**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-1536**

Brian Vitek as Trustee for the next-of-kin of Patric Vitek, deceased,
Respondent,

vs.

The City of Eagan,
Co-Appellant,

Dakota County,
Appellant,

and

Dakota County,
Appellant,

vs.

Independent School District 196,
Co-Appellant.

**Filed July 3, 2023**
**Reversed**
**Ross, Judge**

Dakota County District Court
File No. 19HA-CV-20-3571

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Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

## NONPRECEDENTIAL OPINION

**ROSS**, Judge

A boy crossing a county road by bicycle on his way to school was struck and killed by a car. The boy's family settled any claims against the driver and sued the county, city, and school district for having negligently failed to reduce the speed limit or post warning signs on the road. The defendants each unsuccessfully moved for summary judgment. We reverse the district court's orders denying summary judgment because neither the city nor the school district owed the boy a duty and because the county is entitled to vicarious official immunity.

## FACTS

This negligence action arose from a car-bicycle collision that sadly resulted in the death of thirteen-year-old Patric Vitek, who was struck cycling across a county road in November 2019 on his way to school. We decide this appeal from the district court's orders denying summary judgment by considering the facts in the light most favorable to respondent Brian Vitek, Patric's father, as the nonmoving party.

The collision occurred on a segment of County State Aid Highway 30, also known as Diffley Road, located in the City of Eagan just south of three public schools within Independent School District 196: Northview Elementary School, Dakota Hills Middle School, and Eagan High School. Appellant Dakota County owns and manages Diffley Road, which is a four-lane minor arterial roadway designed to handle a high volume of vehicular traffic. The speed limit on the date of the incident was 45 miles per hour, and the road did not have a reduced, school-zone speed limit. Eagan residents had expressed concerns about safety on Diffley Road since at least 1985, citing its proximity to the schools. They had raised safety concerns to appellants City of Eagan, Dakota County, and Independent School District 196 about the speed limit, the nearby intersections, and other general traffic issues.

Each government entity's role differs as it relates to safety on Diffley Road. The county is the road's owner and operator. The county cannot on its own change the road's underlying speed limit, meaning the speed limit generally in effect, but it can on its own impose a reduced, school-zone speed limit effective when children are present. A county official testified that the county could enact a school-zone speed limit by following the process outlined in the Minnesota Department of Transportation (MnDOT) guide, "A Guide to Establishing Speed Limits in School Zones." According to that guide, the county would first decide to initiate the process and then seek a school-route plan from the school district before deciding whether to implement a school-zone speed limit.

The county could request that MnDOT change the underlying speed limit on Diffley Road with the city's involvement. To do so, according to county policy, it must first obtain

a resolution from the city requesting a change and then request a speed-limit study from the state. The city itself lacks authority to unilaterally change the speed limit on Diffley Road. But it had at least once sent a resolution to the county requesting a reduced speed limit on the road. Responding to a 1985 citizen petition, the Eagan City Council passed a resolution, which it forwarded to the county, encouraging the county to undertake a safety assessment of the speed on the road. Otherwise, the city has responded to complaints about the safety of Diffley Road by forwarding them to the county.

The school district lacks authority to impose or change school-zone speed limits, but it can be involved in the county's consideration of a change. That is, the county's speed-limit-change process would include receiving a school-route plan from the school district before evaluating a change. The school district created student transportation plans, including creating bus routes and safety guidance for students traveling to school. The district had designated Diffley Road as hazardous because of its minor-arterial-roadway designation, meaning that students having to cross the road to reach school would not be required to walk or bike and would instead be assigned to ride a school bus. Because the district provided this preferred method of crossing the road using nonpedestrian means for students to reach the schools by bus, it did not participate in a school-zone speed-limit analysis or initiate a study.

The county's decision not to pursue creating a school-zone speed limit on Diffley Road before the November 2019 accident rested in part on the belief held by county officials that the school district would not provide it with a school-route plan. But a school-district official testified that she would have provided a plan to the county if it had asked

for one. A county official also communicated with Eagan residents about his concerns with implementing a school-zone speed limit on the road. In response to a resident advocating for a lower speed limit in 2016, the official explained that "school speed zones can create problems due to speed differential between those drivers that do and do not comply with a reduced speed." He reasoned that, given the district's busing policy, "the best approach here is likely to pursue strategies that discourage any crossings by school aged children." Responding to a complaint in 2018, the official referenced "A Guide to Establishing Speed Limits in School Zones" and repeated that school speed zones can increase rather than decrease danger to pedestrians. He highlighted the low level of pedestrian activity on Diffley Road and stated that a broader, comprehensive approach would be more effective. He also commented that the county was still evaluating the best approach to increase safety on the road. Although residents continued to raise speed and other safety concerns, and the county said it was undertaking a wider county school-zone analysis, the county undertook no action to implement new safety measures on Diffley Road before November 2019.

Brian Vitek brought this lawsuit in October 2020 as trustee for Patric's next-of-kin. Vitek first sued only the county and city, alleging that the entities

> failed in their duty to safely design, maintain, and implement safe and proper speed limits within the designated school zone and hazardous crossing area, as well as failing to implement the posting and use of traffic control signs, devices, and/or warnings for the anticipated users of this road, including motorists, pedestrians and bicyclists, and failed to implement safe and proper crossing availability for students, including bicyclists and pedestrians.

The county filed a third-party indemnity complaint against the school district. Vitek then filed a claim against the school district, alleging that it "breached its duty of care to Patric Vitek by failing to administer, implement and execute policies, procedures, and protocols to prevent and/or reduce the opportunity for bodily injury or harm resulting in his death."

The county, city, and school district each moved for summary judgment. The district court denied the motions. It concluded, among other things, that genuine issues of material fact existed on the issues of duty and immunity. The county appealed the decision, and the city and school district filed notices of related appeal. We accepted jurisdiction and now decide the appeal as to all defendants.

**DECISION**

The county, city, and school district challenge the district court's decision refusing to grant summary judgment in their favor. A district court must grant summary judgment when there is no material fact in genuine dispute and judgment as a matter of law is warranted, Minn. R. Civ. P. 56.01, and we review summary-judgment decisions de novo, *Montemayor v. Sebright Prod., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). We view the evidence in the light most favorable to Vitek as the nonmoving party. *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018). We are convinced that no genuine disputes of material fact preclude summary judgment favoring the appellants.

Appellants argue that summary judgment should have been granted because vicarious official immunity shields them from civil liability for their decisions related to the speed limit, and the county and school district argue that statutory discretionary immunity also applies to their decisions. The city and school district contend additionally

that the undisputed facts confirm that they owed no duty to Patric, defeating the negligence-based theory of liability. For the following reasons, we conclude that the city and school district owed no duty to Patric and that, because of vicarious official immunity, the county is shielded from liability. We do not reach the appellants' other arguments.

**I**

The city and school district argue that they are entitled to summary judgment because they owed Patric no duty. A plaintiff alleging liability based on negligence can prevail only by proving the existence of a duty, a breach of the duty, causation, and injury. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). We consider whether a duty exists, a question of law, de novo. *Id.* Considering the evidence in Vitek's favor, we conclude that the city and school district owed no duty to Patric Vitek as he crossed the road.

It is significant that Patric was struck and killed by a vehicle driven by a nonparty driver, and this fact argues against liability here. A defendant generally owes no duty to a plaintiff to prevent harm caused by a third party. *Fenrich*, 920 N.W.2d at 201. Two exceptions to this general rule exist. One exception applies when the plaintiff and defendant are in a special relationship and the third party's actions create a foreseeable risk of harm. *Domagala*, 805 N.W.2d at 23. The other applies when a defendant's "own conduct" creates a risk of injury to a foreseeable plaintiff. *Id.*

The parties agree that only the "own conduct" exception is at issue here. That exception allows for liability when a defendant's conduct constitutes misfeasance rather than simply nonfeasance. *Fenrich*, 920 N.W.2d at 203. Vitek contends that the city and school district engaged in misfeasance. Misfeasance is "active misconduct working

positive injury to others," while nonfeasance is "passive inaction or a failure to take steps to protect others from harm." *Id.* (quotations omitted). Whether conduct is misfeasance or nonfeasance is a question of law absent genuine fact issues about a defendant's actions and responsibilities. *Id.* at 205 n.4. Considering the evidence in the light most favorable to Vitek, we conclude that the city and school district's conduct constituted only nonfeasance, not misfeasance.

### *A. The City of Eagan did not engage in misfeasance.*

The city argues that it could not have had a duty to enact safety measures because it had no control over Diffley Road, a road belonging to the county. Vitek challenges this position by referencing two city–county maintenance agreements and the city's crosswalk policy, documents that he argues evidence the city's having a duty to oversee traffic safety on the road. Vitek's interpretation of these documents is far from convincing; the maintenance agreements cover controlled intersections on Diffley Road rather than the road itself, and the pedestrian policy expressly refers only to city roads. But even if the agreements suggest some level of city influence over Diffley Road, Vitek's duty argument fails because he has not alleged any behavior that rises above nonfeasance and into misfeasance, and he therefore falls short of the "own conduct" exception.

Vitek unpersuasively references two city actions that he argues constitute misfeasance. He references the city's alleged awareness of resident concerns about Diffley Road and its passing of a resolution calling for county action as "the next step in the mandatory process." The record does contain evidence that the city previously passed a resolution favoring lowering the speed limit on the road, and a county official testified that

the county needed city cooperation to make changes on roads within city limits. But these actions bear only on changes to the underlying speed limit, not a school-zone reduced limit. And even accepting as true that the city had some role to play in reducing the speed limit but did not play it, the alleged breach constitutes mere nonaction, or, more fitting in the context of the exception we are considering here—nonfeasance. The "own conduct" exception requires action, so the apparent fact dispute over the city's role is not material and cannot preclude summary judgment favoring the city.

Vitek also urges a holding of misfeasance based on the city's referrals to the county of resident complaints concerning Diffley Road. He maintains that the referrals, which are affirmative actions by the city, caused a delay in the county's process that could have led to safety changes. But actionable misfeasance is "active misconduct working positive injury to others." *Fenrich*, 920 N.W.2d at 203 (quotation omitted). The city's referring complaints to the county was not active misconduct working a positive injury. The referrals instead recognized that the county owns the road and has the authority to implement a school speed zone and to initiate the process to implement a school-zone speed limit.

Vitek did not identify any city action that constitutes misfeasance. The city had no duty to Patric Vitek. We need not address the city's argument about the public-duty doctrine because we conclude that the "own conduct" duty exception does not apply. The city is entitled to summary judgment.

***B. Independent School District 196 did not engage in misfeasance.***

The school district argues that the breadth of its duty does not extend to areas outside of its direct control—the school grounds and school buses—and that it committed no active

misconduct otherwise giving rise to a duty. The argument is persuasive, and Vitek does not identify contrary evidence or present a convincing counterargument. The lack of any misfeasance by the district is dispositive.

The school district's not providing a school-route plan to the county is, again, a nonaction: nonfeasance, not misfeasance. The county explains the school-zone speed-limit process by highlighting MnDOT's "A Guide to Establishing Speed Limits in School Zones." The guide indicates that the county's first step in that process is to obtain a school-route plan from the school district. Here too, the parties identify a fact dispute that is not material to our summary-judgment analysis. Vitek and the school district dispute whether the school district was asked for a school-route plan and whether it would have provided the county with one if it had been asked. Even assuming the county asked the school district for a school-route plan, and even assuming the district declined to provide one, the district's failure to provide the plan amounts to no more than another nonaction, or mere nonfeasance. And although the district's referring safety complaints to the county are actions, referring complaints is not misconduct for the reasons we discussed above.

And the actions the school district did take regarding Diffley Road, which were designating it as hazardous and implementing a bus policy that relieved even those students who live near the schools of the need to walk across the road to get there, were not active misconduct leading to Patric's injury. The cases Vitek cites as examples of active misfeasance make the argument against his position. Unlike this case, each involves an actor committing an affirmative act that was objectively wrongful and that created a foreseeable risk of harm. In *Brower v. Northern Pac. Ry. Co.*, the supreme court held that

a duty existed when the defendant replaced a broken gauge without applying a guard and failed to warn the plaintiff of the associated risks. 124 N.W. 10, 11 (Minn. 1910). The *Domagala* court held that a landscaper created a duty when he "forcefully sh[ook] a bucket attachment that was hanging vertically from a skid loader" and "admitted more than once that he created a 'very' dangerous situation." 805 N.W.2d at 27–28. The supreme court in *Delgado v. Lohmar* reasoned that whether the defendants knew that the plaintiff was on the property created a fact issue as to duty because a person "bearing firearms who has knowingly set foot onto the land of another without his knowledge or consent has created an unreasonable risk of harm to those lawfully on the property." 289 N.W.2d 479, 483–84 (Minn. 1979). And the *Fenrich* court held that the plaintiff could prove misfeasance when a school official "took active responsibility for coordinating transportation" to a track meet and "expressly approved the plan" for a teenager to drive to the meet without providing any safety instructions. 920 N.W.2d at 204. By contrast, here the school district engaged in no active wrongful conduct by designating Diffley Road as hazardous and implementing a busing policy that did not direct pedestrian travel to school across the road. The actions were not misfeasance.

Vitek identifies no action by the school district that constitutes active misconduct. The school district owed no duty to Patric, and it is therefore entitled to summary judgment.

**II**

The county convincingly argues for summary judgment based on its challenged school-zone decisions being protected by vicarious official immunity. We review de novo

whether vicarious official immunity applies. *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 599 (Minn. 2016). We conclude that the county is immune from liability.

The type of immunity at issue here is official immunity. Official immunity protects government actors in performing those duties that require their professional judgment. *Id.* at 599–600. A public official exercising his duties using judgment or discretion is therefore not liable for his decisions unless he is guilty of a willful or malicious wrong. *Id.* at 600. And official immunity is generally extended vicariously to employers when "officials' performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006) (quotation omitted). To determine whether official immunity applies, we identify the conduct at issue, we determine whether that conduct is discretionary or ministerial, and, if it is discretionary, we determine whether the conduct was willful or malicious. *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014). We conclude here that the county official or officials tasked with speed-limit decisions engaged in discretionary decision-making without evidence of malice, entitling the county to immunity.

We first identify the conduct at issue: Vitek argues that the county was negligent because it failed to enact a school-zone speed limit or place safety-warning signage on Diffley Road. We next determine whether the conduct was discretionary or ministerial, a question of law. *Id.* at 463. A discretionary duty involves the professional judgment of the individual, incorporating the goals and factors of a situation, while a ministerial duty is

"absolute, certain, and imperative" and involves an official executing a specific duty arising from fixed facts. *Id.* at 462 (quotation omitted). The official here serves as the county's transportation director and county engineer. We agree with the county that the record compels a holding that the official's safety-measure decision-making required his professional judgment and was therefore discretionary.

Both law and fact support this conclusion. As to the law, the statute allowing the county to implement a school-zone speed limit itself reflects the discretionary nature of the decision. It establishes that "[l]ocal authorities *may* establish a school speed limit within a school zone of a public or nonpublic school upon the basis of an engineering and traffic investigation as prescribed by the commissioner of transportation." Minn. Stat. § 169.14, subd. 5a(a) (2022) (emphasis added). And as to the facts, the county official twice responded to inquiries about why he declined to reduce the speed limit after resident complaints, explaining that the area had low pedestrian activity and that school-zone speed limits can increase risk to pedestrians because of inconsistent compliance with the lower limits. He relied on MnDOT's "A Guide to Establishing Speed Limits in School Zones," which highlights professional discretion. Specifically, it emphasizes that an official should use his "reason and judgment," should consider multiple techniques to address safety concerns, and should determine routes that will be the safest "with the least cost and most assurance that they will be used." These references to official judgment are evidence that the decision is discretionary. *See Ireland v. Crow's Nest Yachts, Inc*., 552 N.W.2d 269, 274 (Minn. App. 1996) (holding that a decision was discretionary based on a manual's "express deference to the judgment of engineers in installing traffic control devices"), *rev. denied*

(Minn. Sept. 20, 1996); *Vassallo*, 842 N.W.2d at 464 (holding that language in a policy "invite[d] individual professional judgment that necessarily involves the exercise of discretion"). The record contains abundant support for our holding that the county official's decision concerning whether to pursue a reduced school-zone speed limit was discretionary.

Vitek attempts to frame the county's failure to enact safety measures on Diffley Road as a ministerial failure to carry out the county's policy-level decision to "protect student pedestrians and to respond to citizen concerns, and to follow the protocol for speed zone changes and warnings required for 'dangerous intersections.'" He relies on *Sletten v. Ramsey County*, a case in which the supreme court refused to apply official immunity when a county official failed to follow law and procedure compelling the county to make certain health decisions in operating a compost facility. 675 N.W.2d 291, 306 (Minn. 2004). The reliance on *Sletten* is misplaced. Unlike the circumstances in that case, the alleged county policy at issue here is not based on a statute or other law compelling the county to undertake a specific procedure. Nor does the alleged policy direct any specific governmental actions. Although county officials may bear a general duty to protect pedestrians from harm crossing dangerous intersections, that duty does not define what, if any, measures ought to be taken on Diffley Road; those measures must instead be guided by professional judgment and expertise as matters of discretion.

There being no argument or evidence suggesting that the county official's decision-making process involved malice, the discretionary nature of the decision shields the

official. We conclude that vicarious official immunity appropriately extends to the county. The county is entitled to summary judgment.

Our decision rests only on the law. The outcome therefore is not and cannot be influenced by what is certainly the most important aspect of this case, which is the sad and tragic loss of young Patric to his family.

**Reversed.**