COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP801 **Cir. Ct. No. 2014CV1085**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MICHAEL ENGELHARDT, JULIEANN ENGELHARDT, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF LILY ENGELHARDT,

PLAINTIFFS-RESPONDENTS,

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

CITY OF NEW BERLIN, ABC INSURANCE COMPANY AND NEW BERLIN PARKS AND RECREATION DEPARTMENT,

DEFENDANTS-APPELLANTS,

WIBERG AQUATIC CENTER F/K/A WIRTH AQUATIC CENTER AND MNO INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Reversed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 GUNDRUM, J. This case involves the very tragic loss of life of an eight-year-old girl at a local swimming pool during a summer outing with the New Berlin Parks and Recreation Department. The issue we are called upon to decide is whether the City of New Berlin and its recreation department (collectively "New Berlin") are immune from suit pursuant to WIS. STAT. § 893.80(4) (2015-16).[1] We conclude they are.

Background

¶2 In 2012, the New Berlin Parks and Recreation Department took summer day camp participants on various trips, including a trip every Tuesday to Brookfield's Wiberg Aquatic Center. Eight-year-old Lily Engelhardt began the camp on Monday, July 2, 2012. At the end of that first day, Lily's mother spoke with Stuart Bell, the "Playground Coordinator" in charge of the "summer community playground," regarding the Wiberg trip scheduled for the following day. Lily's mother testified at her deposition that she informed Bell that Lily could not swim, and Bell responded: "That's okay. She can stay in the splash pad area." Bell testified at his deposition that "when she told me she was a poor swimmer, I said we would evaluate Lily at the pool. She would be safe."

[1] This court granted leave to appeal the order. *See* WIS. STAT. RULE 809.50(3). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 Bell further testified that before boarding the buses for Wiberg on Tuesday, July 3, 2012, recreation department staff spoke with campers in the gym regarding proper behavior at the pool and also told them that anyone new to the camp (as Lily was) would "need to find a leader so that we can evaluate your swimming ability." Staff "asked all of … the children who were new to find a leader who would take them to" the shallow end or zero depth area of the pool. Bell notified campers that he would be at a picnic table on the pool deck, and campers were divided into four color groups based largely upon their age and/or size.

¶4 According to Bell, a total of seventy-seven campers went on the trip to Wiberg that day, with sixty-four of those being from Bell's community playground group.[2] At least seven staff supervised the sixty-four, with "specific staff … assigned to the different colored groups." Staff wore distinctive shirts so children could identify them at the pool. At his deposition, Bell could not clearly remember but indicated "[p]robably two to three" staff members were assigned to supervise the youngest group, the red group, which was the group to which Lily was most likely assigned. Bell estimated that the red group consisted of maybe twelve to fifteen children but "[c]ould be up to 20."

¶5 Upon exiting the buses at Wiberg, the campers were separated by gender and color group and proceeded into the locker rooms to change. Bell

[2] New Berlin's summer day camp served three groups of children: special needs children in its "SNAP" program, children ages five to six in its "playground juniors" program, and children ages six to twelve in its "community playground" program. Although the parties agree there were a total of seventy-seven campers, sixty-four of whom were from the community playground program, there appears to be some modest discrepancy with those numbers and the July 3, 2012 swimming sign-in sheet. As this discrepancy does not affect the outcome of this decision, we will use the parties' numbers.

testified "some staff were helping with kids changing, others were proceeding out of the locker room onto the deck; and … basically, staff were helping children where they felt they were needed the most at that particular time." Bell went through the locker room and established himself at a picnic table on the pool deck. Some staff were still in the locker room, some were on the pool deck, and "we were starting to get kids coming out of the locker room," around the time Lily was discovered in the pool.

¶6 Lily died from the incident, and her parents filed suit against New Berlin as well as other defendants. New Berlin moved for summary judgment, arguing inter alia that, as a government entity, it is immune from suit pursuant to WIS. STAT. § 893.80(4). The circuit court denied the summary judgment motion; New Berlin moved for leave to appeal, and we granted its motion. Additional facts will be provided as necessary.

Discussion

¶7 When the material facts are undisputed, as in this case, the question of whether a municipal entity is immune from suit pursuant to WIS. STAT. § 893.80(4) is a question of law we review de novo. ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 88, 596 N.W.2d 417 (1999). Our review of a circuit court's decision on summary judgment is also de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

¶8 WISCONSIN STAT. § 893.80(4) provides that "[n]o suit may be brought against any … political corporation, governmental subdivision or agency … for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-

judicial functions." Such acts "have been collectively interpreted to include any act that involves the exercise of discretion and judgment." ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314.

¶9 "[I]mmunity under WIS. STAT. § 893.80 is not absolute." ***Kierstyn***, 228 Wis. 2d at 90. For example, immunity does not apply "[i]f liability is premised upon the negligent performance (or non-performance) of a ministerial duty imposed by law or government policy." ***Pries v. McMillon***, 2010 WI 63, ¶22, 326 Wis. 2d 37, 784 N.W.2d 648 (citation omitted). Immunity also does not apply where liability is based upon a public officer's failure to properly respond to a particular danger that is known, present and of such compelling force that a public officer "has no discretion not to act" and "the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion." *See* ***Lodl***, 253 Wis. 2d 323, ¶¶34, 38 (citation omitted).

¶10 The Engelhardts and New Berlin spar over whether Lily's death was the result of discretionary acts or failures to act, and thus New Berlin is entitled to governmental immunity, or was the result of a violation of a ministerial duty, and thus New Berlin is not entitled to immunity. They also disagree over whether New Berlin failed to properly respond in the face of a known, present and compelling danger. We conclude New Berlin is immune under WIS. STAT. § 893.80(4) because Lily's death was not the result of a violation of a ministerial duty, and a known, present and compelling danger did not exist.

Discretionary vs. Ministerial

¶11 "A public officer's duty is ministerial only when it 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." ***Pries***, 326 Wis. 2d 37, ¶22 (quoting ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976)). Stated another way, a ministerial duty is a duty that has been "positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." ***Lodl***, 253 Wis. 2d 323, ¶26 (citation omitted). Thus, to create a ministerial duty, a law or policy must express "the duty and its parameters … so clearly and precisely, so as to eliminate the officials' exercise of discretion." ***Pries***, 326 Wis. 2d 37, ¶26. Our supreme court has recognized that "many governmental actions, even those done under a legal obligation, qualify as discretionary because they implicate some discretion." ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶28, 262 Wis. 2d 127, 663 N.W.2d 715.

¶12 The Engelhardts argue a camp information packet, staff guidelines, and a staff handbook contained written policies camp staff members were required to follow and thus created ministerial duties. They assert New Berlin violated those duties, and as a result, caused Lily's death. We conclude the documents they rely upon did not create ministerial duties.

i. Information Packet

¶13 The Engelhardts first direct us to a Community Playground information packet, which Bell described at his deposition as "the information packet that I sent home to parents of children who [had] sign[ed] up for the playground." The Engelhardts point to a section entitled "Field Trip Procedures" that states:

> The following procedures will be used to ensure the safety of all participants and staff while on field trips.
>
> 1. Prior to departure, all participants will be counted, emergency contact sheets will be secured and roll call taken before leaving the building. The participants will be *divided into small groups which will be with a leader for the duration of the day*. A meeting location and time will be designated for the groups to return. **Have your child wear their Playground T-shirt!**
>
> 2. Prior to departure, while on the bus, a head count will be taken.
>
> 3. *Upon arrival* at the field trip location, *rules and instructions* regarding the facility/activity *will be given*. Participants will be directed to follow the directions that may be given by any staff member who can be identified by their Playground T-shirt.
>
> 4. As return time approaches, participants will be called back to the meeting place to get ready to leave and roll call with head count will be taken.
>
> 5. Participants will return on the same bus they departed on. Once on the bus, another head count will be taken. The bus will not leave the field trip location until all leaders and participants are accounted for.
>
> 6. Upon returning to the school, regular playground activities will continue until normal pick-up time. (Italics added.)

¶14 To begin, this information packet did not create any obligation or ministerial duty for New Berlin staff because it was not a document of policies and instructions *for staff*. Rather than giving staff specific direction as to how they were to act, the packet was an informative document sent to parents who had already signed up a child for the summer program. Indeed, the Engelhardts have identified no evidence in the record indicating individual staff members—other than Bell—were even aware of the existence of this packet much less had any opportunity to review it themselves. Even as to Bell, the purpose of this document was to inform parents of field trip procedures, including their own role in assisting

with those procedures,[3] not to bind Bell or other staff as to any particular course of action.

¶15 We note that the language of the packet is consistent with its purpose, as it informed parents that "[t]he following procedures will be used [during] field trips." In addition to informing parents of how oversight would be maintained and children accounted for, the brochure instructed parents, in bold lettering: "Have your child wear their Playground T-shirt!" Next to the "Field Trip Procedures" is a "Field Trip Checklist," informing parents of what items their child should bring for field trips. While the information packet could perhaps be said to have provided parents with a greater sense of safety for their child, nothing in it created a ministerial duty for staff to act in any particular way.

¶16 Even if this information packet constituted a type of document that could have created ministerial duties, the language the Engelhardts cite as establishing such duties was not specific enough to create such duties. In their response brief on appeal, the Engelhardts point to the italicized language in paragraph thirteen. We address each in turn.

¶17 The Engelhardts contend that "[t]he participants will be divided into small groups which will be with a leader for the duration of the day" created a ministerial duty which New Berlin staff breached. What number of participants is necessary to constitute a "small" group, however, is completely unclear and

[3] In addition to the page on field trips and a separate page addressing "Swimming," the information packet contained an introductory "Welcome" statement to parents and included contact numbers for the summer program; informed parents of proper attire for their children, drop off and pick up procedures and times, first aid protocol, procedures for children who use medication throughout the day, and the "Code of Conduct" and behavior expectations for children in the program; told parents to return information sheets and send along a water bottle with their child; and included a calendar identifying the dates of outings throughout the summer.

cannot serve as a basis for a ministerial duty because staff would have been afforded discretion as to the size of a group.[4]

¶18 As to the other italicized language in paragraph thirteen, the Engelhardts argue the staff violated the "requirement" that "rules and instructions regarding the facility/activity" be given "upon arrival" because the staff instead provided rules and instructions in the gym before departing on buses for Wiberg. This "requirement" cannot provide a basis for liability because there is no specificity as to what rules and instructions the staff was supposed to provide upon arrival, thus allowing for the exercise of discretion. The Engelhardts suggest the type of instructions staff should have provided—that Lily should have been "told the layout of Wiberg or its pools, where to meet her leader, to stay in the locker room until the leaders exited, or to meet at any particular place." However, this is precisely the sort of specificity that is *lacking* from the information packet, affording staff discretion in how they would instruct participants.[5]

¶19 The Engelhardts also contend New Berlin "violated its own rules requiring swim testing of campers." They appear to be referencing an information packet page titled "Swimming," which immediately follows the "Field Trip

[4] Bell's undisputed deposition testimony was that the sixty-four campers who went to Wiberg on July 3, 2012, were divided into four different color groups, based upon age and/or size, and each group had at least one staff member assigned to it. The red group, of which Lily was likely a member, would have had between twelve and fifteen children, but could have had up to twenty, and would also have had "[p]robably two to three" staff members assigned to watch the group.

[5] As New Berlin points out, the Engelhardts' criticism on this point goes to negligence, "but in analyzing immunity, … negligence is assumed for the sake of argument." *See* ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314 ("The immunity defense assumes negligence."). That said, we question whether staff could have breached a ministerial duty that was causal of Lily's death when the information packet provides no specific rules or instructions that should have been provided "upon arrival."

Procedures" page. Again, as discussed above, this "Swimming" page does not create a ministerial duty in that it was sent to parents for informational purposes and not provided to staff as directives for staff to follow. That said, the "Swimming" page includes this sentence referenced by the Engelhardts: "We give our own swim test so we know who the non-swimmers are, so we can keep them in the shallow end of the pool." The Engelhardts' contention related to this sentence is insufficiently developed; nonetheless, considering its merits, we conclude that this sentence did not create a ministerial duty because it left to staff discretion as to when and how to conduct any swim tests.

¶20 In this case, Bell's undisputed testimony is that when lifeguards began blowing their whistles and attempting to rescue Lily, some staff members were "on the deck," and some were still in the locker rooms helping children change clothes. Bell planned for staff to give Lily a swim test in the shallow end when they got to the pool but staff "never had a chance to … [b]ecause she was in trouble by the time we had assembled ourselves to the point where we could start anything like that." Procedures for giving weak swimmers a swimming test are of no consequence if a camper enters the pool before testers are even in a position where they can conduct a test. None of the language in the information packet created any type of ministerial duty to ensure Lily received a swim test prior to the time she tragically entered the water.

ii. Staff Guidelines

¶21 The Engelhardts next point to "Staff Guidelines" for the summer program as creating ministerial duties. The guidelines state:

> **Work Times**: Due to the Early Drop Off, and Late Pick Up programs Community, And Playgrounds Jr. staff may

be asked to report as early as …. These hours may change on days of field trips.

….

If you for some reason … can't come to work, call the head of your program. These people are:

….

Staff Meetings: Every Tuesday there will be an 8:00 AM staff meeting for Playground Staff. This way we can discuss that week's field trip, and any problems that may have come up on the playground….

Expectations: You were hired to help create a safe and fun environment for the kids who are signed up for our summer programs. *It is your responsibility to supervise the kids at all times. For example, during our weekly swimming field trips you are to actually watch the kids in the water by being in the water with them, or by sitting on the edge of the pool.* Play games with them in the game room. Be on your feet supervising games in the gym or out on the playground.

A lot of parents contact us with security concerns. *Make sure you know where the kids in your care are at all times*.

Under no circumstances should kids be left alone. Find someone to cover for you if there is a problem you need to deal with. Make sure the activities you do with the children are safe, if something goes wrong you will need to explain how and why it happened. Make sure to tell any of your concerns either to Jake or myself.

Appearance: Make sure that the clothes you wear are appropriate for working with children.… You need to wear a staff shirt on field trip days….

Discipline Policy: A safe environment is very important. If a child is disruptive or refuses to follow the directions of any of the playground staff, …. Some more severe behaviors may result in skipping steps one and/or two.

…. If you are having a problem with a parent, refer them to your program leader, who in turn may refer them to me.…

> **Accident Reports**: Any injury to yourself or one of the children that warrants the use of First Aid needs to be reported….
>
> **Equipment Purchases**: If you program is in need of any supplies please see me so I can get them for you….
>
> Stuart Bell
> Playground Coordinator (Italics added.)

¶22 The Engelhardts refer us to the italicized language above. They note that in ***Pries***, the supreme court stated that "the choice of discretionary versus mandatory language is a significant factor in determining the existence of a ministerial duty." ***Pries***, 326 Wis. 2d 37, ¶30. They state that the above-italicized language uses mandatory language and insist "[t]hese instructions do not permit discretion on the staffers' part; they must do these tasks at all times, thus defining the 'time, mode and occasion' for performance 'with such certainty that nothing remains for judgment or discretion.'" The Engelhardts also note that at one point in his deposition, Bell agreed with their counsel's reference to the "Expectations" section of the "Staff Guidelines" as the "policy" for the camp.

¶23 While this document does use some language of a mandatory nature and Bell did at one point agree with counsel's reference to the "Expectations" section as the "policy" for the camp,[6] it is worth noting that the document is titled as "Guidelines." *See* ***Noffke v. Bakke***, 2009 WI 10, ¶46, 315 Wis. 2d 350, 760 N.W.2d 156 (concluding that the "Coaches' Responsibilities" section of "spirit rules" for cheerleading did not impose a ministerial duty in part because of language referring to these rules as "guidelines"); *see also* ***Pries***, 326 Wis. 2d 37,

[6] The portion of Bell's testimony cited by the Engelhardts comes from Bell's deposition response to this question from the Engelhardts' counsel: "[The "Expectations" section of the "Staff Guidelines"] was the expectation and policy that was in place in 2012, including the aquatic events, correct?" Bell responded, "Correct."

¶29 (noting that in ***Lodl***, 253 Wis. 2d 323, ¶¶29-30, the court found it "significant" that "the police chief described the policy as merely 'guideline[s]'"). Further, the section to which the Engelhardts specifically direct us is the section entitled "Expectations." That title is appropriate, as opposed to, for example, "Requirements" because the language in that section reads as a whole as expectations and aspirations, not dictates. For example, the expectation that staff be in the water or sitting at the edge of the pool while children are in the water is followed by "Play games with them in the game room. Be on your feet supervising games in the gym or out on the playground." The overall expectation conveyed by the guidelines is that staff was supposed to be actively engaged and attentive to the children, not just passing time. That said, we assume without deciding that the "Staff Guidelines" constituted the type of document that could create a ministerial duty if the guidelines contained therein were so specific as to leave staff members with no discretion with regard to their execution.

¶24 It is important to note there is no dispute that the "Staff Guidelines" were not guidelines specific to trips to Wiberg or even to aquatic activities but instead related to the entire summer playground program. The general guideline for staff that "[i]t is your responsibility to supervise the kids at all times," afforded staff discretion as to how they would accomplish such supervision in different venues and situations throughout the summer. While the document does provide some additional specificity related to aquatic field trips: "For example, during our weekly swimming field trips you are to actually watch the kids in the water by being in the water with them, or by sitting on the edge of the pool," this expectation addressed the manner in which staff members are supposed to supervise participants once they are already playing or swimming in the pool. It provided no directives with regard to supervision of the children while in the

process of changing in the locker room at Wiberg and entering the pool area. There is no allegation in this case that Lily's death was caused by the failure of staff to be in the water or sitting on the edge of the pool while Lily and others were playing or swimming in the pool. No policies restricted staff discretion in how to execute supervision during the process of changing in the locker room and entering the pool area.

¶25 The guidelines also state: "Make sure you know where the kids in your care are at all times" and "[u]nder no circumstances should kids be left alone." Again, these guidelines relate to the engagement and oversight by staff with participants throughout the entire summer and in many venues and contexts. As Bell indicated at his deposition, "In moving any group of children in any way, shape, or form, on any field trip, either in schools or in park and rec, having them supervised 100 percent of the time is somewhat of an impossibility." These guidelines do not provide specificity as to how supervision should have been conducted at Wiberg pool so as to have created ministerial duties with regard to staff conduct at the pool.[7]

[7] The Engelhardts also briefly reference Wiberg pool rules that state: "Your group must provide one adult (16 years old or older) per 12 children in your group.… [A] [l]ower ratio[] [is] recommended if your group consists of weak swimmers." They then add: "New Berlin did not alter its ratio despite the known presence of weak or non-swimmers." We need not address this argument because it is undeveloped. *See* ***Wisconsin Conference Bd. of Trs. of United Methodist Church, Inc. v. Culver***, 2001 WI 55, ¶38, 243 Wis. 2d 394, 627 N.W.2d 469 (we do not address insufficiently developed arguments). That said, it is undisputed that on this trip to Wiberg there were sixty-four campers in Bell's group and at least seven staff members, creating a ratio of approximately one counselor for every nine campers.

iii. Staff Handbook

¶26 The Engelhardts next direct us to the "Staff Handbook," stating that the document

> contains … mandatory language. It assigns responsibility for safety to all camp staff, and Playground Specialists and Leaders also have "direct responsibility for supervision." Leaders' "Major Duties and Responsibilities" list "Maintain proper supervision of participants" first. All playground staff must "Place top priority on SAFETY." It instructs the staff to "[g]et in a position where all participants can see and hear you."

The Engelhardts fail to sufficiently develop an argument regarding the handbook and thus we need not address it. *See* ***ABKA Ltd. P'ship v. Board of Review***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments). That said, the cited language applies to all activities in the summer playground program, not just trips to Wiberg. The language they cite is far too broad and vague to create a ministerial duty. The most specific language is "[g]et into a position where all participants can see and hear you," but even that leaves staff members with significant discretion with regard to execution. Furthermore, the handbook describes this specific sentence not as a directive but as a "hint[] that may be helpful to you while working on playground." A "hint" that "may be helpful" does not create a ministerial duty.

¶27 For the foregoing reasons, the documents the Engelhardts rely upon did not create ministerial duties for New Berlin staff and thus application of WIS. STAT. § 893.80(4) and the government immunity provided for therein is not precluded on this basis.

Known, Present and Compelling Danger exception

¶28 As our supreme court has stated, even

> where a public officer's duty is not generally prescribed and defined by law in time, mode, and occasion, such that "nothing remains for judgment or discretion," circumstances may give rise to such a certain duty where … the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act.

Lodl, 253 Wis. 2d 323, ¶34 (citation omitted). This "narrow, judicially-created exception" to immunity arises "only when 'there exists a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion.'" ***Id.***, ¶¶4, 38 (citation omitted). For the exception to apply, "particularly hazardous circumstances" must be both known to the public officer and sufficiently dangerous to require a self-evident, particularized, and nondiscretionary municipal response. ***Id.***, ¶39. "The focus is on the specific act the public officer or official is alleged to have negligently performed or omitted." ***Id.***, ¶40. "It is not enough that the situation require the employee 'to "do something" about it.'" ***Voss v. Elkhorn Area Sch. Dist.***, 2006 WI App 234, ¶18, 297 Wis. 2d 389, 724 N.W.2d 420, (citation omitted).

¶29 The Engelhardts claim the known, present and compelling danger exception applies in this case because Bell "knew Lily Engelhardt could not swim and told her mother he would keep Lily 'safe' on this optional field trip, but then did nothing to ensure her safety." They state that "Bell knew that, on at least 2 earlier occasions, New Berlin camp attendees had to be rescued by Wiberg lifeguards, but still took no steps whatsoever to ensure Lily's safety." Specifically, the record provides that Bell had been taking New Berlin participants

to Wiberg every Tuesday in the summer for twelve years prior to the incident at issue in this case, and during that time there was one incident in 2006 and one in either 2008 or 2009 in which a participant needed the assistance of a lifeguard to make it out of the pool. Neither incident resulted in injury.

¶30 The Engelhardts believe our decision in ***Voss*** supports their position on this issue. It does not. In ***Voss***, a student was injured during a class exercise in which the teacher had students perform various tasks about the classroom wearing "fatal vision goggles," which replicated the effects of intoxication, so they would gain a better understanding of drinking and driving. ***Id.***, ¶¶2-3. "The teacher testified to the risks inherent in the exercise, namely that a student could lose his or her balance and fall down." ***Id.***, ¶5.

¶31 We concluded in ***Voss*** that the known, present and compelling danger exception applied because it was so obvious that continuing the exercise in a classroom full of desks was an "accident[] waiting to happen" and admitted of only one reasonable decision for the teacher to make—"stop the activity the way it was presently conceived." ***Id.***, ¶¶19-20. The circumstances of the case now before us did not present dangers as obvious or immediate as those in ***Voss*** and did not constitute a known, present and compelling danger.

¶32 Bell was aware that in the twelve years prior to the incident in this case, two campers had needed assistance from lifeguards at Wiberg, with the last incident being three or four years prior to Lily's death. Nothing about this background establishes that Lily's inability to swim amounted to a known, present and compelling danger. Lifeguards were on duty at the pool, many New Berlin staff members also were present, and procedures were in place so that weak or nonswimmers such as Lily would be able to enjoy an outing to Wiberg in safe

areas of the pool. No doubt, with the benefit of hindsight, additional or different procedures could have been utilized that would have gone further toward keeping Lily safe. For purposes of immunity consideration, however, we assume negligence by New Berlin officials. *See* ***Lodl***, 253 Wis. 2d 323, ¶17 ("The immunity defense assumes negligence."). But failing to employ such procedures does not mean a known, present and compelling danger existed that "admitted of only one," "self-evident" and "particularized" municipal action. *See* ***Voss***, 297 Wis. 2d 389, ¶¶18, 20 (citation omitted).

¶33 Aware that Lily could not swim, if Bell had seen her walking right along the edge of a deep area of the pool, this case would be akin to ***Voss*** in that a situation would exist that required Bell to take immediate action to stop an "accident waiting to happen." But those facts are not the facts of this case. A known, present and compelling danger did not exist.

¶34 For the foregoing reasons, we conclude the circuit court erred in denying New Berlin's motion for summary judgment.

By the Court.—Order reversed.

Not recommended for publication in the official reports.