

TABLE OF CONTENTS

I. Claims Against Governmental Bodies, Officers, and Employees, Wis. Stat. Section 893.80.....	1
A. Applicability.....	1
B. Procedures for Filing Notice of Claim and Disallowance by Board.....	2
C. Six-Month Statute of Limitations. Wis. Stat. § 893.80(1).....	5
D. Limits on Damages. Wis. Stat. § 893.00(3).....	5
E. Limited Immunity to Districts and Employees for Discretionary Acts by Employees Performed as Part of Job Duties, and to Districts (But Not Employees) for Intentional Acts of Employees. Wis. Stat. § 893.80(4).....	5
F. Intentional Act Immunity for District, Not Employees.....	14
II. Recreational Immunity, Wis. Stat. § 895.52.....	15
A. Provides immunity to governmental bodies including school districts.....	15
B. Recreational activity.....	15
C. Purpose.....	15
D. Exceptions to Immunity.....	15
III. Statutory Indemnification, Wis. Stat. § 895.46.....	15
IV. Insurance Issues.....	16
A. Notify Insurers of Claims or Potential Claims.....	16
B. Types of Policies and Claims.....	16
C. Claims Covered.....	16

V.	Upon Receipt of Summons and Complaint.....	17
A.	Provide Notice to Carrier and Tender of Defense.	17
B.	Provide Notice to District Counsel.	17
C.	Answer–By Insurance Counsel or District Counsel.	17
D.	Selection of Counsel.	17
VI.	Insurer Response.....	17
A.	Reservation of Rights.	17
B.	Coverage Disputes.	17
C.	Insurer’s Duty to Defend.	18
D.	Duty to Cooperate by the Insured.	18
E.	Duty to Settle in Good Faith.....	18
VII.	Litigation Procedures.	19
A.	Pleadings.....	19
B.	Motion to Dismiss.	19
C.	Scheduling By Court.	19
D.	Discovery.....	19
E.	Motion for Summary Judgment.....	19
F.	Trial Versus Administrative Proceedings.	20
G.	Appeal.....	20
H.	Settlement.	20

I. Claims Against Governmental Bodies, Officers, and Employees, Wis. Stats. Section 893.80.

A. Applicability.

1. Section 118.26, of the Wisconsin Statutes provides: “No action may be brought or maintained against a school district upon a claim or cause of action unless the claimant complies with s. 893.80.”
2. Section 893.80 applies to all state law actions, not just tort or money damages – includes action for equitable relief. *Department of Natural Resources v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994).
3. Notice of injury provision allows governmental entity to investigate and evaluate potential claims. Notice of claim affords municipality the opportunity to compromise and settle.
4. Section 1983 preempts – *Felder v. Casey*, 487 U.S. 131 (1988). Landowner was not required to comply with notice of claim statute to bring federal constitutional claim under § 1983 against town and county regarding rezoning. *Thorpe v. Town of Lebanon*, 235 Wis. 2d 610, 612 N.W.2d 59 (2000). True for all federal law actions.
5. Does not limit damages under § 1983 – *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340, N.W.2d 704 (1983).
6. Application to CESA – *Miller v. Mauston School Dist.*, 222 Wis. 2d 540, 588 N.W.2d 305 (Ct. App. 1998).
7. Does not apply to actions commenced under open meetings/records statutes. *Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 547 N.W.2d 587 (1996) or to other actions for which a specific filing procedure is provided like the Wisconsin Fair Employment Act.

B. Procedures for Filing Notice of Claim and Disallowance by Board.

1. Filing a Claim

- a. Section 893.80(1) of the Wisconsin Statutes provides that no action may be brought against a governmental subdivision, including a school district, unless the following two conditions precedent are satisfied: (a) within 120 days after the happening of the event giving rise to the claim, written notice of *the circumstances of the claim* signed by the party or his or her agent or attorney, is served on the school district and on any officer, official, agent or employee of the school district who may have been responsible for the event; and (b) a claim containing the address of the claimant and *an itemized statement of the relief sought* is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the governmental subdivision and the claim is disallowed. See § 893.80(1)(a) and (b).
- b. Usually these two parts of the claim – the notice of circumstances and the itemized statement of relief sought – are contained in one document, but there is no requirement that they both be in one document. A claimant can file a notice of the circumstances of the claim and then later in a separate document file the itemized statement of relief sought. Note also that only the notice of circumstances of the claim has to be filed within 120 days of the event. There is no corresponding 120 time limitation for filing the itemized statement of relief sought.
- c. Let us assume for the moment that the claimant does not file either a written notice of the circumstances of the claim or an itemized statement of the relief sought. Let us then assume that the claimant files a lawsuit seeking damages for the injury several months later but without having complied with either section (1)(a) or section (b). In defense of the lawsuit the District would of course raise as an affirmative defense the plaintiff's failure to comply with § 893.80(1)(a) and (b).
- d. In opposition to the District's affirmative defense the plaintiff might be able to argue that the District had *actual notice of the claim* and was therefore not prejudiced by the plaintiff's failure to file a written notice of the circumstances of the claim within 120 days of the injury. In the usual case, the

Plaintiff's argument would be sufficient to defeat the District's reliance upon the Plaintiff's failure to comply with § 893.80(1)(a).

- e. However, § 893.80(1)(b) does not contain the same safe harbor provision that appears in (1)(a) regarding actual notice of the claim. Therefore, the District's motion to dismiss the complaint would be successful based on the Plaintiff's failure to comply with § 893.80(1)(b), i.e., the failure to file an itemized statement of relief sought.
- f. What would likely happen next is that the plaintiff would attempt to cure the defect arising under § 893.80(1)(b) by filing a claim with the school district containing an itemized statement of the relief sought. Assuming the underlying statute of limitations has not expired, the claimant will be able to cure the § 893.80(1)(b) defect in this manner.

2. Disallowance of a Claim.

- a. At the time the claim containing the itemized statement of the relief being sought is filed, the board will have 120 days to serve a written notice of disallowance on the claimant. Once that is done, then the claimant will have six months to file his lawsuit, again assuming that the underlying statute of limitations has not expired.
- b. It should be noted that the procedures for effectively disallowing a notice of claim must be *strictly followed* in order for the disallowance to be effective. If and when a written notice of any kind gets filed with the school district, therefore, the District should check with legal counsel to ensure that the procedures are properly followed. The procedures for disallowing a claim are set forth in § 893.80(1g) and they provide in relevant part as follows:
 - i. Notice of disallowance of the claim submitted under sub (1) shall be served on the claimant by registered or certified mail and the receipt therefore, signed by the claimant, or the returned registered letter, shall be proof of service. Failure of the appropriate body to disallow a claim within 120 days *after presentation of the written notice of claim* is a disallowance. No action on a claim under this section against any defendant... subdivision... nor against any defendant

officer, official, agent or employee, may be brought after six months from the date of service of the disallowance, and the notice of disallowance shall contain a statement to that effect. (Emphasis added.)

ii. Notice of disallowance of the claim must be served on the claimant by registered or certified mail. Failure to disallow claim within 120-days after presentation is *deemed* disallowance.

3. Case Law under Wis. Stats. § 893.80(1).

- a. Actual notice of potential litigation given by school and parents was sufficient. *Providence Catholic School v. Bristol School Dist. No. 1*, 231 Wis. 2d 159, 605 N.W.2d 238 (Ct. App. 1999), *rev. den.*, 607 N.W.2d 291 (action to compel public districts to provide busing to parochial students).
- b. Claim must identify claimant's name and address, contain itemized statement of relief sought, signature, be submitted to clerk, and be disallowed. *Linn, supra*; *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 207, 208, 556 N.W.2d 326 (Ct. App. 1996).
- c. Statute requires specific statement that claimant swears to contents of notice – *Kellner v. Christian*, 188 Wis. 2d 525 (Ct. App. 1994).
- d. Must state requested relief in specific dollar amount. *Thorpe v. Town of Lebanon, supra*.
- e. No time limit for presentation of notice of claim. *Smith v. Milwaukee County*, 149 Wis. 2d 934, 440 N.W.2d 360 (1989).
- f. Cannot file suit before disallowance of claim or running of time. *Selerski v. Village of West Milwaukee*, 212 Wis. 2d 10, 568 N.W.2d 9 (Ct. App. 1997), *rev. den.*, 215 Wis.2d 422, 576 N.W.2d 279.
- g. *Schwetz v. Employers Ins. of Wausau*, 126 Wis. 2d 32, 374 N.W.2d 241 (Ct. App. 1985) (claim not disallowed in writing and claimant did not wait 120-days after presentation before filing suit – statute of limitation not tolled) (premature suit) (overturned on other issue, *Colby v. Columbia County*, 202 Wis. 2d 342, 550 N.W.2d 124 (1996)).

- h. Information supplied to claimant – employee’s reliance on schools employee’s instruction to deal directly with school’s insurer -- estopped school from asserting failure to comply with statute as a defense. *Fritscj v. St. Croix Central School Dist.*, 183 Wis. 2d 336, 515 N.W.2d 328 (Ct. App. 1994).

C. Six-Month Statute of Limitations. Wis. Stat. § 893.80(1).

1. No action may be brought six months after service of notice of disallowance, and notice must so state.
2. Where claim is filed and body does not serve notice of disallowance, six-month limitation period is not triggered. *Linstrom v. Christianson*, 161 Wis. 2d 635, 469 N.W.2d 189 (Ct. App. 1991).
3. Once the 120-day period has run, municipality may not revive six-month period of limitation by giving notice of disallowance. *Blackbourn v. Onalaska School Dist.*, 174 Wis. 2d 496, 497 N.W.2d 460 (Ct. App. 1993).

D. Limits on Damages. Wis. Stat. § 893.00(3).

1. \$50,000.00. cap.
2. Generally inapplicable to contract claims.
3. Student injured in shop class was *not* third-party beneficiary of employment contract between district and teacher, and of district’s insurance contract, entitling him to \$1,000,000.00 policy limits on breach of contract claim rather than \$50,000.00 limit under § 893.80. *Schilling v. Employers Mut. Cas. Co.*, 212 Wis. 2d 878, 569 N.W.2d 776 (Ct. App. 1997), rev. den., 215 Wis. 2d. 423.
4. Limit applicable to insurer of municipality. *Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 403 N.W.2d 747 (1987).

E. Limited Immunity to Districts and Employees for Discretionary Acts by Employees Performed as Part of Job Duties, and to Districts (But Not Employees) for Intentional Acts of Employees. Wis. Stat. § 893.80(4).

1. No action may be brought against governmental subdivision for *intentional* torts of officers, officials, agents or employees, nor against subdivision or officers, officials, agents or employees for acts done in exercise of legislative, quasi-legislative, judicial or *quasi-judicial* functions.

2. The doctrine of governmental immunity is grounded in several important considerations, which are discussed in *Kimps v. Hill*, 200 Wis. 2d 1, 9, 546 N.W.2d 151 (1996). These considerations can be summarized as: “(1) the danger of influencing public officers in the performance of their functions by the threat of lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions; (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.” 200 Wis. 2d at 9. These same factors and considerations are relevant here.
3. No immunity for breach of contract. *Energy Complexes v. Eau Claire County*, 152 Wis. 2d 453, 449 N.W.2d 35 (1989).
4. Discretionary acts involve exercise of judgment and discretion. *Gorden v. Milwaukee County*, 125 Wis. 2d 62, 66, 370 N.W.2d 803 (Ct. App. 1985).
5. “Quasi legislative” and “quasi judicial” are synonymous with discretionary.
 - a. *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 683, 292 N.W.2d 816 (1980) (whether to retain or terminate an employee)
 - b. *Kimpton v. New Lisbon School Dist.*, 138 Wis. 2d 226, 405 N.W.2d 740 (Ct. App. 1987) (failure to investigate criminal or sexual behavior of teacher or inspect rooms).
 - c. *Bauder v. Delavan-Darien School District*, 207 Wis. 2d 310, 558 N.W.2d 881 (Ct. App. 1996) (gym teacher’s decision to move in-doors and deflate soccer ball was discretionary).
 - d. In *Bauder*, the Court held that a teacher’s decisions to move a gym class indoors, and to play soccer indoors using a partially deflated soccer ball, was a discretionary action on the part of the school teacher. The Court held that the school district was immune from suit under the doctrine of governmental immunity. Although the Court held that the provision of a physical education class was mandated by the Legislature and

was thus *ministerial*, the manner of conducting the physical education class was *discretionary*, and not ministerial, in nature. In *Bauder*, the Court specifically stated that “the manner in which those classes are conducted is not specified either by state statute or by the school district under the facts of this case. The teacher made a decision to move the class indoors. He also decided to deflate the ball, hoping to reduce the chance of injury. We hold that the teacher’s judgmental decision was a discretionary and not a ministerial act.” *Bauder* 207 Wis. 2d at 314.

- e. In *Kimps v. Hill*, it was asserted that a teacher had a duty that was ministerial in nature to provide safe volleyball equipment for his students. However, the Supreme Court pointed out that it is important to distinguish the issue of negligence from the issue of immunity. An employee of a governmental body can be negligent under common law negligence standards, but the employing governmental body or the officer may still be immune from suit under the governmental immunity doctrine. As the Court stated in *Kimps*: “Just because a jury can find that certain conduct was negligent does not transform that conduct into a breach of a ministerial duty.” *Kimps*, 200 Wis. 2d at 11.
- f. The Court in *Kimps* set aside the negligence issue, and strictly applied the ministerial versus discretionary standard to determine whether or not there was immunity. One of the parties in the *Kimps* case argued that the existence of a teacher’s common law duty to provide safe equipment, combined with the simple design of the piece of equipment involved in the *Kimps* case, i.e., a volleyball standard, turned the matter into a ministerial duty. However, this argument was rejected by the Court, which found it “wholly unconvincing.” *Kimps*, 200 Wis. 2d at 12. The Court stated that this argument in favor of liability “completely misconstrues the test for determining when a duty is ministerial.” *Kimps*, 200 Wis. 2d at 12. The Court further warned that “A party cannot work backwards from a consequence to create a duty that is ‘absolute, certain and imperative.’” *Kimps*, 200 Wis. 2d at 12.
- g. Still another school case is *Kimpton v. School District of New Lisbon*, 138 Wis. 2d 226, 405 N.W.2d 740 (Ct. App. 1987), in which James Kimpton and his parents brought a suit for

money damages against the school district claiming that it had negligently allowed a sexual relationship to develop between James, a high school student, and one of his teachers, David Segerstrom. In 1980, Segerstrom initiated a sexual relationship with James that took place primarily on school premises and continued for three years. James did not tell anyone about the relationship until December 1983. Segerstrom was eventually convicted of sexual assault, but the Kimptons sued the district, alleging it was negligent in hiring, training, and supervising Segerstrom, as well as negligent in assigning and failing to provide for regular inspection of teachers' rooms.

- h. The Kimptons argued that the school district was not immune from suit because it had a policy against teachers sexually assaulting students, and that its employees were negligent in carrying out this policy. They asserted that the district was negligent, first, when it hired Segerstrom because, although the district checked his credentials and references, it did not check to determine whether he had a criminal record or had engaged in sexual relations with students. It turned out that Segerstrom had been convicted of breaking and entering prior to his hire at the New Lisbon School District and had engaged in occasional same sex relationships prior to his hire. His twenty-year teaching career at New Lisbon, however, was described as uneventful. Furthermore, none of the school officials, employees, or school board members had any knowledge of Segerstrom's relationship with James nor had they heard of anything suspicious about his conduct.
- i. Second, the Kimptons argued that the district negligently implemented its "policy" against teachers sexually assaulting students because it failed to investigate and inspect the teachers' rooms during the year to check for inappropriate activities and otherwise direct its employees in order to foster the policy. They complained that the district never held any meetings or programs to inform parents of their efforts to protect students from such assaults and discourage teacher/student sexual assaults. The school district, however, explained that it monitored Segerstrom's classroom to the same extent as those of other teachers. It had not sent anyone to his office to try to find things that were wrong.

- j. The Wisconsin Court of Appeals rejected the Kimptons' arguments, however. It concluded that the Kimptons had not proven that the district had failed to comply with any of its established policies or procedures. Although the New Lisbon School District did not have any specific policies aimed at the detection and prevention of teacher-student assaults, the court explained that the Kimptons could not sue the district for failing to promulgate such policies because that is a quasi-legislative function, and, therefore, a discretionary act.
- k. Furthermore, the court reasoned that the hiring and supervision of Segerstrom was a quasi-judicial act, also protected from liability as a discretionary act. Therefore, the government immunity statute barred the Kimptons' suit. The court explained:

What the Kimptons attempt to do in the negligence action is to bootstrap their damage lawsuit against Segerstrom into one against the school district and its insurer. Their complaint alleges no more than that the district was negligent in hiring and supervising Segerstrom, and those functions are no less discretionary—no less 'quasi-judicial'—than decisions on whether to fire an employee, whether to convene an inquest or perform an autopsy, or whether to release a patient from a hospital. . . .

138 Wis. 2d at 236.

- 4. *Ministerial* duties are absolute, certain and imperative, in the execution of a set task. Law prescribes and defines the time, mode and occasion for performance of ministerial duty with such certainty that nothing is reserved for judgment or discretion.
 - a. Duty of paramedic to attempt to rescue a life. *Linville v. City of Janesville*, 174 Wis. 2d 571, 497 N.W.2d 465 (Ct. App. 1993).
 - b. Failure to post warning signs or advise superiors of dangerous condition was breach of ministerial duty. *Cordes v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). Failure to have fallen tree removed from road was breach of ministerial duty. *Domino v. Walworth County*, 118 Wis. 2d 488, 347 N.W.2d 917 (Ct. App. 1984).
 - c. Construction and maintenance of baseball diamond. *Wellner v. Beechwood Fire Dept.*, 171 Wis. 2d 769, 495 N.W.2d 102 (1992).

5. Exception to immunity from liability:
- a. Negligently performs ministerial duty – no immunity for employee or district.
 - b. The “known danger” exception.
 - i. The Supreme Court pointed out in *Kierstyn v. Racine Unified School District*, 228 Wis. 2d 81, 95, 596 N.W.2d 417 (1999), that the “known danger exception” is a very limited one, “*having rarely been asserted successfully.*” (emphasis added) In *Kierstyn*, the Court cautioned that in order to trigger the “known danger” exception, there must be present the type of “extraordinary events” that are best exemplified by the facts of *Anderson*, 228 Wis. 2d at 91.
 - ii. The “known danger” exception is described in *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). In *Anderson*, two people in a group enjoying the use of the Parfrey’s Glen recreational area, owned and maintained by the Wisconsin Department of Natural Resources, fell after dark from a dangerous trail into a gorge, causing serious, permanent injury. The Court described the physical situation in its decision, as follows:

At places, the upper trail comes within inches of the bluff edge or a bluff undercut. The high ground has obvious dropoffs to the west and to the northwest of the picnic area. A main branch of the upper trail running south from the picnic area toward the parking lot comes within a foot of the high bluff where the bluff is undercut obliquely to the southeast. The undercut is narrow, not readily discernible and within forty-five feet of the picnic area. This cutback or “shoot” as it was referred to in the testimony is at a place where one misstep of a foot in a southerly direction would cause an uninterrupted twenty foot slide down a sharp incline to a direct dropoff of approximately eighty feet to the rock bottom of the gorge. This is the point where Norina Boyle fell. 80 Wis. 2d at 532.

- iii. Having described the physical circumstances, the Court went on to describe the inaction on the part of the Park Manager. The Court noted that in 1966, four years before the accident, the defendant Park Manager knew “that the paths at Parfrey’s Glen went near the edge of sheer drop off right into the glen and that the trails never had any rail, sign or protective devices of any kind warning people or advising them not to use the upper trail.” 80 Wis. 2d at 536-537. The Court went on to note that the Park Manager “knew that these trails were especially hazardous at night, but from 1965 to the time of the accident, there were no signs warning of the hazard. He agreed that these conditions were hazardous and that he wouldn’t want to be on the trails after dark.” 80 Wis. 2d at 537.
- iv. Finally, the Court noted that the Park Manager “never even informed his supervisor of any of the hazardous conditions. It was his job to make recommendations for public safety at the glen. He never recommended to his supervisors that warning signs be erected or that trails be closed.” 80 Wis. 2d at 537.
- v. In its legal analysis, the Court held that these facts created “an absolute, certain, or imperative duty to either place the signs warning the public of the dangerous conditions existing on the upper trail or to advise his superiors of the condition with a view toward adequate protection of the public responding to the invitation to use this facility. . . . Anderson knew the terrain at the glen was dangerous particularly at night; he was in a position as park manager to do something about it; he failed to do anything about it.” 80 Wis. 2d at 541. The Court concluded that “the duty to either place warning signs or advise supervisors of the conditions is, on the facts here, a duty so clear and so absolute that it falls within the definition of a ministerial duty.” 80 Wis. 2d at 542. Clearly, the Wisconsin Supreme Court felt that the circumstances in the *Anderson* case compelled the park manager to have done something, where he knew of the extreme danger for a long period of time, particularly at night, and admitted that he would not want to have been on the trail at night.

- vi. Since the *Anderson* decision, the Wisconsin Supreme Court has dealt with a number of circumstances in which it has been asked to apply the so-called “known danger” doctrine. One noteworthy and relevant case is *Kimps v. Hill*, 200 Wis. 2d 1, 546 N.W.2d 151 (1996), in which the Court held that the “known danger” exception to the immunity rule did not apply in a circumstance where a teacher used a volleyball standard which fell apart in a college gym class injuring a student. In *Kimps*, there was evidence that two years prior to the accident in question, a similar accident occurred in which a volleyball pole separated from its base and the base fell on the foot of a maintenance worker who was helping to move one of the standards. The safety school officer, who was a defendant in *Kimps*, investigated the accident and “determined that the appropriate response to the accident was that maintenance personnel should check to make sure the set screws were tight before moving the standards.” 200 Wis. 2d at
- vii. The safety officer memorialized this in a workers compensation report. However, there was evidence that his report did not receive campus-wide distribution, and other personnel in the university did not know of the earlier accident. The Supreme Court held that the safety officer was immune from suit in the *Kimps* case because he “did investigate and take action he deemed appropriate to address the problem” with regard to the earlier incident. 200 Wis. 2d 15-16. The Court concluded that “the nature of the danger posed here cannot be equated with that in *Cords*.” 200 Wis. 2d at 16.
- viii. Another highly relevant Supreme Court decision in which the Court found that the “known danger” exception did not apply is *C. L. v. Olson*, 143 Wis. 2d 701, 422 N.W.2d 614 (1988). In *C. L.*, the plaintiff alleged that a state parole agent had negligently permitted a parolee under his supervision to operate a motor vehicle. As a result, the parolee used the vehicle to sexually assault the plaintiff. In *C. L.*, the parolee had previously used motor vehicles to transport female

victims to secluded areas where he had assaulted them, and he had been convicted for this. Further, the plaintiff directed the Court's attention to the fact that the parole agent had been informed by the police of an anonymous report that the parolee had been observed "eyeing" young girls at a tavern prior to the assault on C. L., and that at the only home visit made by the parole agent, four days before the assault on C. L., the parole agent observed that the parolee appeared nervous and had a newspaper article concerning a Dane County rape-murder case spread on the table.

- ix. Hence, in *C. L.*, there was definitive prior evidence of the use by the parolee of motor vehicles in connection with sexual assaults, based upon the prior criminal convictions of the parolee, and there was some indication of unusual behavior on the part of the parolee immediately before the injury to C. L. However, the Court found that the parole agent in *C. L.* was immune. The Court stated that in *Anderson*, "there could be no subjective determination that could justify the failure to take some action in response to the dangerous condition known by the park manager to be present." 143 Wis. 2d at 723. On the other hand, in *C. L.*, the Court stated that "the very nature of a parole agent's position involves a subjective and discretionary balance between the danger posed by a parolee and the treatment of the parolee-client." 143 Wis. 2d at 723. The Court went on to note that "While in hindsight we may observe that the balance was improperly struck and grieve the tragic consequences, this is not to say that the potential of danger rose to such a degree of probability that, in determining whether [the parolee] should be permitted to drive, nothing was left to [the parole agent's] discretion." 143 Wis. 2d at 723.
- x. These Wisconsin Supreme Court cases make it clear that the existence or nonexistence of prior incidents is of little or no consequence in evaluating the immunity issue. In *Anderson*, there was no evidence of prior incidents at all; yet, the Court found that there was no immunity. On the other hand, in *Kimps*, there had been

a prior incident in which a university employee had been injured by a volleyball standard in a similar fashion; yet, the Court found that the “known danger” exception did not apply, and the defendants were immune. More importantly, in *C. L.*, there had been a prior criminal conviction of the parolee, for a similar offense, a fact which was known to the parole agent; yet, the Court found that this did not eliminate immunity under the “known danger” doctrine.

F. Intentional Act Immunity for District, Not Employees.

Section 893.80(4), Wis. Stats., provides in relevant part that “[n]o suit may be brought against any ... political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees ...” *See Salerno v. Racine*, 62 Wis. 2d 243, 245, 214 N.W.2d 446 (1974) (“Assault and battery constitutes an intentional tort. The trial court sustained the city’s demurer to the first cause of action, holding that § 895.43(2) [since renumbered as 893.80(4)] establishes municipal immunity against actions for intentional torts of its employees. We agree that it does.”) (footnote omitted). *See also Smith v. Medford Area Public Sch. Dist. Bd. of Educ., et al.*, Case No. 95-C-176-S (W.D. Wis. 1995) (“Defendant School District is immune from suit on Plaintiff’s state law claims for the intentional torts of assault and battery and inflicting of emotional distress ...”) (slip opinion, p. 9)

II. Recreational Immunity, Wis. Stat. § 895.52.

- A. **Provides immunity to governmental bodies including school districts.**
- B. **Recreational activity** is any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity, with examples.
- C. **Purpose** – to encourage property owners to open lands for recreational activities. *Doane v. Helenville Mut. Ins. Co.*, 216 Wis. 2d 345, 575 N.W.2d 734 (Ct. App. 1998).
- D. **Exceptions to Immunity.**
 - 1. Death or injury occurring on property government body owns for which admission fee is charged for spectators,
 - 2. Caused by malicious act or failure to warn against unsafe condition of which officer, employer or agent of body knew was occurring on such property.
 - 3. Sponsoring organized team sports activities. *Meyer v. School District of Colby*, 226 Wis. 2d 704, 595 N.W.2d 339. Organized team sport activity exception to immunity extended to spectators who were not participants and when did not arise out of team sport activity or action of participants – school district not immune (football game).

III. Statutory Indemnification, Wis. Stat. § 895.46.

- A. Public employer required to indemnify employees for acts committed within the employee's scope of employment, if the employee is sued and judgment rendered against the employee.
- B. Covers intentional acts as well as negligent acts. Sexual misconduct is an exception, however.

IV. Insurance Issues.

A. Notify Insurers of Claims or Potential Claims.

1. Many types of policies – coverage may exist where unexpected (e.g., advertising injury for trademark/software use).
2. No down side to notifying too early (“better safe than sorry”).
3. Written notice.

B. Types of Policies and Claims.

1. Comprehensive Or Commercial General Liability Policies (“CGL”).
Generally cover allegations of property damage, bodily injury and personal injury. Definitions generally will exclude employment disputes.
2. Errors and Omissions (“E&O”) Coverage.
Typically professional negligence – may include breach of duty, neglect, error, misstatement or omission committed in performance of duties for District.
3. Worker’s Compensation Policies.
Injury of employee while on the job.

C. Claims Covered.

1. “Claims” creating duties of insured under policies may be written complaints, such as demands for relief or documents commencing proceedings, while other policies may be triggered when the District learns of a “wrongful act” which may later lead to a claim. Insurer must receive prompt notice of the claim, and there may be time limits.
2. Not all policies cover injunctive relief, only actions seeking monetary relief.
3. When in doubt, write and notify; enclose demands received from claimant.
4. Policy terms and definitions are crucial – for example, an “occurrence” may or may not include wrongful discharge, and may or may not be intentional versus negligent. Policies typically include many exclusions, such as worker’s compensation, intentional acts, and punitive damages.
5. Claims made v. Occurrence Polices.

V. Upon Receipt of Summons and Complaint.

A. Provide Notice to Carrier and Tender of Defense.

1. Document notification and don't delay.
2. Insurer put on notice of claim against the insured. *Towne Realty, Inc. v. Zurich Ins. Co.*, 201 Wis. 2d 260, 548 N.W.2d 64 (1996) (insurer must determine insured's wishes regarding defense).

B. Provide Notice to District Counsel.

Must not allow default which occurs if no answer filed on timely basis.

C. Answer – By Insurance Counsel or District Counsel (timing issues).

D. Selection of Counsel.

1. By insurer or district (panels).
2. Multiple counsel for multiple parties versus joint defense (outside scope of employment, vicarious liability).

VI. Insurer Response.

A. Reservation of Rights.

Reservation of rights letter – notice sent by insurer to insured notifying insured of intent to maintain control defense while reserving rights to contest coverage or raise policy defenses under the policy. Means to prevent operation of waiver or estoppel before determination of liability.

B. Coverage Disputes.

1. Resolved by stay, bifurcation and declaratory judgment. *Elliott v. Donahue*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992).
2. Insurer can retain independent counsel where a dispute over coverage exists.
3. Primary counsel should not address coverage issues or disputes between insurer and insured.

C. Insurer's Duty to Defend.

1. Duty to investigate.

(Nichols v. American Employers Ins. Co., 140 Wis. 2d 743, 412 N.W.2d 547 (Ct. App. 1987).

2. Duty to defend broader than duty to indemnify.

- a. Requires allegations which would support liability if proven. *Professional Office Bldgs, Inc. v. Royal Indem. Co., 145 Wis. 2d 573, 427 N.W.2d 427 (Ct. App. 1988).*

- b. Issue is the allegations, not whether there is truth to them at the initial stage.

3. Duty to defend is contractual.

- a. *Mowry v. Badger State Mut. Casualty Co., 129 Wis. 2d 496, 385 N.W.2d 171 (1986).* Failure to defend may result in liability. *Grieb v. Citizens Cas. Co., 33 Wis. 2d 552, 148 N.W.2d 103 (1967).*

D. Duty to Cooperate by the Insured.

1. Settlement.
2. Role of District counsel and insurance counsel.
3. Role of District employees and officers.

E. Duty to Settle in Good Faith.

Insurer may tender limits of coverage.

VII. Litigation Procedures.

A. Pleadings.

1. Complaint, answer, counterclaims, cross-claims, third-party claims.
2. Investigation and information for answer.

B. Motion to Dismiss. (not favored by courts)

1. Failure to state a claim (even if allegations proven, no legally cognizable claim).
2. Amendment of pleadings.

C. Scheduling By Court.

D. Discovery.

1. Document requests.
2. Interrogatories.
3. Depositions.
4. Requests for Admissions.
5. E-discovery. (See sample letter attached.)

E. Motion for Summary Judgment.

1. The purpose of summary judgment is no “avoid trials where there is nothing to try.” *Transportation Ins. Co. v. Hunzinger Construction Co.*, 179 Wis. 2d 281, 289 (Ct. App. 1993). There is a standard methodology that a trial court follows when faced with a motion for summary judgment. *Voss v. Middleton*, 162 Wis. 2d 737, 747 (1991), *citing Spring Green Farms v. Kersten*, 136 Wis. 2d 304, 315 (1987). The first step of that methodology is to discern whether the pleadings set forth a claim for relief as well as a material issue of fact. *Grams v. Boss*, 97 Wis. 2d 332, 338 (1980).

2. If the pleadings meet this initial test, the court next examines the evidentiary record to determine whether there is a “genuine issue as to any material fact,” and, if not, whether a party is thereby entitled to “judgment as a matter of law.” *Transportation Ins. Co.*, 179 Wis. 2d at 289. A party seeking summary judgment must establish that there is no triable issue of material fact on any issue presented. *Id.* at 290, citing *Heck & Paetow Claim Serv., Inc. v. Heck*, 93 Wis. 2d 349, 356 (1980).
3. If the moving party’s materials are subject to conflicting interpretations, or if reasonable people could differ as to their significance, summary judgment is improper. *Grams*, 97 Wis. 2d at 339. Any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Id.* at 338-339.
4. If, on the other hand, the material facts or inferences are not in dispute, the court considers the legal issue or issues raised by the motion and may grant judgment to either party. *Magnum Radio Inc. v. Brieske*, 217 Wis. 2d 130, 135 (Ct. App. 1998), citing *State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 511 (Ct. App. 1986).
5. Affidavits and evidence.

F. Trial Versus Administrative Proceedings.

Bench trial or jury.

G. Appeal.

H. Settlement.

1. Mediation.
2. Decision – insurer or client?