

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 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. 2010AP1617

Cir. Ct. No. 2008CV100

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CHARLES NEITZEL, III, THE ESTATE OF BRADLEY SCHULTZ, STEVE SCHULTZ, DIANNE SCHULTZ, THE ESTATE OF LIANNE THOMAS, GARY THOMAS, LINDA THOMAS, THE ESTATE OF LINDSEY STAHL, JENNY STAHL, THE ESTATE OF KATRINA MCCORKLE, KEVIN MCCORKLE AND MICHELLE TILLMAN,

PLAINTIFFS-APPELLANTS,

UNITED HEALTH CARE,

SUBROGATED PARTY,

V.

**CITY OF CRANDON AND LEAGUE OF WISCONSIN MUNICIPALITIES
MUTUAL INSURANCE,**

DEFENDANTS,

**FOREST COUNTY AND WISCONSIN COUNTY MUTUAL INSURANCE
CORPORATION,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Forest County:
MARK MANGERSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PETERSON, J. On October 7, 2007, Tyler Peterson, an off-duty Forest County sheriff’s deputy, shot seven people, killing six and injuring Charles Neitzel, III. Neitzel and four of the other victims’ families (collectively, Neitzel) sued the County and its insurer, alleging the County negligently hired and supervised Peterson. The circuit court granted summary judgment dismissing Neitzel’s claims. The court concluded the County was immune from suit under WIS. STAT. § 893.80(4)¹ because its hiring and supervision of Peterson were discretionary acts.

¶2 Neitzel appeals. He concedes that the County’s actions were discretionary, but he argues the doctrine of governmental immunity for discretionary acts is “wrong as a matter of historical precedent” and “wrong as a matter of public policy.” (Capitalization omitted.) He urges us to “overturn” “this anachronistic doctrine.” However, we are bound by past supreme court decisions, which hold that, under WIS. STAT. § 893.80(4), governmental subdivisions are immune from liability for discretionary acts. We therefore affirm.

BACKGROUND

¶3 The County hired Peterson as a sheriff’s deputy in September 2006. He was nineteen years old at the time. The County did not require Peterson to

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

undergo any psychological screening before it hired him. After he was hired, Peterson became a member of the County's Special Emergency Response Team and was issued an assault rifle. The County permitted Peterson to keep the assault rifle with him while he was off duty so that he could respond more quickly in the event of an emergency.

¶4 In the early morning hours of October 7, 2007, Peterson arrived at his ex-girlfriend Jordanne Murray's apartment in Crandon. Murray and six others were watching a movie and drinking. Murray and Peterson got into an argument, and Murray told Peterson to leave, but Peterson refused. After Murray and two of her friends attempted to push Peterson out of the apartment, Peterson hit one of Murray's friends and pushed Murray onto the couch. He then walked out of the apartment and slammed the door, which Murray's friend locked.

¶5 Approximately one minute later, Peterson returned to the apartment with his County-issued assault rifle. Peterson broke down the apartment door, raised the gun to his shoulder, and began shooting. In less than one minute, Peterson had killed everyone in the apartment except Neitzel. Peterson then shot Neitzel three times, but Neitzel feigned death and survived the attack.

¶6 Neitzel sued the County, alleging it was negligent in its hiring and supervision of Peterson.² Neitzel claimed that Peterson suffered from mental disorders that predisposed him to violence and that the County negligently failed

² Neitzel also sued the City of Crandon, which employed Peterson as a police officer at the time of the shooting. The circuit court granted summary judgment dismissing Neitzel's claims against the city, concluding that the city was immune from suit. The parties stipulated to a voluntary dismissal of Neitzel's appeal against the city, and, consequently, the city is not a party to this appeal.

to conduct psychological screening before hiring him. Neitzel also contended the County negligently armed Peterson with an assault rifle and permitted him to carry it while off duty.

¶7 The County moved for summary judgment, arguing that its hiring and supervision of Peterson were discretionary acts entitling it to immunity under WIS. STAT. § 893.80(4). In response, Neitzel contended the County had a ministerial duty to ensure that Peterson was free from mental disorders before it hired him. The circuit court held that the County’s hiring and supervision of Peterson were discretionary, not ministerial, acts. The court therefore concluded the County was immune from suit and granted summary judgment dismissing Neitzel’s claims.

DISCUSSION

¶8 We independently review a grant of summary judgment, using the same methodology as the circuit court. *Smaxwell v. Bayard*, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶9 The circuit court concluded the County was entitled to summary judgment because Neitzel’s claims were barred by WIS. STAT. § 893.80(4). Section 893.80(4) immunizes governmental subdivisions against liability for “acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.”³ Our supreme court has repeatedly stated that this statutory language

³ WISCONSIN STAT. § 893.80(4) reads in full:

(continued)

grants immunity for “any act that involves the exercise of discretion and judgment.” *See, e.g., Noffke v. Bakke*, 2009 WI 10, ¶41, 315 Wis. 2d 350, 760 N.W.2d 156 (quoting *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314); *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶54, 277 Wis. 2d 635, 691 N.W.2d 658. Elsewhere, the court has explained that “legislative, quasi-legislative, judicial or quasi-judicial functions” are “synonymous with discretionary acts.” *See, e.g., Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶25, 235 Wis. 2d 409, 611 N.W.2d 693; *Lifer v. Raymond*, 80 Wis. 2d 503, 512, 259 N.W.2d 537 (1977).

¶10 On appeal, Neitzel concedes that the County’s hiring and supervision of Peterson were discretionary acts. However, he argues that the doctrine of governmental immunity for discretionary acts is wrong as a matter of law. He contends that prior cases interpreting WIS. STAT. § 893.80(4) were wrongly decided because “legislative, quasi-legislative, judicial or quasi-judicial functions” are not synonymous with discretionary acts. He also asserts that governmental immunity should be limited for public policy reasons.

¶11 However, we do not have the authority to overrule, modify, or withdraw language from supreme court decisions. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). “The supreme court, ‘unlike the court of

No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

appeals, has been designated by the constitution and the legislature as a law-declaring court.” *Id.* (quoting *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 229-30, 340 N.W.2d 460 (1983)). The supreme court has repeatedly stated that WIS. STAT. § 893.80(4) immunizes governmental subdivisions from liability for discretionary acts. *See supra*, ¶9. Neitzel concedes that the County’s hiring and supervision of Peterson were discretionary acts. Accordingly, under existing law, the County is immune from suit, and the circuit court properly granted summary judgment dismissing Neitzel’s claims.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

