COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1023

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

ANDREA CHIROFF,

PLAINTIFF-APPELLANT,

V.

MILWAUKEE COUNTY, THE CITY OF FRANKLIN, PATRICIA R. MARTIN, ERIC E. BALOW, GENEVIEVE PENN, JEFFREY M. JENTZEN AND GENERAL STAR INDEMNITY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Andrea Chiroff appeals from the trial court's granting of summary judgments dismissing all of her claims filed against Milwaukee County, its employees, Patricia R. Martin, Genevieve Penn, and Dr. Jeffrey M. Jentzen; the City of Franklin and its insurer, General Star Indemnity Company, and its employee, Police Officer Eric E. Balow. Mrs. Chiroff claims the trial court erred when it concluded that she could not pursue her statutory and common law claims of negligence and intentional tort, and her claims under 42 U.S.C. § 1983 because the defendants were immune from suit, the defendants came to the home at Mrs. Chiroff's request, and because Mrs. Chiroff did not establish the requisite "extreme disabling emotional response" as a result of the defendants' actions. Because the trial court did not err in making its ruling, we affirm.

I. BACKGROUND

¶2 On July 1, 1996, at approximately 1:00 a.m., Mrs. Chiroff's husband, James, died at home, after a two-year encounter with tonsillar cancer. The Chiroffs lived in Franklin, Wisconsin. Shortly after Mr. Chiroff's death, Mrs. Chiroff called a local funeral home requesting transportation and preparation of her husband's body for burial. She was informed that her husband's death had to be medically confirmed before the body would be removed from the home. Mrs. Chiroff called her husband's treating physician, who advised her to call 911 to summon paramedics to physically confirm the death. After she did so, a squad car from the City of Franklin Police Department and two paramedic units arrived at the home.

¶3 Franklin Police Officer Balow was among those who arrived at the home. Balow and the paramedics confirmed that Mr. Chiroff was in fact

deceased. Balow, however, complying with his police department policies, telephoned Penn, a staff person who was on duty at the Milwaukee County Medical Examiner's office, and informed the office of the death. Balow advised Penn that there was nothing suspicious about the death. Penn told Balow that a forensic investigator would be sent to pronounce the death. Balow then informed Mrs. Chiroff of this procedure. Balow remained with Mrs. Chiroff to await the arrival of the forensic investigator.

¶4 At approximately 7:40 a.m., Martin, a forensic investigator from the Milwaukee County Medical Examiner's office, arrived at the Chiroff home. Martin advised Mrs. Chiroff that she would examine her husband's body, take body samples, pronounce death, and that subsequently, the county medical examiner would sign the death certificate. This process necessitated performing certain established procedures, which included measuring the body, taking pictures, fingerprinting, and extracting certain body fluids. Martin did not inform Mrs. Chiroff of these details.

¶5 Without objection from Mrs. Chiroff, Martin and Balow proceeded to the bedroom that contained Mr. Chiroff's body. Before entering the bedroom, Martin, out of respect for the Chiroffs, advised Mrs. Chiroff to stay out of the bedroom while she performed her official duties. Balow witnessed Martin's actions. Because Martin had trouble obtaining a blood sample, she withdrew vitreous humor from Mr. Chiroff's eyes. When Martin had completed her task, she told Mrs. Chiroff that her husband would look different because of the withdrawal of the eye fluid. After Martin and Balow departed, Mrs. Chiroff entered the bedroom and discovered that her husband's body had been moved and that his eyes were depressed.

¶6 After Mr. Chiroff's body was taken to the funeral home, the undertaker performed sufficient corrective cosmetic work so that the eyes no longer appeared depressed. Nevertheless, Mrs. Chiroff chose to have a closed casket funeral service.

¶7 Before Mr. Chiroff had been diagnosed with cancer in 1994, Mrs. Chiroff began receiving treatment from a psychiatrist, Dr. Paul Todd, for depression. Subsequent to her husband's death, Mrs. Chiroff attended an eight-week course for recent widows and continued receiving the assistance of Dr. Todd.

¶8 On April 28, 1997, Mrs. Chiroff filed suit against Milwaukee County, its medical examiner, Jentzen, medical examiner employees Penn and Martin, the City of Franklin, its insurer, General Star Indemnity, City of Franklin Police Officer Balow, and his supervisor, Gaylord Hahn.[1] On May 27, 1997, Mrs. Chiroff amended her complaint and obtained a stay of all actions until resolution of her legal challenge to the validity of WIS. ADMIN. CODE § HSS 135.08, which was pending in Dane County Circuit Court.[2]

¶9 Mrs. Chiroff's complaint against the City of Franklin and Officer Balow alleged that Balow's conduct: (1) violated her Fourth Amendment rights and was thereby actionable under 42 U.S.C. § 1983; (2) violated her fundamental liberty interest to bury her husband as protected by the Fourteenth Amendment

[1] The claim against Hahn was subsequently voluntarily dismissed.

[2] Mrs. Chiroff filed a declaratory judgment action in Dane County Circuit Court challenging the validity of WIS. ADMIN. CODE § HSS 135.08. This action was dismissed without prejudice on June 23, 1998, for failure to sufficiently allege proper standing. She neither appealed the decision, nor filed a new action.

and § 1983; (3) violated her privacy under Wisconsin law; (4) violated her common law right to bury her husband intact; and (5) violated WIS. STAT. § 979.01 (1997-98).[3] Mrs. Chiroff further alleged that Balow's conduct was within the scope of his employment as a City of Franklin police officer; therefore, the City of Franklin was vicariously liable for Balow's actions. Consequently, Mrs. Chiroff sought compensatory and punitive damages from Balow and the City of Franklin.

¶10 Mrs. Chiroff's complaint against Milwaukee County and its employees alleged that Penn: (1) negligently and intentionally disregarded her right to bury the remains of her husband intact and without unjustified interference; and (2) dispatched Martin to the Chiroff residence to engage in unlawful conduct contrary to WIS. STAT. § 979.01(1). Chiroff alleged that Martin: (1) negligently and recklessly violated § 979.01(1); (2) violated her right to be free from unreasonable searches and seizures as protected by the Fourth and Fourteenth Amendments; (3) violated her rights under the Fourteenth Amendment to bury the remains of her husband intact without unwarranted interference; and (4) violated article I, § 11 of the Wisconsin Constitution and WIS. STAT. § 895.50. Finally, Mrs. Chiroff alleged that Dr. Jentzen: (1) negligently and intentionally established policies in violation of WIS. STAT. § 979.01(1), which violated her rights; (2) negligently and intentionally supervised Penn and Martin by implementing unlawful policies; and (3) intentionally violated WIS. STAT. § 69.18, by completing the medical death certificate instead of allowing the treating physician to fulfill that task.

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶11 The defendants filed motions seeking summary judgment, which the trial court granted, dismissing all of the claims. Mrs. Chiroff now appeals.

II. ANALYSIS

¶12 In granting the summary judgment motions, the trial court ruled as a matter of law that: (1) Balow and Martin were entitled to qualified immunity from the claims lodged against them pursuant to 42 U.S.C. § 1983; (2) the complaint, and its amendments, failed to sufficiently state a claim that Balow and Martin violated WIS. STAT. § 895.50; (3) the complaint, and its amendments, failed to sufficiently state a claim that Penn and Jentzen negligently inflicted emotional distress; and (4) the complaint, and its amendments, failed to sufficiently state a claim against Milwaukee County, the City of Franklin, and General Star Indemnity Company.

¶13 The trial court based its decision in part on its findings that: (1) Balow and Martin were invited to the Chiroff home as a result of Mrs. Chiroff's phone call to 911; (2) no evidence established that Mrs. Chiroff's privacy was violated; (3) Penn and Martin acted pursuant to the lawful policies and procedures established by Jentzen pursuant to WIS. ADMIN. CODE § HSS 135.08; (4) WIS. STAT. § 979.01 was not implicated by the facts of this case; and (5) the evidence was insufficient to demonstrate that Mrs. Chiroff sustained emotional distress as a result of the defendants' actions because the depression medicine she was taking was prescribed for her three years prior to the death of her husband.

¶14 When reviewing a summary judgment, we recognize that the motion should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Courts examine summary judgment motions in a three-step process. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶15 First, we must review the pleadings to determine if a claim for relief has been stated. *See* ***id.*** Second, the court must determine whether the moving party's affidavit and other proofs present a prima facie case for summary judgment. *See* ***id.*** A defendant states a prima facie case for summary judgment by showing a defense that would defeat the claim. *See* ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 115-16, 334 N.W.2d 580 (Ct. App. 1983). Finally, the court examines the affidavits and proofs of the opposing party to determine whether any disputed material fact exists, or whether any undisputed material facts are sufficient to allow for reasonable alternative inferences. *See* ***Grams***, 97 Wis. 2d at 338. The court proceeds to each succeeding step only if it determines that the appropriate party has satisfied the preceding one.

¶16 The mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment. *See* ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994). One purpose of summary judgment is to avoid a trial where no genuine issues of material fact exist, leaving nothing to try. *See* ***Rollins Burdick Hunter, Inc. v. Hamilton***, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981).[4]

[4] Although there is some confusion in the record because the defendants moved in the alternative that the claims be dismissed upon the pleadings or for summary judgment, we deem that the methodology for disposition by the trial court was summary judgment.

A. WIS. STAT. § 979.01 AND WIS. ADMIN. CODE § HFS 135.08 VIOLATIONS.[5]

¶17 Many of Mrs. Chiroff's claims are founded in her belief that the employees of the Milwaukee County Medical Examiner's office and Officer Balow exceeded their statutory authority. Her argument is premised on her contention that Penn and Martin acted as if this case fell under WIS. STAT. § 979.01, which authorizes an investigation of the scene and withdrawal of fluids. The defendants respond that the actions taken were authorized under WIS. ADMIN. CODE § HFS 135.08. The trial court concluded that § 979.01 was not implicated in the case and found that the defendants were acting under the authority of § HFS 135.08. Therefore, we address the interplay of § 979.01 and § HFS 135.08.[6]

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[5] WISCONSIN ADMIN. CODE § HSS 135.08 has been renamed as § HFS 135.08.

[6] WISCONSIN STAT. § 979.01 provides:

> **Reporting deaths required; penalty; taking specimens by coroner or medical examiner. (1)** All physicians, authorities of hospitals, sanatoriums, institutions (public and private), convalescent homes, authorities of any institution of a like nature, and other persons having knowledge of the death of any person who has died under any of the following circumstances, shall immediately report such death to the sheriff, police chief, medical examiner or coroner of the county wherein such death took place, and the sheriff or police chief shall, immediately upon notification, notify the coroner or the medical examiner and the coroner or medical examiner of the county where death took place, if the crime, injury or event occurred in another county, shall report such death immediately to the coroner or medical examiner of that county:
>
> (a) All deaths in which there are unexplained, unusual or suspicious circumstances.
>
> (b) All homicides.
>
> (c) All suicides.
>
> (d) All deaths following an abortion.
>
> (e) All deaths due to poisoning, whether homicidal, suicidal or accidental.
>
> (f) All deaths following accidents, whether the injury is or is not the primary cause of death.
>
> (g) When there was no physician, or accredited practitioner of a bona fide religious denomination relying upon prayer or

(continued)

¶18 A medical examiner's authority to perform an autopsy is not inherent in the office, but a power derived from legislation. *See* ***Schultz v. Milwaukee County***, 245 Wis. 111, 121-22, 13 N.W.2d 580 (1944). Historically, the medical examiner's power to conduct an autopsy was limited to those circumstances specified in WIS. STAT. § 979.01. However, additional statutory sections have been enacted to cover other circumstances. *See, e.g.,* WIS. STAT. § 979.03 (relating to deaths that may have been caused by Sudden Infant Death Syndrome); and WIS. STAT. § 979.10 (relating to cremation).

¶19 In the instant case, it is undisputed that an autopsy did not occur. The scene investigation was limited to measuring and photographing the body, taking a fingerprint of the right index finger, and withdrawing fluid from the eyes. Mrs. Chiroff argues that WIS. STAT. § 979.01, prohibits the medical examiner from taking any body samples from a corpse unless the death is reportable under § 979.01(1). She directs us to §§ 979.01(3) and (3m) as her support for this proposition.[7] We are not convinced.

> spiritual means for healing in attendance within 30 days preceding death.
>
> (h) When a physician refuses to sign the death certificate.
>
> (i) When, after reasonable efforts, a physician cannot be obtained to sign the medical certification as required under s. 69.18 (2) (b) or (c) within 6 days after the pronouncement of death or sooner under circumstances which the coroner or medical examiner determines to be an emergency.

WISCONSIN ADMIN. CODE § HFS 135.08 provides:

> **Pronouncement of death outside of a hospital or nursing home.** The coroner or medical examiner of a county shall establish procedures for use within that county for the legal pronouncement of death outside of a hospital or nursing home.

[7] These subsections provide:

(continued)

¶20 Subsection (3) provides that if the death occurred under the circumstances delineated in section (1), and an autopsy is not conducted, the medical examiner may still withdraw body fluids. Subsection (3m) similarly provides that if the death occurred under any of the circumstances set forth in section (1), and an autopsy is not conducted, the medical examiner shall withdraw body fluids if requested by certain designated family members and not objected to by anyone of the same group. We find no basis for the prohibitive thrust that Mrs. Chiroff desires to read into the statute. It is undisputed that Mr. Chiroff's death does not fit into any of the classifications set forth in WIS. STAT. § 979.01(1). However, contrary to Mrs. Chiroff's contention, this statute is not the sole authority governing a medical examiner's conduct relating to deaths that occur in homes.

¶21 WISCONSIN STAT. § 979.22, which was enacted in 1983 by legislative Act 146, reads:

> **(3)** In all cases of death reportable under sub. (1) where an autopsy is not performed, the coroner or medical examiner may take for analysis any and all specimens, body fluids and any other material which will assist him or her in determining the cause of death. The specimens, body fluids and other material taken under this subsection shall not be admissible in evidence in any civil action against the deceased or the deceased's estate, as the result of any act of the deceased.
>
> **(3m)** In all cases of death reportable under sub. (1) where an autopsy is not performed, the coroner or medical examiner shall take for analysis any and all specimens, body fluids and any other material that will assist him or her in determining the cause of death if requested to do so by a spouse, parent, child or sibling of the deceased person and not objected to by any of those family members. The specimens, body fluids and other material taken under this subsection shall not be admissible in evidence in any civil action against the deceased or his or her estate, as the result of any act of the deceased.

> Autopsies and toxicological services by medical examiners. A medical examiner may perform autopsies and toxicological services not required under this chapter and may charge a fee established by the county board for such autopsies and services. The fee may not exceed an amount reasonably related to the actual and necessary cost of providing the service.

Milwaukee County contends this section provides the medical examiner's office with the necessary statutory authority to perform autopsies and toxicological services such as taking samples which far exceed the specified situations set forth in WIS. STAT. § 979.01(1).

¶22 Mrs. Chiroff responds that WIS. STAT. § 979.22 merely authorizes the medical examiner to conduct autopsies and toxicological services not required by law, and to charge fees therefore. Referring to the legislative history of § 979.22 and the fiscal report appended to the Senate Bill proposing the section, Mrs. Chiroff argues that the legislature intended the statute to be a vehicle for raising revenue for counties by allowing the medical examiner to hire out his or her services to perform autopsies and toxicological testing "even where such autopsies and toxicological testing are not required by law." She reasons that the statute does not authorize autopsies, investigations or sample taking where they are prohibited by law. We are left unpersuaded.

¶23 The 1983 Wisconsin Act 146, which adopted Senate Bill 387, in its enabling language provides, "AN ACT to amend … and to create 979.22 of the statutes, relating to the authority of county medical examiners and the establishment of certain county government fees by county boards." The fiscal note to Senate Bill 387 where the measure was introduced states, "Finally, the bill permits medical examiners to perform autopsies and toxicological services unrelated to examinations *required by law* and to charge a fee set by the county

board." (Emphasis added.) Thus, WIS. STAT. § 979.22 empowers medical examiners to perform services the medical examiner might otherwise not have authority to perform. It is correct that the section allows county boards to charge for services not otherwise required, but it is equally correct that the act positively grants medical examiners authority to perform services other than autopsies. Thus, the argument that § 979.22 was strictly a revenue-raising device is not supported by the legislative history.

¶24 In addition, WIS. ADMIN. CODE § HFS 135.08 provides the medical examiner authority to establish procedures regarding death pronouncements that occur outside a hospital or nursing home. Unless otherwise demonstrated, we presume that this regulation is valid. Section HFS 135.08 became effective February 1, 1993. WIS. STAT. § 979.22 was enacted in 1983. When these provisions are read together, it is reasonable to conclude that the Milwaukee County Medical Examiner had the authority to establish the procedures used by his office in this case, relating to the pronouncement of death.

¶25 Mrs. Chiroff argues that this code provision does not authorize the medical examiner to take body samples, but limits the medical examiner's authority to "pronouncing death." She contends that Penn could have done so over the telephone without sending Martin to the Chiroff home and without conducting a scene investigation. We do not read the code provision as narrowly as Mrs. Chiroff does. The code provision requires the medical examiner to *establish procedures* for the legal pronouncement of deaths that occur outside a hospital or nursing home. The procedures that Jensen established pursuant to the code provision involved sending personnel to the home to measure the corpse, obtain fingerprints, and take body samples. These procedures were implemented to avoid concerns that might arise later regarding proper identification and other

circumstances. The code provision permits the procedures developed by Jentzen, and does not conflict with the statutory requirements of WIS. STAT. § 979.01, which addresses suspicious deaths. The focus of the two provisions is different. The code provision applies to *all* deaths that occur at home. Section 979.01 applies to *all* deaths that occur under suspicious circumstances.

¶26 Therefore, we conclude that the trial court did not err when it ruled that the personnel of the Milwaukee County Medical Examiner's office acted pursuant to lawful policies and procedures.

B. CONSTITUTIONAL CLAIMS AND QUALIFIED IMMUNITY.

¶27 Mrs. Chiroff next challenges the trial court's conclusion that the doctrine of qualified immunity bars her 42 U.S.C. § 1983 claims. The question of qualified immunity is one of law, which we decide independently. *See* ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 468, 565 N.W.2d 521 (1997). If a public official is immune from suit, the lawsuit does not proceed, and there is no determination of liability on the merits. *See* ***id.*** Qualified immunity is appropriately resolved by a motion for summary judgment. *See* ***id.*** at 468-69.

¶28 Qualified immunity protects government employees performing discretionary functions from civil liability if their conduct does not violate a person's clearly established constitutional rights. *See* ***Burkes v. Klauser***, 185 Wis. 2d 308, 326, 517 N.W.2d 503 (1994). Although the doctrine of qualified immunity is an affirmative defense, a plaintiff has the burden to demonstrate by closely analogous case law, that the defendant has violated a clearly established constitutional right. *See* ***id.*** at 330.

> Once the defendant's actions are defined or characterized according to the specific facts of the case this

> characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law.
>
> … The factual circumstances of the alleged violation need not be "identical" to prior holdings in order to find an officer entitled to qualified immunity…. Nonetheless, "[c]losely analogous cases, those decided before the defendants acted or failed to act, are required to find that a constitutional right is clearly established."

Rakovich v. Wade, 850 F.2d 1180, 1209 (7th Cir. 1988) (citations omitted). The relevant inquiry is whether the official acted reasonably under settled law in light of the circumstances, not whether another more reasonable interpretation of events can be construed after the fact. *See* ***Barnhill v. Board of Regents***, 166 Wis. 2d 395, 408, 479 N.W.2d 917 (1992). Could a reasonable public official have believed that his or her acts were constitutional in light of clearly established law and the information he or she had at the time of the official's action? The doctrine provides ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. *See* ***Hunter v. Bryant***, 502 U.S. 224, 229 (1991); ***Baxter v. DNR***, 165 Wis. 2d 298, 302, 447 N.W.2d 648 (Ct. App. 1991).

¶29 Mrs. Chiroff alleges that she is entitled to 42 U.S.C. § 1983 relief because both Balow, as an employee of the City of Franklin, and Martin, as a Milwaukee County employee, violated her rights under the Fourth and Fourteenth Amendments. She contends that both Balow and Martin, under color of law, intentionally violated her Fourth Amendment right to be free from unreasonable searches and seizures and her Fourteenth Amendment right to bury her husband intact and without unwarranted interferences.

¶30 In ***Weber v. City of Cedarburg***, 129 Wis. 2d 57, 384 N.W.2d 333 (1986) our supreme court declared:

> An inquiry into whether a complaint alleges a sec. 1983 action must focus on two essential elements: (1) whether the conduct of which the plaintiff complains was committed by a person acting under color of state law; and (2) whether the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Id. at 65. Mrs. Chiroff claims both Balow and Martin violated her Fourth Amendment rights when each conducted an unreasonable search and seizure of the Chiroff residence, the bedroom involved, and by prohibiting Mrs. Chiroff from entering her bedroom. We first examine Balow's conduct.

¶31 It is conceded that Balow functioned under the color of state law because he was summoned to the Chiroff home after Mrs. Chiroff called 911 for assistance. Therefore, the first factor of the test is satisfied. Mrs. Chiroff's claim, however, fails the second part of the test. There is an exception to the Fourth Amendment prohibition against search or seizure if a person consents to the search or seizure. *See* ***Illinois v. Rodriguez***, 497 U.S. 177, 186-88 (1990). Consent may be implied from the circumstances. *See* ***Kelly v. State***, 75 Wis. 2d 303, 310, 249 N.W.2d 800 (1977). Mrs. Chiroff concedes she consented to have officials enter her home in order to obtain a pronouncement of Mr. Chiroff's death. Thus, there was no illegal search or seizure on Balow's part, and the trial court did not err in so ruling. The same analysis applies to the initial presence of Martin from the medical examiner's office, whom Balow called to further assist Mrs. Chiroff. The

trial court did not err in ruling that Martin's presence was also authorized by consent.[8]

¶32 We now turn to the actions of Balow and Martin in the bedroom of the Chiroff residence. When Martin arrived, her purpose was to conduct a scene investigation pursuant to the medical examiner's policies prior to releasing the corpse to a funeral home. This procedure, which included examining the body, measuring, photographing and taking body samples, permits gathering of pertinent information in case any questions should arise in the future about the cause of death. Mrs. Chiroff was aware that an examination of the body would occur and that specimens would be taken. Out of respect to a decedent's family, it is the practice to exclude the presence of the family members during the examination of the body. Balow accompanied Martin into the bedroom. Without objection, Balow escorted Mrs. Chiroff from the bedroom and closed the bedroom door.

¶33 It is uncontroverted that no one objected to the procedure, no one asked Balow or Martin to leave at any time, and no one sought entry into the bedroom during the twenty-minute investigation. Nothing in the record suggests that an illegal search and seizure occurred. The overwhelming circumstances, including both Mrs. Chiroff's actual conduct and the implications arising from that conduct, lead to the compelling conclusion that consent was given.

¶34 Mrs. Chiroff's Fourteenth Amendment substantive due process claim against Balow is based on the creation of a liberty interest drawn from

[8] Mrs. Chiroff argues that her consent was limited in scope to the pronouncement of Mr. Chiroff's death, and that the defendants exceeded her intended scope. Mrs. Chiroff, however, never expressed any limitations in seeking the assistance of the individuals who were there to help her achieve her goal of properly conveying her husband to a funeral home.

Chapter 979. We have already concluded that WIS. STAT. § 979.01 does not apply to the facts of this case. But even if we were to assume that a fundamental liberty interest was created by Chapter 979, Balow's conduct did not violate any of the provisions of Chapter 979 and did not deprive Mrs. Chiroff of any proposed constitutional liberty interest.

¶35 Mrs. Chiroff raises a similar Fourteenth Amendment claim against Martin, who examined Mr. Chiroff's body. The pivotal issue is whether Martin violated any "clearly established right." Mrs. Chiroff fails to cite any case law alleging the "clearly established rights" Martin supposedly violated. The record reflects that Martin believed she was acting in conformity with legally established official policy as attested to by Dr. Jentzen. Because Martin did not violate any clearly established right of Mrs. Chiroff, she is entitled to the protection of qualified immunity.

¶36 In support of her Fourteenth Amendment claim, Mrs. Chiroff contends that the right to decide issues relating to the lawful burial of the remains of one's dead, including the right to bury the remains intact, is a clearly established right. To support this contention she relies upon ***Koerber v. Patek***, 123 Wis. 453, 102 N.W. 40 (1905), as analogous case law, suggesting Martin's action was unconstitutional. This reliance is misplaced. ***Koerber*** involved a private individual who, after receiving permission to examine the stomach of a deceased, fraudulently, and without authority, removed the stomach and refused to return it. In ***Koerber***, an unauthorized autopsy was performed. Unlike the person who removed the stomach in ***Koerber***, Martin was a public official who was properly involved in the lawful performance of pronouncing a death. The common law right to bury one's deceased intact as established in ***Koerber*** may be a clearly established right, but absent any showing of how that right was violated, ***Koerber***

cannot constitute an "analogous case" for the purpose of insulating the claim from the rigors of summary judgment scrutiny.

C. COMMON AND STATUTORY LAW CLAIMS AND DISCRETIONARY IMMUNITY.

¶37 Mrs. Chiroff's complaint alleged various common law and state statutory claims. The trial court dismissed all of them. Mrs. Chiroff argues on appeal that the defendants are not entitled to discretionary immunity on these claims.[9]

¶38 In Wisconsin, government officials and employees are immune from liability for injuries resulting from certain acts. WISCONSIN STAT. § 893.80(4) sets the parameters for this immunity: "No suit may be brought against any … political corporation … or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." We have explained: "Quasi-judicial and quasi-legislative acts are synonymous with discretionary acts and governmental officers are entitled to immunity for such acts. Ministerial acts, on the other hand, are not generally subject to immunity." ***Bauder v. Delavan-Darien Sch. Dist.***, 207 Wis. 2d 310, 313, 558 N.W.2d 881 (Ct. App. 1996) (citations omitted).

¶39 In ***Kimps v. Hill***, 200 Wis. 2d 1, 546 N.W.2d 151 (1996), our supreme court declared:

> The test for determining whether a duty is discretionary (and therefore within the scope of immunity) or ministerial (and not so protected) is that the latter is found "'only when

[9] This issue was briefed in the trial court, but was not mentioned at oral argument in the trial court or in the judgment documents. Regardless, in the interest of completeness, we shall examine the issue.

> [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 certainly that nothing remains for judgment or discretion.'"

Id. at 10 (citations omitted). With these precepts in mind, we shall now examine the suspect actions of the individual defendant governmental employees.

BALOW

¶40 **1. Common Law Claims.** Mrs. Chiroff first asserts a claim against Balow on the basis that he delayed transportation of her husband's body to the funeral home, denied her access to the marital bedroom during the physical examination, and assisted Martin in the conduct of her investigation. She claims that Balow was merely performing ministerial duties when he violated her rights, and, therefore, that he is not immune from liability. We reject this claim.

¶41 When questioned by Mrs. Chiroff's counsel concerning his responsibilities at the Chiroff residence, Balow explained:

> Q You believe it was Franklin policy for you to --
>
> A I was to stay on scene, right, until [Martin] left.
>
> Q What about specifically assisting her in measuring the body?
>
> A Assisting her, no.[10]

[10] At another point in his deposition, Balow testified that Franklin policy required him to "assist or observe." Chiroff's counsel contends the quoted phrase establishes a disputed material issue of fact. In the next sentence of his deposition, however, Balow clarifies his statement by stating: "There's really nothing I can do to assist her in her work other than maybe hold a tape measure when she measures the length of the body. Everything else she does on her own." Thus, this did not create a genuine issue of fact.

Balow's only fixed duty was to remain at the Chiroff residence until Martin left. Our supreme court has declared that the very nature of a police officer's day-to-day work:

> requires moment-to-moment decision making and crisis management which, in turn, requires that the police department have the latitude to decide how best to utilize law enforcement resources. Unlike those professionals who have a set daily calendar they follow, police officers have no such luxury. For these reasons, it is clear that law enforcement officials must retain the discretion to determine, at all times, how best to carry out their responsibilities.

Barillari v. Milwaukee, 194 Wis. 2d 247, 260, 533 N.W.2d 759 (1995). Any other acts Balow performed were purely discretionary. He was not required to escort Mrs. Chiroff from her bedroom, or act as a witness, or render the minimal assistance to Martin that he performed. He used his discretion in engaging in such conduct. To the extent that these actions formed the basis for a claim against him and the City of Franklin, discretionary immunity provides a shield from liability.

¶42 **2. Statutory Rights Claims.** Mrs. Chiroff also alleges that Balow violated her statutory right to privacy. WISCONSIN STAT. § 895.50(2)(a) defines the invasion of privacy as the "intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable in trespass." We reject Mrs. Chiroff's contention that Balow violated her statutory right to privacy.

¶43 First, WIS. STAT. § 895.50 is inapplicable because, under the undisputed facts, Balow did not intrude upon the privacy of Mrs. Chiroff. By her 911 emergency phone call, Chiroff requested assistance to come to her home in order to obtain a pronouncement of death for her husband. Mrs. Chiroff proffered

no evidence that Balow or anyone else exerted force or unnecessary influence to gain access to the residence. ***Mauri v. Smith***, 901 P.2d 247, 248 (Or. Ct. App. 1995), *aff'd in part and rev'd in part by* 324 Or. 476 (1996). Thus, there was no intrusion.

¶44 Second, under the undisputed facts, as a matter of law, Balow's actions were not "highly offensive." He entered the residence with the consent and knowledge of Mrs. Chiroff. There is no showing of inappropriate conduct on his part. In fact, Mrs. Chiroff was complimentary about his deportment.

¶45 Third, under the facts of this case, the range and scope of consent granted by Mrs. Chiroff, in view of what she wanted to achieve, eliminate any expectation of privacy that ordinarily would accompany the sanctity of the marital bedroom.

DR. JENTZEN

¶46 Mrs. Chiroff claims that Dr. Jentzen: (1) negligently and intentionally established policies that violated WIS. STAT. § 979.01, and the rights of families in Milwaukee County; (2) failed to properly instruct and supervise defendants Penn and Martin; and (3) intentionally completed and signed a medical certification of death in violation of WIS. STAT. § 69.18. We briefly address each premise in turn.

¶47 We have already concluded that WIS. STAT. § 979.01 is not applicable to the facts of this case, that WIS. ADMIN. CODE § HFS 135.08 is valid, and that WIS. STAT. § 979.22 extends the authority of the county medical examiner's office to perform autopsies and render other related toxicological services that cover the factual circumstances of this case.

¶48 WIS. ADMIN. CODE § HFS 135.08 requires the medical examiner to establish procedures within its county for the pronouncement of death when the death occurs outside of a hospital or nursing home. There are no restrictions placed upon the implementation of this requirement. It is undisputed that Dr. Jentzen developed and established a policy and procedures manual that is used by the personnel in his office. The formulation of the policies and procedures was discretionary and allowed for discretionary latitude of application. In his uncontradicted deposition testimony, Dr. Jentzen testified that these discretionary policies and procedures were followed by Penn and Martin in performing the scene investigation. There is no basis then for any claim of negligent or intentional tort against Jentzen. Even if there were, his actions and those of his subordinates, are clearly of a discretionary nature and intended to be protected by the discretionary immunity of WIS. STAT. § 893.80(4). Thus, all of Mrs. Chiroff's common law and state statutory claims fail.

¶49 Mrs. Chiroff also claims she suffered compensable damages as the result of Jentzen violating WIS. STAT. § 979.01, and signing the medical certification section of Mr. Chiroff's death certificate, contrary to WIS. STAT. § 69.18. We have already rejected the application of § 979.01. As for § 69.18, there is nothing in the language of the statute to indicate that the legislature desired to create a private cause of action for a violation of the statute. Regardless of

whether Dr. Jentzen violated the statute, Mrs. Chiroff has no claim against Jentzen under the statute.[11]

¶50 Mrs. Chiroff's claim also fails because she cannot establish that she suffered an "extreme disabling emotional response" as a result of the defendants' actions. Under ***Plautz v. Time Insurance Co.***, 189 Wis. 2d 136, 525 N.W.2d 342 (Ct. App. 1994), a plaintiff "must demonstrate that [s]he was unable to function in [her] other relationships because of the emotional distress …. Temporary discomfort cannot be the basis of recovery." ***Id.*** at 152 (citations omitted).

By the Court.—Judgments affirmed.

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

[11] Mrs. Chiroff suggests two additional grounds to impose responsibility upon the City of Franklin and Milwaukee County for the actions of their employees: (1) WIS. STAT. § 895.46(1); and (2) respondeat superior. Both suggestions fail. Section 895.46(1) does not create a cause of action for Mrs. Chiroff. The intent of the statute is to enable an official of a political subdivision to bring an action against the political subdivision to obtain reimbursement for an obligation of the political subdivision he or she has borne. *See* ***Thuermer v. Village of Mishicot***, 86 Wis. 2d 374, 378-79, 272 N.W.2d 409 (Ct. App. 1978), *aff'd*, 95 Wis. 2d 267, 290 N.W.2d 689 (1980). The doctrine of respondeat superior only applies if a viable underlying action exists against a governmental employee. Since here no viable state law claim can be found, the doctrine does not apply.