

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 7, 2004

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 No. 03-0997

Cir. Ct. No. 01CV000979

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SU WINGS CORPORATION AND SIU WING LEUNG,

PLAINTIFFS-APPELLANTS,

v.

**CITY OF LAKE GENEVA, CATHLEEN M. AHLGREN
AND COLLEEN ALEXANDER,**

DEFENDANTS-RESPONDENTS,

COREGIS INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Su Wings Corporation and Siu Wing Leung (Su Wings) appeal from the judgment entered against them. The issue on appeal is whether the circuit court properly granted summary judgment against them. Because we conclude that summary judgment was appropriately granted, we affirm.

¶2 The underlying issue in this case—which has been before this court in other guises before—is whether Su Wings can recover money damages because the City of Lake Geneva did not grant it a liquor license until 2001. Su Wings sued the City, Cathleen M. Ahlgren, the chair of the Finance/License Committee, City Clerk Colleen Alexander, and the City’s insurer, alleging two causes of action: (1) intentional or negligent misrepresentation, and (2) negligence. The facts underlying this case are related to those described in *Su Wings Corp. v. City of Lake Geneva*, Appeal Nos. 02-1248 and 02-1995, unpublished slip op. (Ct. App. February 26, 2003) (*Su Wings I*). In that case, Su Wings sued the City, Ahlgren, and the mayor and his wife, Spyro Condos and Patricia Condos. Su Wings alleged various causes of action based on the grant of a liquor license to the Condos. *Id.*, ¶5. The circuit court granted summary judgment to the defendants on the basis of governmental immunity. *Id.*, ¶8. We affirmed, concluding that the decision to grant or deny a liquor license is a legislative function and the City and its agents are immune from liability for actions done in the exercise of legislative functions. *Id.*

¶3 Su Wings also alleged that the defendants had breached a ministerial duty and therefore did not enjoy immunity for failing, among other things, to publish the Condos’ application for a liquor license. *Id.*, ¶9. We concluded that even if the acts were ministerial, Su Wings was not able to establish a causal connection between the acts and the harm it suffered. *Id.* Su Wings also sought

damages on the basis of a civil conspiracy on the grounds that it would have received the liquor license if it had not been given to the Condoes. *Id.*, ¶¶15-16. We concluded that Su Wings had not established that it had a right to the liquor license and that “any claim that Su Wings suffered monetary damage as a result of the denial is mere speculation.” *Id.*, ¶17.

¶4 The case before us now involves a similar issue with related, but somewhat different, facts. Su Wings alleged negligent or intentional misrepresentation asserting that Alexander and Ahlgren told it that there were no Class B intoxicating liquor licenses available because of the quota imposed on the City by statute. Su Wings further alleged that this was not true, but that additional licenses had been available to the City. In addition, Su Wings alleged that members of the common council stated that if they had been aware that another license was available, they would have awarded it to Su Wings. The claim for negligence alleged that Alexander and Ahlgren were both negligent for failing to publish the Condoes’ application for a liquor license. Consequently, Su Wings argued before the circuit court and here that it is entitled to lost profits as damages for the time during which a license could have been granted to it but was not.

¶5 The defendants moved for summary judgment. The circuit court granted the motion. The court concluded that the case was controlled by the doctrine of legislative immunity. The court found that an applicant may not sue a City for failure to grant or deny a liquor license. The court further held that since the City does not have a duty to grant a license, an officer, agent, or employee of the City cannot be found to have such a duty.

¶6 Su Wings argues that the defendants are not entitled to blanket immunity. It argues that this case is different from the earlier case because here it

is not challenging the legislative action of granting or denying a license, but rather the determination by the City officers that there was no license available to grant.

¶7 This court reviews summary judgment decisions de novo, applying the same standards employed by the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins an issue of material fact or law. *Id.* If we determine that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. *Id.* at 232. If the movant has carried his or her initial burden, we then look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial. *Id.* at 233.¹

¶8 Su Wings asserts that while the decision to grant a liquor license is discretionary, this case involves ministerial duties imposed on the city clerk. Su Wings argues that if the city clerk had complied with her statutory duties, she would have known that another license was available. We need not decide whether this was a ministerial duty, however, because as in the other case, the basis for Su Wings' claim is that it would have received the license if the City had

¹ We question the adequacy of the affidavits submitted by Su Wings in opposition to the City's motion for summary judgment. Summary judgment affidavits must contain "evidentiary facts, of which the affiant has personal knowledge." *Hopper v. City of Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977). Portions of affidavits "which are made by persons who do not have personal knowledge or which contain allegations of ultimate facts, conclusions of law or anything other than evidentiary facts do not meet the statutory requirements and will be disregarded." *Id.* The affidavits submitted by Su Wings appear to contain conclusions of law, allegations of ultimate fact, statements of which the affiant may have no personal knowledge, as well as mere speculation. Because we have decided the case on the merits, however, we need not decide whether the affidavits were actually sufficient.

properly determined that one was available. And also as in the other case, Su Wings cannot establish that it has a property interest in that license.² Although Su Wings has offered affidavits from members of the city council in support of its position, any statements by members of the common council about how they would have voted if they had been aware of an additional available license are mere speculation. Su Wings simply does not have a right to recover monetary damages for profits lost for not receiving a license which it had no right to receive.

¶9 As to its second claim, Su Wings argues that City Clerk Alexander had a ministerial duty to publish the Condoses' application for a liquor license. Except for the change in defendant from Ahlgren to Alexander, we do not see how this claim is different from the very issue we decided in the previous case. *See Su Wings I*, ¶9. We concluded in that case that even if the actions were ministerial in nature, there was no causal connection between the failure to perform the duty and the harm alleged. We see no meaningful distinction between this issue and the one previously decided. Consequently, the issue is governed by the doctrine of issue preclusion, and we will not decide the issue again. *See Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

² As we concluded in the other case, this issue may be governed by the doctrine of issue preclusion. *See Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). While the underlying issue is basically the same as that decided in *Su Wings Corp. v. City of Lake Geneva*, Appeal Nos. 02-1248 and 02-1995, unpublished slip op. (Ct. App. February 26, 2003), the facts are somewhat different. While this does not preclude us from applying the doctrine of issue preclusion, we nonetheless address the underlying merits of the claims.

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

