

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 2003

Cornelia G. Clark
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 Nos. 02-1248
02-1995**

Cir. Ct. No. 00-CV-264

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 02-1248

SU WINGS CORPORATION,

PLAINTIFF-APPELLANT,

v.

CITY OF LAKE GENEVA AND CATHY AHLGREN,

DEFENDANTS-RESPONDENTS,

SPYRO G. CONDOS AND PATRICIA CONDOS,

DEFENDANTS.

No. 02-1995

SU WINGS CORPORATION,

PLAINTIFF-APPELLANT,

v.

CITY OF LAKE GENEVA, SPYRO G. CONDOS, PATRICIA

**CONDOS AND CATHY AHLGREN,
DEFENDANTS-RESPONDENTS.**

APPEAL from judgments and orders of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Su Wings Corporation appeals from the order and judgment granting summary judgment to the City of Lake Geneva and Cathy Ahlgren (appeal no. 02-1248), and from a separate order and judgment granting summary judgment to Spyro and Patricia Condos (appeal no. 02-1995). Su Wings argues on appeal that the law of conspiracy does not require a pre-existing right and that the respondents are not entitled to governmental immunity. Because we conclude that summary judgment was appropriate in both cases, we affirm.

¶2 While these two cases were briefed separately, we have consolidated them for the purpose of disposition.¹ The facts underlying both appeals are the same, but the legal issues, while related, are somewhat different. Therefore, we will discuss the facts for the appeals jointly but the legal issues separately.

¹ These appeals were consolidated on the court's own motion by an order dated February 6, 2003.

Background

¶3 This case arises from a dispute over the granting of a liquor license in the City of Lake Geneva (hereafter “the City”). Su Wings is a corporation which operates a restaurant in the City. Spyro Condos and Patricia Condos own a different restaurant in the City. Spyro Condos was also the mayor of Lake Geneva. Cathy Ahlgren was at the relevant times a member of the Lake Geneva City Council and served as chair of the committee which had jurisdiction over liquor licenses. In May 1999, Su Wings learned that a special kind of liquor license would be available. The license belonged to a restaurant which had closed. Su Wings agreed to purchase the assets of that business and the business surrendered the license to the City. Su Wings apparently assumed the license would be reissued to it.

¶4 Shortly thereafter, the license committee unanimously approved transferring the license to Su Wings. At the June meeting of the Lake Geneva City Council, the Council denied the request to transfer the license to Su Wings. The Council apparently voted to deny the license because it concluded that the sale of the business to Su Wings had merely been a sale of the license. The Council determined that the license should revert back to the City, which it eventually did. After it reverted back, the Condoes then applied for the license. The license was granted to the Condoes at a meeting for which the agenda items had not been published.

¶5 Su Wings then brought this action against the City, the Condoes, and Ahlgren alleging violations of equal protection and due process, as well as

causes of action in civil conspiracy and for violating the open meetings law, WIS. STAT. § 19.81 (1999-2000).² The action was removed to United States District Court for the Eastern District of Wisconsin in June 2000. That court granted summary judgment to the respondents on the federal claims, but sent the case back to the circuit court for the determination of the claims based on state law.

¶6 At some point the City issued a license to Su Wings. The question before the court, therefore, was whether Su Wings was entitled to monetary damages for civil conspiracy and violation of the open meetings law.

Appeal No. 02-1248

¶7 In appeal no. 02-1248, Su Wings appeals from the grant of summary judgment to the City and Ahlgren on the grounds of governmental immunity. Su Wings argues that the trial court erred when it: (1) determined that Su Wings had no right to receive the liquor license and, therefore, could not claim a civil conspiracy based on being denied the license; and (2) determined that the respondents were immune from liability. Su Wings asserts that an action for civil conspiracy does not require an actionable underlying wrong, and that the respondents' actions fall within the ministerial duty exception to governmental immunity.

¶8 We agree with the trial court's determination that the City and Ahlgren are immune from liability for their actions in denying Su Wings the liquor license. The granting of a liquor license is a legislative function. *State ex rel. Ruffalo v. Common Council of City of Kenosha*, 38 Wis. 2d 518, 524, 157

² All references to the Wisconsin Statutes are to the 1999-2000 version.

N.W.2d 568 (1968). A governmental body, its officers, officials, agents or employees are immune from liability for acts done in the exercise of legislative functions. WIS. STAT. § 893.80(4). See *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 299, 240 N.W.2d 610 (1976). Since the City and Ahlgren acted in their legislative capacity when denying the license to Su Wings, they are immune from liability for those actions.

¶9 Su Wings argues, however, that there is an exception for immunity when a governmental official acts in violation of a ministerial duty. See *Kimps v. Hill*, 200 Wis. 2d 1, 10-11, 546 N.W.2d 151 (1996). Su Wings argues that it alleged that the respondents intentionally failed to publish the Condoses' application for a liquor license and that the publication of the application is a ministerial duty. In addition, Su Wings alleges other violations of the open meetings laws which it claims are ministerial in nature. As the respondents argue, however, even assuming that these actions are ministerial in nature and the respondents did not perform them, there is no causal connection between failing to perform these duties and the harm Su Wings claims it suffered. The damage Su Wings alleges it suffered was not as a result of any open meetings law violation, but rather from the decision not to grant the license. That action is legislative and not ministerial. Consequently, the ministerial exception to governmental immunity does not apply.

¶10 Su Wings also argues that an action for civil conspiracy does not require an independent underlying right to recover. See *Maleki v. Fine-Lando Clinic Chartered, S.C.*, 162 Wis. 2d 73, 81-82, 469 N.W.2d 629 (1991). Su Wings asserts that under *Maleki*, it did not need to have a right to a liquor license in order to pursue a claim for civil conspiracy. Su Wings, however, ignores the effect of the immunity statute. In *Greene v. Farnsworth*, 188 Wis. 2d 365, 525

N.W.2d 107 (Ct. App. 1994), this court considered a claim for civil conspiracy in which a different immunity statute applied. *Id.* at 371. In that case, three men were drinking alcoholic beverages for about nine hours, before one of them drove his car. *Id.* at 368. While driving, he struck one of the plaintiffs as she played in front of her home, seriously injuring her. *Id.* The plaintiffs brought suit against the other two men alleging that they had conspired with the driver to consume alcoholic beverages and operate a motor vehicle. *Id.* at 369. The defendants asserted that their actions were immune under WIS. STAT. § 125.035(2) which provides immunity when one adult provides alcohol to another. *Greene*, 188 Wis. 2d at 369. The plaintiffs argued that their claim involved more than just serving alcohol but that providing alcohol was only a part of the conspiracy “to render assistance and encouragement to [the driver] in the commission of the unlawful act of operating a vehicle while intoxicated.” *Id.* at 371.

¶11 We rejected the plaintiffs’ argument. We recognized that a conspiracy claim is not dependent on underlying actionable conduct. *Id.* at 372. We concluded, however, that all of the plaintiffs’ allegations arose out of the underlying act of providing alcohol to another adult. *Id.* We concluded that the statute provided immunity for that act even if alleged as part of conspiracy. *Id.* We stated that to allow a cause of action for conspiracy in such a situation “would create an exception so great that it would swallow the nonliability rule.” *Id.*

¶12 The same is true here. Su Wings’ conspiracy claim arises from the action the City took when it denied Su Wings the liquor license. The action of denying the application for a liquor license is a legislative action and the City and its agents are statutorily immune from liability for that act. Were we to allow a cause of action for conspiracy based on that very action, we would abrogate the

immunity the legislature has provided. This would be the kind of exception we refused to create in *Greene*. We will not create such an exception here.

¶13 Su Wings argues that *Greene* is not applicable because the statute at issue provides exceptions to immunity. We are not convinced that this difference in the immunity statutes renders the reasoning inapplicable. Further, as we have already discussed, Su Wings has not established an exception to the immunity for the action at issue: the denial of a liquor license. Because we are not presented with those facts, we need not decide whether a conspiracy claim would lie if Su Wings had established an exception to the immunity statute.

¶14 Moreover, we are not convinced that the record allows a reasonable inference that the defendants engaged in a conspiracy. In *Maleki*, the supreme court held: “To prove a conspiracy, a plaintiff must show more than a mere suspicion or conjecture that there was a conspiracy or that there was evidence of the elements of a conspiracy.” *Maleki*, 162 Wis. 2d at 84. The court went on to say that if there are equal inferences of lawful and unlawful action, then the conspiracy is not proven. *Id.* at 85. In this case, the conspiracy claim is based on speculation. Even if we allow an inference of unlawful action, at most the record shows competing equal inferences of lawful and unlawful action. Consequently, the conspiracy was not proven.

Appeal No. 02-1995

¶15 In appeal no. 02-1995, Su Wings appeals from the order which granted summary judgment to the Condoes on the grounds that Su Wings had not demonstrated that any damages it sought were attributable to a civil conspiracy. The circuit court found that the civil conspiracy claim for damages was based on

mere speculation. We agree. As we discussed above, under *Maleki*, 162 Wis. 2d at 84, to be successful, such a claim must be based on more than speculation.

¶16 The basis for Su Wings' claim for damages is that it would have received the liquor license had the license not be granted to the Condoes. In support of this claim, Su Wings argues that the City kept a waiting list to determine who would receive a liquor license and that it was next on that list. As the United States District Court determined, however, Su Wings did not have a property right to the license. *See Su Wings Corp. v. City of Lake Geneva*, Case No. 00-C-797, decision and order (E.D. Wis. Jan. 24, 2001). The federal court determined that the keeping of a waiting list for liquor licenses did not constitute the enacting of an ordinance or achieve the status of a rule. The list did not create a protectible interest in the license for the entities on the list. The court concluded that the determination of who would receive the license under Wisconsin law remained within the discretion of the City Council.

¶17 We agree with the federal court's determination.³ Since Su Wings did not have a property interest in the liquor license, and since the determination of who would receive a license lay within the City Council's discretion, any claim that Su Wings suffered monetary damage as a result of the denial is mere speculation. Since Su Wings cannot show it had a right to the license, it cannot demonstrate that it suffered compensable damage as a result of its denial.

³ We also conclude that the doctrine of issue preclusion controls this issue. *See Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). Although the federal court ruled on the issue in the context of a federal cause of action, the core conduct was the same. Su Wings could have appealed the District Court's ruling but did not.

CONCLUSION

¶18 For the reasons stated, we conclude that the circuit court properly granted summary judgment to the City, Ahlgren and the Condoes. We affirm the orders and judgments.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

