COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1733 **Cir. Ct. No. 01-CV-951**

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

NICHOLAS A. LIVINGSTON,

PLAINTIFF-APPELLANT,

V.

WAUSAU UNDERWRITERS INSURANCE COMPANY, WINNECONNE COMMUNITY SCHOOL DISTRICT AND JASON CLARK,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Nicholas Livingston appeals from a judgment dismissing his action against the Winneconne Community School District and its insurer, Wausau Underwriters Insurance Company. The issues concern the trial

court's summary judgment ruling that the District was immune from suit. We affirm.

¶2 Livingston was a senior at Winneconne High School when a fellow student, Jason Clark, accidentally struck him with a golf club during a physical education class. Livingston subsequently commenced this lawsuit against the District and Clark, asserting the District's liability for his injuries based on the alleged negligence of the physical education teacher supervising Livingston's class.

¶3 The sole evidence on the District's summary judgment motion was Livingston's written description of the accident, summarized as follows. His physical education class was practicing golf on the day in question. The teacher, Melodie Hoenecke, divided the class into two sections, one to practice chipping and one to practice driving. Hoenecke stayed with the chippers and sent the drivers to a practice area forty to fifty feet away. There, some class members began driving golf balls into a field, while others, including Livingston and Clark, stood behind them waiting their turn to hit. Hoenecke had instructed the students not to swing their clubs in the waiting area. Clark disregarded that instruction and took a practice swing. His club head struck Livingston in the face, causing the injury that led to this lawsuit.

¶4 WISCONSIN STAT. § 893.80(4) (1999-2000)[1] bars suits against governmental entities, or against their employees, "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." Liability does

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

exist, however, for negligent performance of ministerial duties, which are those where the duty 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." ***Kimps v. Hill***, 200 Wis. 2d 1, 10-11, 546 N.W.2d 151 (1996) (quoting ***C.L. v. Olson***, 143 Wis. 2d 701, 711-12, 422 N.W.2d 614 (1988)). An exception to immunity also exists when a public agency or official negligently addresses or responds to a "compelling and known danger." ***Id***. at 15. Determining whether the alleged act falls outside the scope of immunity under § 893.80(4) is a question of law. ***Kimps***, 200 Wis. 2d at 8.

¶5 Hoenecke did not have a ministerial duty to conduct and supervise her physical education class in a particular manner. "While the obligation to provide physical education classes is mandated, and thus ministerial, the manner in which those classes are conducted is not specified [by law]." ***Bauder v. Delavan-Darien School Dist.***, 207 Wis. 2d 310, 314, 558 N.W.2d 881 (Ct. App. 1996). Hoenecke's decision to provide safety instruction but not directly supervise the driving section of her class was therefore a discretionary decision that did not subject her employer to liability.

¶6 Neither is the District's immunity lost under the compelling and known danger exception to governmental immunity. This exception derives from the case of ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977), where a park's hiking trail, used at night, lay inches from the edge of a high cliff without warning to its users. The supreme court concluded that the danger was so obvious that the park manager had a clear and absolute duty to address it. ***Id***. at 541. The danger from a carelessly swung golf club in a physical education class is not

remotely analogous to the obvious and predictable danger posed in ***Cords***. The manner in which the risk of injury was addressed remained discretionary.

By the Court.—Judgment affirmed.

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