

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 7, 2011**

A. John Voelker  
Acting 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. 2010AP836**

**Cir. Ct. No. 2009CV15**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**DALE A. WEIS, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR  
OF THE ESTATE OF LINDA A. WEIS, DECEASED,**

**PLAINTIFF-APPELLANT,**

**v.**

**CORNHUSKER CASUALTY COMPANY, JEFFERSON BUS SERVICES, INC.  
AND RONALD J. RATZBURG,**

**DEFENDANTS-RESPONDENTS,**

**DEAN HEALTH PLAN, INC. AND GENERAL CASUALTY INSURANCE  
COMPANY,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Jefferson County:  
JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Dale Weis appeals a summary judgment dismissing claims against Ronald Ratzburg, Jefferson Bus Service, Inc. (“JBS”), and their insurer, Cornhusker Casualty Company. Weis argues that the circuit court improperly concluded that Ratzburg and JBS were agents of the Jefferson School District, and thus entitled to immunity under WIS. STAT. § 893.80(4),<sup>1</sup> for alleged negligence arising from the operation of a school bus. We disagree and affirm.

¶2 The relevant facts are undisputed. Linda Weis was operating a lawn tractor on the shoulder of Probst Lane in Jefferson County when she was fatally struck by a school bus operated by Ratzburg. Ratzburg was an employee of JBS, which contracted with the school district to provide student transportation.

¶3 Ratzburg, JBS, and Cornhusker moved for summary judgment, contending that the undisputed facts established that Ratzburg and JBS were agents of the school district and therefore entitled to governmental immunity under WIS. STAT. § 893.80. The circuit court agreed, and granted summary judgment dismissing Weis’s claims. Weis now appeals.

¶4 On review of a summary judgment decision, we employ the same methodology as the circuit court. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751. The well-established purpose of summary judgment is to avoid trials where there is nothing to try. *Lodl v. Progressive Northern Ins. Co.*, 2002 WI 71, ¶16, 253 Wis. 2d 323, 646 N.W.2d 314. If the facts are undisputed, the application of WIS. STAT. § 893.80(4)

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

involves a question of law that we review *de novo*. See *Kettner v. Wausau Ins. Cos.*, 191 Wis. 2d 723, 732, 530 N.W.2d 399 (Ct. App. 1995).

¶5 The governmental immunity statute, WIS. STAT. § 893.80(4), confers broad immunity from suit to public officers or employees for acts done pursuant to legislative, judicial, quasi-legislative, or quasi-judicial capacities. See *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 90, 596 N.W.2d 417 (1999). To describe an activity as quasi-judicial or quasi-legislative is to say that the activity involves the exercise of discretion. *Id.* Governmental immunity applies to employees of school districts, and to agents of school districts who have master-servant relationships with school districts. See *Kettner*, 191 Wis. 2d at 729-30, 736.

¶6 The dominant factor in determining whether a master-servant relationship exists is the right to control. *Id.* at 737. Here, the circuit court properly focused on the school district's right to control details of its contractual school bus operation. We agree with the court's analysis.

¶7 The circuit court noted that bus routes were subject to approval by the school district. The court also referenced the fact that JBS was required to transport students in compliance with passenger lists, days of operation, and time schedules established by the school district. In addition, the school district required JBS to provide a resident manager "immediately available" to the district, and the district had the right to monitor JBS radio traffic. The school district also required drivers to have first aid certification, attend safety meetings, write reports concerning rider misconduct, follow school board procedures on discipline, and wear appropriate clothing. The contract also provided that the school district could terminate its contract with JBS on thirty days' notice for cause, and JBS had

no reciprocal right. JBS was also required to cooperate with the school district on media and community issues.<sup>2</sup>

¶8 Aside from the right to control, several secondary factors may be taken into account, including such factors as the nature of the job, the intent of the parties, and which party provided any instrumentalities or tools. *Id.* We acknowledge that the secondary factors do not all favor immunity, notably that JBS furnishes the buses and the contract states that JBS is an independent contractor. The contract also contains an insurance requirement in excess of the statutory minimums.

¶9 However, as the circuit court pointed out, the school district “does not mandate bus manufacturer nor require the buses to be housed on school property, but in almost all other respects, the District controls the buses.” Furthermore, the court emphasized that the school district controls the details of non-routine events, such as snow days and passenger list amendments.

¶10 In addition, the use of the label “independent contractor” in the contract between the parties is not dispositive. *See Pamperin v. Trinity Mem’l Hosp.*, 144 Wis. 2d 188, 201, 423 N.W.2d 848 (1988). Even assuming the independent contractor and insurance provisions in the present contract may be indicative of independent contractor status, we conclude that the bulk of the factors paint a picture of a master-servant relationship.<sup>3</sup>

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<sup>2</sup> The circuit court acknowledged that the school district did not have daily control over JBS to the extent that school district employees did not ride along with and instruct drivers.

<sup>3</sup> Weis argues that none of these factors “was a cause of this fatal rear end crash that claimed the life of Linda Weis.” However, this argument is unsupported by legal citation and we  
(continued)

¶11 Weis contends that the circuit court failed to give “due weight to the joint decision-making that was performed by both the District and JBS.” We disagree. The court acknowledged the joint decision-making, but also recognized that many of these decisions were subject to the school district’s ultimate approval.

¶12 Weis also contends that the circuit court failed to appreciate the extent of statutory regulation of bus drivers and transportation companies. *See* WIS. STAT. §§ 121.51-121.58. To the contrary, the court emphasized that the parties’ relationship went beyond those aspects required by statute. In any event, the fact that school bus service is regulated does not change the *Kettner* analysis.<sup>4</sup>

¶13 Finally, Weis argues that, even if Ratzburg and JBS are agents for purposes of WIS. STAT. § 893.80(4), there is no immunity arising out of the negligent operation of a motor vehicle under WIS. STAT. § 345.05. Weis concedes that this issue was raised for the first time on appeal. We generally do not address issues raised for the first time on appeal, and decline to do so here. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). Regardless, Weis also concedes that “[t]he statute is not directly applicable to the situation here since there is no claim against the District, and it is not a party to this action.” Weis essentially raises a policy argument that is not before us, and we take no position as to whether § 345.05 may apply under some other set of facts.

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therefore will not address the argument further. *See Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (Ct. App. 2004).

<sup>4</sup> Because we conclude that Ratzburg and JBS were agents of the school district and therefore entitled to immunity pursuant to WIS. STAT. § 893.80(4), we need not reach the issue of whether the government contractor defense applies to the operation of a school bus. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938).

*By the Court.*—Judgment affirmed.

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

