before *Holytz* (and *Spencer*). The first case to directly address this issue was *Heiden v. City of Milwaukee*.¹⁰ In *Heiden*, the plaintiff recovered from the city of Milwaukee for a safe place violation. The plaintiff had been injured on a poorly lit stairway in a city-owned school building.

“The words of the statute are clear, plain, and unambiguous, and ... are clearly applicable to a school building, owned by a city, and to a frequenter who may go in or be in such a public building”¹¹

“We think it clear, therefore, that the Legislature fully intended that the ‘safe place’ law should apply to cities and school districts.”¹²

“It is our conclusion that the Legislature intended that cities and school districts, as owners of public buildings, should be subject to the ‘safe place’ statute regardless of whether at a given time they are acting in a proprietary or governmental capacity and that a city or school district may be liable to a frequenter who is injured in one of their public buildings, when such injury is proximately caused by a lack of safety, as defined by law, i. e., unsafe construction or unsafe maintenance.”¹³

In numerous cases after *Heiden*, the supreme court clearly stated that the

safe place statute applied to governmental entities:

- “It is clear enough therefore that under the statute as construed in the *Heiden* case a county is liable under the safe place statute.”¹⁴

- “To apply the [immunity] rule as contended by the city would be to abrogate the exception provided for in this section. Such an argument was rejected in ... *Heiden v. City of Milwaukee*”¹⁵

- “The defense of governmental function is not available under the safe place statute.”¹⁶

- “The safe-place statute applies to cities, regardless of whether at a given time they are acting in a proprietary or governmental capacity. This is an illustration of a statutory limitation upon the immunity of a city from liability for a tort committed in the exercise of a governmental function.”¹⁷

- “The immunization of municipalities from tort liability has been chipped away by a number of statutes in this state. Some examples are [Wis. Stat. sections] 101.01 and 101.06 ... (safe place statute).”¹⁸

- “If it can be said that the appellant school district is an ‘owner’ upon the facts of this case, then it is impressed with a non-delegable duty to make the bleachers safe under [Wis. Stat. section] 101.06.”¹⁹

Thus, even before *Holytz*, when the general rule was immunity, governmental entities were subject to potential liability for safe place violations. *Holytz* was meant to expand liability and make it easier to hold such entities liable for negligence. *Spencer* did the opposite.



John A. Becker, U.W. 1982, is a partner in Becker & French, Racine. He is a member of the State Bar of Wisconsin's Senior Lawyers Division. Access the digital article at www.wisbar.org/wl.

jab@beckerfrench.com

SPECIAL OPPORTUNITY

- Older very experienced rainmaker and building owner – Milwaukee Area
- Wants to partially retire but still be involved in cases and strategies.

Looking for approximately 3-5 person attorney firm or group for mutually advantageous arrangements that includes providing you with high quality/low cost office space.

Open to various possible proposals including sharing support personnel, consulting on cases, etc.

Please reach out with interest to Blindbox@wisbar.org and include #675 in the subject line.

Spencer v. County of Brown

In *Spencer*, the plaintiff was injured in a county jail. The court of appeals accepted that the jail was a public building²⁰ but held that *how* to comply with the safe place statute was discretionary, and thus, governmental immunity relieved the county of liability for the alleged safe place violation. “[W]hile the safe-place statute imposes a duty on owners of public buildings to maintain safe place premises for employees and frequenters, the duty set forth in [Wis. Stat. section] 101.11 ... does not rise to the level of imposing a ministerial duty for purposes of analyses under [Wis. Stat. section] 893.80(4).”²¹

Spencer made the right to bring a safe-place claim against a governmental entity even more restrictive than before *Holytz*. How did the *Spencer* court come to such a conclusion despite the above supreme court cases? The reason for this can be discovered by reviewing

*Anderson v. City of Milwaukee*²² and the briefs that were filed in *Spencer*.

Anderson Opinions. *Anderson v. City of Milwaukee* was decided by the court of appeals and then by the supreme court. The *Spencer* court referred to the cases as *Anderson I* (court of appeals) and *Anderson II* (supreme court).

In *Anderson*, the plaintiff fell on property owned by the city of Milwaukee. The jury returned a verdict of over \$400,000. On appeal, the city argued that it was entitled to governmental immunity with respect to the negligence and safe place claim and that the \$50,000 statutory cap applied to the damages.

The court of appeals affirmed the verdict. With respect to the statutory cap, the court of appeals held that the city failed to raise it as an affirmative defense and therefore waived its right to challenge that issue.

With respect to governmental immunity, the court of appeals held that

the city had a ministerial duty to comply with the safe place statute. “Once the City exercised its overall discretion and decided to design and construct the farmer’s market, it had to comply with the Safe Place statute mandates.... While designing a walkway does invoke an architect’s or engineer’s professional exercise of discretion ..., this creative discretion is eclipsed by the City’s ‘ministerial’ duty to comply with the safe-place statute.”²³

In *Anderson II*, the supreme court reversed on the issue of the statutory-damages limitation and held that a municipality cannot impliedly waive the statutory limit merely by failing to raise it as an affirmative defense. The supreme court held that the city waived the discretionary immunity defense by not raising it timely. The supreme court remanded the matter to the circuit court to enter judgment for the plaintiff for \$50,000.



Young lawyers, make yourselves HEARD

Bottom Up - A WisLawNOW podcast for young lawyers, by young lawyers featuring real talk on practicing law your way.

Listen wherever you get your podcasts.

www.wisbar.org/podcast




Co-hosts Emil Ovbiagele and Kristen Hardy



NICOLET LAW
ACCIDENT & INJURY LAWYERS







Bottom Up

A WisLawNOW Podcast



STATE BAR OF WISCONSIN

CP1180 6/25

The supreme court stated, “because we conclude that the City waived the discretionary immunity defense, we do not reach the issue of whether the City has a ministerial duty to comply with the safe-place statute.” The problem is that, in a footnote to that sentence, the court stated that because “this determination is dispositive, and [because], therefore we do not reach the ministerial duty-safe place, we emphasize that our decision should not be taken as approval of the reasoning of the Court of Appeals on that issue.”²⁴

Spencer was decided after *Anderson II*. The *Spencer* court did not seem to look beyond the supreme court decision in *Anderson II*. *Spencer* interpreted *Anderson II* as holding that how to comply with the safe place statute is discretionary, not ministerial; therefore, governmental immunity relieved the municipality from liability for not complying with the statute.

The *Spencer* court said, “Based on the status of the *Anderson* decisions, we decline to follow *Spencer*’s invitation to apply the reasoning that has not been approved by our State Supreme Court though not specifically overruled We agree with the defendants that

while the safe place statute imposes a duty on owners of public buildings to maintain safe premises for employees and frequenters, the duty set forth in [Wis. Stat. section] 101.11 ... does not rise to the level of imposing a ministerial duty for purposes of analysis under [Wis. Stat. section] 893.80(4).”²⁵ *Spencer* was the first case in which a Wisconsin appellate court held that governmental immunity relieves a municipality from complying with the safe place statute.

Review of *Spencer* Reasoning

Why did the court of appeals in *Spencer* conclude that governmental immunity relieves entities from liability for a safe place violation when the supreme court said the opposite?

The eight supreme court cases cited above specifically stated that governmental immunity did not relieve a municipality from complying with the safe place statute. All the cases, except *Novak*, were decided before *Holytz*. Thus, although a municipality had general immunity for negligence before *Holytz*, a plaintiff could still recover against a municipality for violation of the safe place statute.

Although *Holytz* was meant to expand

a person’s right to recover from a governmental entity, the *Spencer* decision is even more restrictive than the law before *Holytz*. This result is inconsistent with both the prior supreme court decisions and the intent of *Holytz*.

A review of the briefs that were filed in the *Spencer* case reveals that the plaintiff in *Spencer* did not cite any of the above supreme court decisions that specifically stated that governmental immunity does not apply to a safe place claim. The plaintiff in *Spencer* only argued that *Anderson II* did not address the issue and the language in *Anderson I* was controlling.²⁶

Thus, the problem now is that there is a 1997 court of appeals decision holding that governmental immunity does apply to safe place claims, and eight supreme court decisions from 1966 and earlier that state that governmental immunity does not apply to safe place claims.

The ruling in *Anderson II* was based on the fact that the city did not timely raise the defense. The *Anderson II* court was clear that it was neither adopting nor rejecting the language in *Anderson I*.

After *Spencer*

Spencer was followed in an unpublished opinion, *Larsen v. Wisconsin County Mutual Insurance Co.*²⁷ As in *Spencer*, the *Larsen* plaintiff did not cite any of the above supreme court cases. The plaintiff merely tried to distinguish its facts from the facts in *Spencer*.

This issue arose again in *Rogers v. Slinger School District*. In *Rogers*, the circuit court held that how to comply (not whether to comply) with the statute was discretionary, and therefore governmental immunity relieved a school district from complying with the safe place statute.

The supreme court chose not to accept a petition to bypass in *Rogers*,²⁸ and the court of appeals’ hands were tied.²⁹ In Wisconsin, a court of appeals does not have the authority to reverse a prior decision of another court of appeals,³⁰ and a court of appeals also does not have the authority to reverse a supreme court decision.³¹

MOORE’S LAW

ADVANCING YOUR LEGAL CAREER EXPONENTIALLY



For more than 15 years Michael Moore, J.D., has been helping Wisconsin lawyers and their law firms with:

- Strategic Planning**
- Succession Planning**
- Talent Retention and Development**
- Improved Operations and Management**

For a free consultation contact me at:
mmoore@moores-law.com or (414) 467-5983.

“Even if you’re on the right track,
 you’ll get run over if you just sit there.”

The court of appeals in *Rogers* reversed the circuit court on a more limited ground. The court of appeals held that because a defect in the bleachers was known to the school district, the known-and-compelling danger was so apparent that the school district had a ministerial duty to protect people from the defect.³²

Because the plaintiff prevailed in the court of appeals, there was no reason to then petition the supreme court for review. Thus, there remains a clear conflict between the result reached in *Spencer* and the earlier supreme court decisions. Because a court of appeals cannot overrule the *Spencer* decision nor prior supreme court decisions, this matter can only be resolved by the supreme court.

Conclusion

Even before *Holytz*, when the general rule was immunity, governmental immunity did not protect a governmental entity from liability for safe place violations. *Holytz* was meant to expand liability. *Spencer* relieves a municipality from complying with the safe place statute and restricts a plaintiff's rights even more than before *Holytz*.

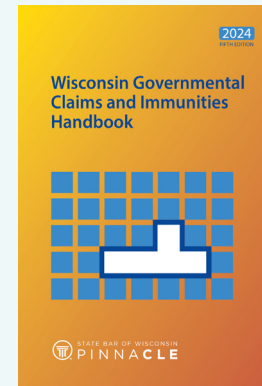
This author hopes that the supreme

ALSO OF INTEREST

Get the Guide to Governmental Tort Litigation

The *Wisconsin Governmental Claims and Immunities Handbook* is your guide to the world of governmental tort litigation. The book's topics will help you understand sovereign immunity, governmental immunity, and discretionary immunity; the parameters of absolute and qualified immunity and when exceptions apply; local governmental immunities; and Wisconsin's recreational immunity statutes. The book also describes Wisconsin's key notice requirements for claims against the state or a municipality.

This is the first book to compile all the relevant governmental immunity statutes, both state and federal, in one handy resource. It includes appendices with selected statutory chapters on all



types of immunity, notice procedures, and the Federal Tort Claims Act.

Required reading for plaintiffs' attorneys and government attorneys alike, the *Wisconsin Governmental Claims and Immunities Handbook* is an essential resource for anyone involved with a claim against a governmental entity.

www.wisbar.org/ak0186 **WL**

court will again have the opportunity to resolve the clear conflict between

Spencer and earlier supreme court decisions. **WL**

ENDNOTES

¹*Hofflander v. St. Catherine's Hosp.*, 2003 WI 77, ¶ 96, 262 Wis. 2d 539, 664 N.W.2d 545.

²Wis. Stat. § 101.01(11).

³There are exceptions to this rule, which will not be discussed here.

⁴Wis. Stat. § 101.01(12).

⁵Wis. Stat. § 101.01(10).

⁶*Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39-40, 115 N.W.2d 618 (1962).

⁷*Patterman v. City of Whitewater*, 32 Wis. 2d 350, 145 N.W.2d 705 (1966). The courts have been inconsistent in applying the *Holytz* rule and there are other issues with the courts' current application of governmental immunity, but those are not discussed here. For further discussion, see John Becker, *Figuring Out Governmental Immunity*, Wis. Law., Sept. 2023.

⁸*Novak v. City of Delavan*, 31 Wis. 2d 200, 207, 143 N.W.2d 6 (1966).

⁹*Spencer v. County of Brown*, 215 Wis. 2d 641, 573 N.W.2d 222 (Ct. App. 1997).

¹⁰*Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W.2d 922 (1937).

¹¹*Id.* at 98.

¹²*Id.* at 100.

¹³*Id.* at 101.

¹⁴*Flynn v. Chippewa Cnty.*, 244 Wis. 455, 457, 12 N.W.2d 683 (1944).

¹⁵*Laffey v. City of Milwaukee*, 8 Wis. 2d 467, 470-71, 99 N.W.2d 743 (1959).

¹⁶*Potter v. City of Kenosha*, 268 Wis. 361, 371, 68 N.W.2d 4 (1955) (citing *Heiden*, 226 Wis. 92, and 114 A.L.R. 420).

¹⁷*Flesch v. City of Lancaster*, 264 Wis. 234, 237, 58 N.W.2d 710 (1953) (citing *Heiden*, 226 Wis. 92, and 114 A.L.R. 420).

¹⁸*Holytz*, 17 Wis. 2d at 36.

¹⁹*Novak*, 31 Wis. 2d at 207 (citations omitted); see also *Lawver v. Joint Sch. Dist. No. 1*, 232 Wis. 608, 288 N.W. 192, 194 (1939) (citation omitted). The school district, in the exercise of a governmental function, would not be legally chargeable with negligence. Of course, the safe place statute applies to schools and school districts.

²⁰*Spencer*, 215 Wis. 2d at 649 (citing *Henderson v. Milwaukee Cnty.*, 198 Wis. 2d 747, 543 N.W.2d 544 (Ct. App. 1995)).

²¹*Spencer*, 215 Wis. 2d at 652.

²²*Anderson v. City of Milwaukee (Anderson I)*, 199 Wis. 2d 479, 493, 544 N.W.2d 630 (Ct. App. 1996); *Anderson v. City of Milwaukee (Anderson II)*, 208 Wis. 2d 18, 37, 559 N.W.2d 5 (1997).

²³*Anderson I*, 199 Wis. 2d at 493-94.

²⁴*Anderson II*, 208 Wis. 2d at 37.

²⁵*Spencer*, 215 Wis. 2d at 651, 652.

²⁶In fairness to the *Spencer* court, it is easy to understand how the court reached the conclusion that it did if one looks only at *Anderson I* and *Anderson II* (the only cases cited).

²⁷*Larsen v. Wisconsin Cnty. Mut. Ins. Co.*, No. 2013AP2395, 2014 WL 2974214 (Wis. Ct. App. July 3, 2014) (unpublished).

²⁸This might have been because there were numerous other issues on appeal that did not merit supreme court review.

²⁹*Rogers v. Slinger Sch. Dist.*, No. 2023AP1867, 2025 WL 865807 (Wis. Ct. App. March 19, 2025) (unpublished).

³⁰*Cook v. Cook*, 208 Wis. 2d 166, 171, 190, 560 N.W.2d 246 (1997).

³¹*Id.* at 189.

³²*Rogers*, 2025 WL 865807, ¶¶ 17-20 (citing *Cords v. Anderson*, 259 N.W.2d 672, 80 Wis. 2d 525 (1977)). **WL**