COURT OF APPEALS
DECISION
DATED AND RELEASED

February 4, 1997

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

NOTICE

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

No. 95-2452

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

William F. O'Connor, by his Guardian Ad Litem, Michael E. McMorrow, Rosemary O'Connor and CompCare,

Plaintiffs-Appellants,

v.

Thomas M. Boehlke and Classified Insurance Company, Inc., Edward J. Friede, Charles Thompson, Robert R. Packee, Wisconsin Department of Transportation and State of Wisconsin, City of Milwaukee, Mequon/Thiensville School District, City of Mequon and Wausau Insurance Companies,

Defendants-Respondents.

APPEAL from judgments of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. William F. O'Connor, (by his guardian ad litem, Michael E. McMorrow), and Rosemary O'Connor appeal from a grant of summary judgment in favor of Thomas M. Boehlke, Classified Insurance Company, Inc., Edward J. Friede, Charles Thompson, Robert R. Packee, the Wisconsin Department of Transportation, the State of Wisconsin, the City of Milwaukee, the Mequon/Thiensville School District, the City of Mequon and Wausau Insurance Companies.

O'Connor claims that the trial court erred in granting summary judgment because material issues of fact exist, the release at issue expressly reserved a claim against Boehlke in his capacity as a City of Milwaukee employee and the various parties are not entitled to immunity. Because no material issues of fact exist, because Boehlke was not acting within the scope of his employment, and because the various parties are entitled to governmental immunity, we affirm.[1]

I. BACKGROUND

On September 13, 1993, at approximately 7:45 a.m., City of Milwaukee Police Officer Boehlke was traveling eastbound on Highway 167 in his personal automobile. He was not on duty, but was on his way to the Milwaukee County Courthouse to give testimony pursuant to a subpoena. He had just dropped his son off at school and, because he was ahead of schedule, decided to take the scenic route through Mequon to the courthouse rather than the quickest route.

As he was crossing the intersection of Range Line Road and Highway 167 in Mequon, Boehlke struck William O'Connor, a minor, when he was riding his bicycle to school. O'Connor was in the crosswalk at the time of impact. O'Connor settled with Boehlke and Boehlke's personal automobile insurance carrier for the limits of the policy, $50,000. A release was executed.

[1] O'Connor also claims that the trial court erred in refusing to allow him to amend his pleadings. This claim, however, was never argued. Accordingly, we decline to consider it. ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).

Subsequent to the settlement, O'Connor commenced a lawsuit against Boehlke and his personal auto insurance carrier (Classified), the City of Milwaukee, the City of Mequon, the Mequon/Thiensville School District and the Department of Transportation, as well as three of the DOT's employees (Friede, Packee and Thompson).

Each defendant filed a motion for summary judgment. The trial court granted summary judgment on the basis that Boehlke and Classified were released, the City of Milwaukee could not be responsible for Boehlke's actions because he was not acting within the scope of his employment at the time of the accident, and the rest of the defendants were entitled to immunity for discretionary acts pursuant to § 893.80, STATS. O'Connor now appeals.

II. DISCUSSION

When reviewing a grant of summary judgment, we apply the standards set forth in § 802.08, STATS., just as the trial court applies those standards. ***Voss v. City of Middleton***, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991). The standard has been so often repeated, we need not do so again here. *See* ***id.*** Our review is *de novo*. ***Id.*** After independently reviewing the record in this case, we conclude that the trial court was correct to grant summary judgment to each of the defendants.

A. City of Milwaukee.

O'Connor claims that the trial court erred in granting summary judgment to the City of Milwaukee because whether Boehlke was acting within the scope of his employment is an issue of fact. O'Connor presents two theories of liability against the City: that because Boehlke was acting within the scope of his employment at the time of the accident, the City is liable (1) under the theory of respondeat superior; and (2) under statutory indemnification pursuant to § 895.46, STATS. The key to succeeding under either theory rests on the issue of whether Boehlke was acting within the scope of his employment. *See* ***Shannon v. City of Milwaukee***, 94 Wis.2d 364, 370, 289 N.W.2d 564, 568 (1980), and § 895.46. We agree with the trial court, as a matter of law, that he was not.

The following facts are undisputed. The accident occurred while Boehlke was en route to the Milwaukee County Courthouse to testify. He was driving his personal automobile and was "off-duty." He had just dropped his son off at school and decided to take the scenic route through Mequon instead of the direct route through Milwaukee to get to the courthouse. He was not paid for his travel time or reimbursed for gas mileage. The City was not controlling his route or means of travel. Based on these undisputed facts, we conclude that Boehlke was not serving his employer in any fashion at the time the accident occurred. Accordingly, he was not acting within the scope of his employment and the City cannot be held liable. *See* ***DeRuyter v. Wisconsin Elec. Power Co.***, 200 Wis.2d 349, 360-61, 546 N.W.2d 534, 537 (Ct. App. 1996) (for employer to be held vicariously liable for employee's actions en route to work, it is necessary to show that employer exhibited some control over the employee's route or means of travel), *review granted*, 204 Wis.2d 317, 555 N.W.2d 123 (1996).

We also reject O'Connor's claim for statutory indemnification. He has failed to cite any controlling case law to indicate that municipal liability under § 895.46, STATS., exists for an accident involving a municipal employee while traveling to work. Moreover, we are convinced that at the time of the accident, Boehlke was involved in a task of a purely personal nature. It involved taking his son to school and driving the scenic route to the courthouse. Because of the purely personal nature of this task, the City cannot be held accountable. *See* ***Wuorinen v. State Farm Mut. Auto. Ins. Co.***, 56 Wis.2d 44, 56, 201 N.W.2d 521, 527 (1972) (employee is not acting within scope of employment when driving involves task of purely personal nature).

B. Boehlke/Classified.

O'Connor claims that the trial court erred in granting summary judgment to Boehlke and Classified because the legal effect of the "settlement document" was to preserve a $50,000 claim against Boehlke by virtue of his employment with the City of Milwaukee.

We have reviewed the "settlement document." We conclude that the document clearly releases Boehlke from any personal liability, but does attempt to reserve the right to pursue vicarious liability from the City of

Milwaukee based on Boehlke's employment with the City. We need not decide the effect of the settlement document, however, because we have already determined that Boehlke was not acting within the scope of his employment at the time of the accident.

Accordingly, whether the settlement document successfully reserved a claim against the City is irrelevant. No claim exists against the City because Boehlke was not acting within the scope of employment at the time of the accident. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

C. City of Mequon.

O'Connor claims the trial court erred in granting summary judgment to the City of Mequon because it breached the ministerial duties of: (1) maintaining a flashing beacon light at the intersection; (2) failing to place crossing guards at the intersection; and (3) failing to enforce the speed limit. He also argues that the City is not immune because the intersection presented a "known present danger," which removes immunity protection. We reject each argument.

O'Connor's first three arguments involve purely discretionary acts. Enforcement of the speed limit is clearly discretionary. *See* ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 260-61, 533 N.W.2d 759, 764 (1995) (police must be given discretion regarding how best to carry out their responsibilities). Whether or not to place crossing guards at an intersection is also a discretionary act. *See* § 349.215, STATS., (a city *may* provide for school crossing guards), as is placement of a traffic sign in the absence of a statute requiring the sign. *See* ***Hjerstedt v. Schultz***, 114 Wis.2d 281, 284, 338 N.W.2d 317, 319 (Ct. App. 1983) (placement of a traffic sign in the absence of a statute of regulation that mandates the sign requires the exercise of judgment).

We also reject O'Connor's contention that the known present danger exception to immunity applies in this case. A known present danger exists where the "nature of the danger is compelling and known to the officer" so that "nothing remains for judgment or discretion." ***C.L. v. Olson***, 143 Wis.2d

701, 715, 422 N.W.2d 614, 620 (1988). An example constituting a known present danger includes circumstances where a tree is lying across a road. *See* ***Domino v. Walworth County***, 118 Wis.2d 488, 347 N.W.2d 917 (Ct. App. 1984). The standard requires some known immediate and obvious danger. This standard is not satisfied under the facts presented in the instant case. As stated by the trial court, every intersection is dangerous. We see nothing in the record to convince us that the intersection at issue here was so dangerous that placing crossing guards, or additional signs, transformed a discretionary function into something mandatory. There was no tree down presenting such a compelling danger that the City was required to act. Based on the foregoing, we conclude that the City had no prior knowledge of any vehicular-pedestrian accidents. Hence, this case is not one which falls under the known present danger exception.

D. Mequon/Thiensville School District.

O'Connor next argues that the trial court erred in granting summary judgment to the school district because it failed to place crossing guards and because the known present danger exception applies. We reject both arguments.

Whether to place crossing guards involves a discretionary act, *see* § 120.13, STATS., and we have already concluded that the circumstances in this case do not warrant application of the known present danger exception. The school district is immune and, accordingly, granting it summary judgment was proper.

E. Department of Transportation Employees, Packee and Friede.[2]

O'Connor argues that the trial court erred in granting summary judgment to Packee and Friede because they violated ministerial duties including: (1) failing to install a S3-2 school warning sign; (2) removing a

[2] O'Connor has not appealed the dismissal of the Department itself or a third employee, Thompson.

flashing light beacon at the intersection; (3) failing to recommend that crossing guards be placed at the intersection; and (4) raising the speed limit to 25 m.p.h. He argues that each of these is a ministerial act because the Manual on Uniform Traffic Control Devices mandates each. He also argues that the intersection presented a known present danger and, therefore, immunity is not available. Again, we reject each of O'Connor's contentions.

Packee was not even involved in the design or installation of the signs at the intersection. Friede was not directly involved, but did play a supervisory role. Nevertheless, we are not convinced that the manual creates a ministerial duty with respect to the four instances outlined above. The manual makes placement of crossing guards discretionary in certain circumstances, not mandatory. *See* Manual on Uniform Traffic Control Devices, § 7D-2. The manual makes placement of school warning signs discretionary, not mandatory. *See* MUTCD § 7B-12. Neither the manual nor § 346.57(4)(b), STATS., prohibits raising the customary 15 m.p.h. speed limit. The manual does not make the decision to remove a flashing light beacon a violation of a mandatory duty.

Further, we have already concluded that the circumstances present here do not satisfy the known present danger exception. Accordingly, because the DOT employees either were not involved with the intersection or because any actions the employees took were discretionary in nature, they are not liable to O'Connor for his injuries. Therefore, the trial court did not err in granting these defendants summary judgment.

By the Court.—Judgments affirmed.

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