COURT OF APPEALS
DECISION
DATED AND RELEASED

July 9, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-0203

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

THOMAS E. LENGYEL,

PLAINTIFF-RESPONDENT-
CROSS APPELLANT,

v.

SHEBOYGAN COUNTY, ANN WONDERGEM, GARY JOHNSON AND DAN LEMAHIEU,

DEFENDANTS-APPELLANTS-
CROSS RESPONDENTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. Thomas E. Lengyel was terminated from his employment as a social worker for the Sheboygan County Health and Human

Services Department (HSS). In this action, Lengyel filed a complaint alleging claims against Sheboygan County; Ann Wondergem, his immediate supervisor; Gary Johnson, the HSS director; and Dan LeMahieu, the chairperson of the Sheboygan County Personnel Committee.

Against the County, Lengyel requested a writ of mandamus seeking reinstatement to his employment. Against Wondergem and the County, Lengyel alleged defamation. Against Wondergem, Johnson and the County, Lengyel alleged negligence. Against all of the defendants, Lengyel alleged due process violations pursuant to 42 U.S.C. § 1983, and a claim for deprivation of liberty interests without due process based on his substantive right to bodily integrity.[1]

Both sides moved for summary judgment. The trial court denied Lengyel's motion for summary judgment. The court granted the defendants' motions for summary judgment on all of Lengyel's claims except the due process allegations. We have previously granted the County's petition for leave to appeal the court's denial of this remaining claim. Lengyel has cross-appealed the court's grant of summary judgment to the defendants on his other claims. He also cross-appeals the trial court's denial of his motion for summary judgment. *See* ***Johnson v. Pearson Agri-Systems, Inc.,*** 119 Wis.2d 766, 782-83, 350 N.W.2d 127, 135 (1984) ("Once the appellant has been granted an appeal, either on the basis of right or in the court's discretion, the respondent who was formerly required to bring a

[1] We note that Lengyel's complaint also alleges that the County's termination of his employment caused him to suffer damage to his liberty interest in his professional reputation without due process of law. However, Lengyel does not address the trial court's dismissal of this claim. We deem this issue abandoned. *See* ***State v. S.H.***, 159 Wis.2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990) (issues not briefed are deemed abandoned).

notice of review may now utilize the cross-appeal procedure and have nonfinal orders reviewed.").

We reverse the trial court's grant of summary judgment to the County dismissing Lengyel's writ of mandamus action and its corresponding denial of Lengyel's summary judgment motion as to this claim. We remand with directions that the court issue the writ of mandamus. We affirm the court's grant of summary judgment dismissing Lengyel's defamation, negligence and bodily integrity claims. We reverse the court's denial of summary judgment to the defendants on Lengyel's due process claims.

BACKGROUND

Lengyel was a social worker employed by HSS. On January 3, 1994, he was involved in an altercation with a 13-year-old neighbor boy, during which Lengyel struck the boy. On January 5, Lengyel reported the incident to Wondergem, his immediate superior. The following day, Lengyel also reported the incident to Johnson, the HSS department head. Eventually, Wondergem, with Johnson's approval, terminated Lengyel. For reasons not germane to this appeal, Lengyel did not appeal his termination through the existing county grievance procedures. Instead, he requested a hearing under WIS. ADM. CODE § HFS 5.07(3),[2] which provides:

> (5) APPEALS. In the event of demotion or separation, permanent employes shall be provided with the right to appeal through an impartial process that may be recommendatory or enforceable on the employer.

[2] The administrative code provision in effect at the time was WIS. ADM. CODE § **HSS** 5.07(3) (emphasis added). The current version is cited as WIS. ADM. CODE § **HFS** 5.07(3) (emphasis added). The text of the current section is the same as the former.

The County granted Lengyel's appeal request and arranged for a hearing before the Sheboygan County Personnel Committee. The letter notifying Lengyel of the hearing stated: "The Committee intends to treat this hearing as a 'contested case' hearing, and each of the parties will be granted a full opportunity to present testimony and evidence which have reasonable probative value and are material to the issues." In its appellate brief, the County concedes that it agreed to assume the burden of proof at this proceeding.

At the hearing, Lengyel was represented by counsel. All parties were permitted to present evidence and to cross-examine witnesses. Each side presented briefs to the Committee at the close of the evidence. During the Committee's deliberation, LeMahieu, the chairman of the Committee, obtained information from the district attorney regarding the status of the agency's investigation of the incident between Lengyel and the neighbor boy.

During its deliberation, the Committee first voted on whether to uphold Lengyel's termination. The vote resulted in a tie.[3] The Committee then voted on whether to reinstate Lengyel. This vote also resulted in a tie. When Johnson, the HSS director, was informed of the deadlock, he decided not to reinstate Lengyel. On September 20, 1994, the Sheboygan County Health and Human Services Board (HSS Board) affirmed Johnson's decision to let Lengyel's termination stand. Lengyel responded with this lawsuit.

We will recite additional facts and specifics of the circuit court's rulings as they pertain to the appellate arguments.

[3] The Committee consisted of four members. A fifth member did not participate because of his acquaintance with Lengyel.

STANDARD OF REVIEW

When reviewing a motion for summary judgment, we use the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. That methodology is well known, and we will not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182. Although summary judgment presents a question of law which we review de novo, we still value a trial court's decision on such a question. *See* ***id.*** at 497, 536 N.W.2d at 182.

DISCUSSION

Writ of Mandamus

Lengyel appeals the trial court's grant of summary judgment to the County dismissing his mandamus action. Lengyel further appeals the court's denial of his request for summary judgment on this claim. The court ruled that Lengyel had not established that he had a clear legal right to reinstatement. The trial court also concluded that Lengyel had alternative adequate legal remedies, specifically certiorari review of the Committee's action.

Before a writ of mandamus may issue, the claimant must demonstrate: (1) a clear legal right; (2) a positive and plain legal duty; (3) substantial damages due to the nonperformance of the duty; and (4) no other adequate legal remedy. *See* ***Law Enforcement Standards Bd. v. Lyndon Station***, 101 Wis.2d 472, 493, 305 N.W.2d 89, 99 (1981).

Lengyel contends that because the Committee's vote to uphold his termination ended in a tie, the County did not prevail at the hearing. As such, Lengyel concludes that he was clearly entitled to reinstatement and that the County had a corresponding clear legal duty to reinstate. The County contends that because the later vote to reinstate Lengyel ended in a tie, Lengyel did not prevail at the hearing. As such, the County concludes that Lengyel has no clear right to reinstatement and the County has no corresponding plain duty to reinstate. These conflicting positions reveal that the controlling question is which party carried the burden of proof at the hearing before the Committee.

As we have noted, the hearing was conducted pursuant to WIS. ADM. CODE § HFS 5.07(3). However, this code provision is very general and it does not specifically address the burden of proof. Therefore, we asked the parties to provide us with any relevant county ordinances or policies which might assist us on this question. The parties responded with a stipulation which included the following:

> 1. That the hearing conducted by the Sheboygan County Personnel Committee was not held pursuant to any ordinance or policy of Sheboygan County or pursuant to the County's grievance procedure.
>
> 2. That Lengyel had a protected property interest in his continued employment with Sheboygan County and the County believed that it was necessary pursuant to the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution to provide Lengyel with a post-termination due process hearing.
>
> 3. That the hearing was intended as an opportunity for Lengyel to appeal the decision of the County to discharge him….

Thus, in order to accord Lengyel his right to a due process hearing, the parties created their own hybrid proceeding and agreed to utilize the procedures set out in WIS. ADM. CODE § HFS 5.07(3). The parties have not cited us to any case law or other authority which has specifically addressed this section of the administrative code nor the burden of proof question which is before us. Nor have we discovered any such authority.

However, Lengyel has directed us to ***Reinke v. Personnel Board***, 53 Wis.2d 123, 191 N.W.2d 833 (1971). There, the supreme court held that in an appeal proceeding before the State Personnel Board, the employer carries the burden of proof. *See* ***id***. at 131-33, 191 N.W.2d at 837. This holding was cited with approval in a later case, ***Berkan v. Personnel Board***, 61 Wis.2d 644, 648 n.2, 215 N.W.2d 354, 356 (1973).[4] We see no reason why the same holding should not apply to an appeal proceeding pursuant to WIS. ADM. CODE § HFS 5.07(3). This is especially so in this case since the County noticed the proceeding as a "contested case" hearing and agreed to assume the burden of proof.[5]

We hold that the County failed to carry its burden of proof when the Committee's initial vote on whether to uphold Lengyel's termination produced a tie. The subsequent vote on whether to reinstate Lengyel was unnecessary and and of no legal effect. As such, Lengyel prevailed at the hearing.

[4] The County does not respond to Lengyel's arguments under ***Reinke*** and ***Berkan***.

[5] In its reply brief, the County states that its acceptance of the burden of proof was merely its acceptance of the burden of going forward with its proofs. These concepts, however, are distinct and carry separate meanings in the law. Regardless, ***Reinke*** and ***Berkan*** control the question.

The trial court also ruled that Lengyel was not entitled to mandamus relief because he had other adequate legal remedies. Specifically, the court held that Lengyel could have sought review of the Committee's ruling by certiorari. However, this ruling was premised on the court's assumption that Lengyel did not prevail at the hearing. As we have just explained, Lengyel prevailed at the hearing. Thus, he was not required to seek further review.

The County also contends that mandamus is not available to Lengyel because he may seek relief via a § 1983 action pursuant to ***Hough v. Dane County***, 157 Wis.2d 32, 49-50, 458 N.W.2d 543, 550 (Ct. App. 1990). Yet, in its next breath, the County argues against Lengyel's § 1983 complaint, contending that the trial court should have granted its summary judgment motion seeking dismissal of those claims. And, as our ensuing discussion will reveal, we agree with the County and reject Lengyel's § 1983 claims. Moreover, in ***Hough,*** the claimant had already recovered damages via a § 1983 action. That has not occurred in this case.

If the County's argument was correct, then the mere potential for a § 1983 action, regardless of how meritless, would bar a mandamus action in a setting such as this. That would fly in the face of well-established law which has recognized mandamus as a viable remedy in employment discharge cases. *See* ***State ex rel. Karnes v. Board of Regents***, 222 Wis. 542, 550-51, 269 N.W. 284, 287-88 (1936) (writ of madamus compelling reinstatement and certification of back pay appropriate); ***State ex rel. Nelson v. Henry***, 216 Wis. 80-89, 256 N.W. 714, 717 (1934) (mandamus lies to compel reinstatement of state employee fired for political reasons); ***State ex rel. Thompson v. Board of Sch. Dirs.***, 179 Wis. 284, 287, 191 N.W. 746, 748 (1923) (writ of mandamus is the proper remedy for a teacher seeking reinstatement and back pay).

Based on the undisputed facts, we conclude that the trial court erred by granting summary judgment to the County dismissing Lengyel's request for a writ of mandamus and by denying Lengyel's concurrent motion for summary judgment on this claim. We reverse and remand with directions that the court issue the writ.

Defamation Claims Against the County and Wondergem

Lengyel next argues that his immediate supervisor, Wondergem, defamed him by failing to give a full recitation of the facts surrounding the altercation with Lengyel's neighbor when she reported the incident to the HSS Board. Specifically, Lengyel contends that Wondergem failed to report to the HSS Board that he was defending himself against a physical attack by the neighbor boy who was larger than Lengyel and that the altercation was the result of a long-standing dispute between the two.[6] The trial court rejected this claim, ruling that Wondergem's statements were not defamatory. Alternatively, the court ruled that the statements were conditionally privileged and that Wondergem had not abused the privilege. While we have serious doubts that the statements were defamatory, we will assume for purposes of this discussion that they were. However, we agree with the trial court that Wondergem's statements were protected by the law of conditional privilege.

[6] Lengyel also contends that there is a genuine issue of material fact as to whether Wondergem informed the HSS Board that Lengyel was terminated for "abusing a child." Lengyel bases this claim on the deposition testimony of George Meyer, a member of the Agricultural and Land Committee. Meyer stated that when he asked two members of the HSS Board the reason for Lengyel's termination, he believed they told him that Lengyel was fired because "he had abused a child." Section 802.08(3), STATS., provides that affidavits supporting a motion for summary judgment "shall set forth such evidentiary facts as would be admissible in evidence." Meyer's statement as to what certain members of the HSS Board recall as the reason for Lengyel's termination is hearsay evidence as attributed to Wondergem and is inadmissible in evidence. We disregard it.

"Defamatory conduct otherwise actionable may escape liability because the defendant acts in furtherance of an interest of social importance—an interest that is entitled to protection even at the expense of uncompensated harm to the plaintiff." ***Olson v. 3M Company***, 188 Wis.2d 25, 36, 523 N.W.2d 578, 582 (Ct. App. 1994). A defamatory statement is conditionally privileged if it is "'made on a subject matter in which the person making the statement and the person to whom it is made have a legitimate common interest.'" ***Id***. at 36-37, 523 N.W.2d at 582 (quoting ***Zinda v. Louisiana Pac. Corp***., 149 Wis.2d 913, 922, 440 N.W.2d 548, 552 (1989)). "'The common interest privilege is based on the policy that one is entitled to learn from his associates what is being done in a matter in which he or she has an interest in common…. The common interest privilege is particularly germane to the employer-employee relationship.'" ***Zinda***, 149 Wis.2d at 923, 440 N.W.2d at 552 (quoted source omitted).

Lengyel concedes that Wondergem's statements were conditionally privileged. However, he contends that Wondergem lost the privilege by abusing it. A conditional privilege may be forfeited when the defendant abuses the privilege. *See* ***Olson***, 188 Wis.2d at 38, 523 N.W.2d at 583.

Lengyel argues that Wondergem abused the conditional privilege because she acted with knowing disregard of her statements' falsity. "'Reckless disregard as to truth or falsity exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement.'" ***Id***. at 39, 523 N.W.2d at 583. Wondergem stated in her affidavit that Lengyel informed her of the circumstances involving the altercation with his 13-year-old neighbor. Wondergem discussed the situation with Johnson, her supervisor and director of the department. Wondergem recommended that Lengyel be terminated. Wondergem's decision to terminate Lengyel was based on Lengyel's version of

his actions and his attitude about the incident. Wondergem then informed the HSS Board that Lengyel's employment had been terminated because "he admitted physically striking the thirteen-year old neighbor boy."

When a conditional privilege has been established, the burden is on the plaintiff to affirmatively prove an abuse of the privilege. *See* ***id.*** at 38, 523 N.W.2d at 583. Thus, even though the County and Wondergem sought summary judgment on this claim, the burden shifted to Lengyel to demonstrate a material issue of fact as to whether Wondergem abused her conceded conditional privilege. Wondergem reported to her superiors that she had discharged Lengyel because he had struck a child. That statement was true. Lengyel contends, however, that Wondergem was duty bound to say more. But Lengyel cites no law which requires the declarant, operating under a conditional privilege, to recite matters which might arguably mitigate the incident.[7] We conclude that Lengyel has failed to recite facts (or reasonable inferences drawn therefrom) which suggest that Wondergem's statements were made with reckless disregard. We affirm the trial court's grant of summary judgment to the County and Wondergem on this claim. We also affirm the court's denial of summary judgment to Lengyel on this claim.[8]

Negligence Claims Against All Defendants

[7] Nor does Lengyel cite to any law in support of his argument that Wondergem was required to await the outcome of the pending civil restraining order proceedings between Lengyel and the neighbor or to otherwise conduct a further investigation of the event before reporting the matter to her superiors.

[8] The defendants argue in the alternative that Wondergem would be immune from liability under § 893.80(4), STATS., and that Lengyel's exclusive remedy lies under the Worker's Compensation Act. The County also argues that it cannot be held liable for the intentional torts of its employees. Because we conclude that Wondergem's statements are conditionally privileged, we do not reach these additional arguments. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of appeal, we will not decide other issues raised).

Lengyel's complaint alleges negligence against the County, Wondergem and Johnson. However, the facts alleged in the complaint in support of this claim and Lengyel's appellate brief allude only to actions by Wondergem. Since Lengyel offered nothing in support of his negligence claim against Johnson, we summarily affirm the trial court's ruling dismissing this claim against Johnson. *See* ***Keplin v. Hardware Mut. Cas. Co.,*** 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964) (it is not the duty of this court to sift and glean the record to find facts to support appellant's arguments).

Lengyel argues that Wondergem was negligent for failing to await the outcome of the civil restraining order proceedings between Lengyel and the neighbor boy's family before reporting to the HSS Board that she had fired Lengyel. The trial court concluded that Lengyel's negligence claim was not supported by a showing that Wondergem either had a duty to Lengyel or that she breached her duty. The trial court additionally concluded that Wondergem's actions in terminating Lengyel were protected under the doctrine of governmental immunity. We will assume for purposes of this discussion that Wondergem owed Lengyel a duty after his termination. However, we affirm the court's ruling on the latter two grounds.

When Lengyel contacted Wondergem two days after the altercation, he informed her that the boy's family and he had each filed petitions for a restraining order against each other. Lengyel argues that because Wondergem knew that the reciprocal petitions for restraining orders were pending in civil court, she did not have "good cause" to terminate him and therefore she was negligent for failing to await the outcome of those proceedings before reporting to the HSS Board that she had terminated Lengyel.

Lengyel's argument is flawed on three grounds. First, the argument presumes that Wondergem did not have good cause to terminate Lengyel before the restraining order proceedings were concluded. We know of no law which requires an employer to await collateral proceedings before a discharge decision is made. Second, the argument assumes that the result of the collateral proceedings should somehow control the discharge decision by the employer. To the contrary, the employer is entitled to make the discharge decision on the basis of the factors which the employer deems relevant. Third, the argument equates a lack of good cause to terminate with the concept of common law negligence. We are unaware of any law which has "married" these two distinct and separate legal concepts. We affirm the trial court's ruling that Wondergem did not breach any duty owed to Lengyel.

In addition, we agree with the trial court that Wondergem's actions were protected by governmental immunity pursuant to § 893.80(4), STATS. That statute provides that a governmental employee is immune from liability for the injuries resulting from a discretionary act.[9] *See* § 893.80(4); ***Sheridan v. City of Janesville***, 164 Wis.2d 420, 425, 474 N.W.2d 799, 801 (Ct. App. 1991) (a quasi-judicial act is synonymous with a discretionary act). That immunity will be lost if the employee: (1) engages in malicious, willful or intentional conduct; (2) negligently performs a ministerial duty; and (3) is aware of a danger that is of

[9] Section 893.80(4), STATS., provides:

> 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 employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

"such quality that the public officer's duty to act becomes 'absolute, certain and imperative.'" *See* ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 257-58, 533 N.W.2d 759, 763 (quoted source omitted). A ministerial duty is one which 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***, 187 Wis.2d 508, 513, 523 N.W.2d 281, 284 (Ct. App. 1994) (quoted source omitted).

Clearly, a decision whether to discharge an employee is a discretionary—not a ministerial—act. Moreover, having already concluded that Wondergem's acts were not negligence, it logically follows that they were not malicious, willful or intentional. Finally, there is no evidence which suggests that Wondergem was under an "absolute, certain and imperative" duty to await the results of the civil restraining order proceedings.

On these grounds, we affirm the trial court's grant of summary judgment to the County and Wondergem dismissing Lengyel's negligence claims. Likewise, we affirm the court's denial of summary judgment to Lengyel on this claim.

Due Process Claims Against All Defendants

Both Lengyel and the County challenge the trial court's denial of summary judgment on Lengyel's procedural due process claims. The trial court concluded that a genuine issue of material fact existed as to whether Lengyel's due process rights had been violated.

We begin by addressing the County's procedural argument that because both sides moved for summary judgment and neither party argued that a

factual dispute exists, the trial court was obligated to decide this issue as a matter of law. We disagree. The court in ***Grotelueschen v. American Family Ins. Co***., 171 Wis.2d 437, 492 N.W.2d 131 (1992), stated that "*when only one reasonable inference* can be drawn from those undisputed facts as a matter of law, reciprocal motions for summary judgment waive the right to a jury trial." ***Id.*** at 447, 492 N.W.2d at 134 (emphasis added). Undisputed facts, as well as disputed facts, can create material issues necessitating a trial. Summary judgment is appropriate only if there is no genuine issue about both the material facts and the inferences that can reasonably be drawn from those facts. *See* § 802.08(2), STATS.; ***Grotelueschen***, 171 Wis.2d at 446, 492 N.W.2d at 134. The trial court did not err in denying summary judgment on this ground.

Thus, we turn to an examination of Lengyel's due process claims. While Lengyel's complaint regarding his other claims is properly focused and organized, his § 1983 due process claims are more of a "scatter-gun" approach. We dissect it as follows. First, Lengyel incorporates all of the prior fifty-two allegations in the complaint. We take this to mean that Lengyel is alleging that the mandamus, defamation and negligence claims also constitute § 1983 violations. We construe the balance of Lengyel's § 1983 complaint to allege three due process violations: (1) the Committee improperly conducted a portion of the proceedings in closed session; (2) the Committee improperly considered extraneous material; and (3) during the Committee's deliberations, LeMahieu improperly obtained and revealed information from the district attorney regarding that agency's investigation of the altercation between Lengyel and the neighbor boy.

We first examine Lengyel's complaints regarding the hearing process. The parties concede that Lengyel's employment is a constitutionally

protected property interest. *See* ***Cleveland Bd. of Educ. v. Louderhill***, 470 U.S. 532, 538 (1985). The question is "'what process is due.'" ***Id***. at 541 (quoted source omitted). The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he or she is deprived of any significant property interest. *See* ***id***. at 542. All the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures. *See* ***id.*** at 547-48. The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions. *See* ***Collins v. City of Harker Heights***, 503 U.S. 115, 129 (1992).

Here, we conclude that Lengyel was accorded all of the process due him regarding the discharge process. He was accorded a pre-termination opportunity to respond. In addition, he was accorded a full blown post-termination hearing with advance notice at which he was represented by counsel, allowed to produce evidence, allowed to call witnesses, allowed to cross-examine witnesses, and allowed to file a brief at the conclusion of the evidentiary phase of the proceedings. Despite Lengyel's complaints about certain irregularities at the hearing, we conclude that these do not constitute a deprivation of his due process rights.

We say this recognizing that we have reversed the trial court's denial of Lengyel's application for a writ of mandamus based on our conclusion that the County failed to meet its burden of proof before the Committee and in the face of Lengyel's other complaints about the hearing process. These irregularities (real or perceived) are properly addressed in judicial settings other than a § 1983 action. Indeed, our ruling directing the issuance of a writ of mandamus in Lengyel's favor demonstrates that this is so. As the United States Supreme Court has declared, an "incorrect or ill-advised decision" is not a basis for § 1983 relief. ***Id.*** at 129.

We reverse the trial court's denial of the defendants' motions for summary judgment as to Lengyel's due process complaints regarding the post-termination hearing process.

Next, we address Lengyel's complaint that the County violated his due process rights by not providing advance notice that his self-defense conduct against the neighbor boy's attack would result in termination. This argument is a non-starter since Lengyel's complaint fails to allege this as a due process violation. Thus, his appellate argument in support of the claim is without any foundational support.[10] We reverse the trial court's denial of summary judgment to the defendants on this claim.

Next, we address Lengyel's complaints about the individual conduct of Wondergem and Johnson. As against Wondergem, we read Lengyel's due process complaints to invoke the same conduct which he offers in support of his defamation and negligence claims. As against Johnson, we read Lengyel's complaint to say that Johnson violated Lengyel's due process rights by failing to reinstate him following the proceedings before the Committee.[11]

Individual governmental officers may be held liable under § 1983 when they act under "color or law" to deprive another of constitutionally or statutorily protected rights. *See* ***Dowd v. City of New Richmond***, 137 Wis.2d 539,

[10] This is not a matter of determining whether the allegations in the complaint state a claim, which is the first step of summary judgment methodology. *See* ***Grams v. Boss***, 97 Wis.2d 332, 337 n.5, 294 N.W.2d 473, 476 (1980). Rather, the inquiry is more fundamental—are there any allegations at all which even allude to the claim. There are none.

[11] We recall here that we have previously held that, although naming Johnson as a defendant in the negligence portion of his complaint, Lengyel made no substantive allegations against Johnson. *See supra* at 12.

557, 405 N.W.2d 66, 73 (1987). However, such individuals are entitled to qualified immunity if they are "'performing discretionary functions … insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" ***Id***. at 562, 405 N.W.2d at 75 (quoting ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982)).

We have already held that Wondergem was acting in a discretionary capacity as to her actions surrounding Lengyel's termination. The summary judgment record reveals no facts which suggest or infer that Wondergem's conduct regarding her investigation of the event, her decision to terminate Lengyel, or her report of this decision to the HSS Board was undertaken in violation of a "'clearly established statutory or constitutional right'" of Lengyel's "'of which a reasonable person would have known.'" ***Id***. (quoting ***Harlow***, 457 U.S. at 818).

We reverse the trial court's denial of Wondergem's motion for summary judgment as to this claim.

The same reasoning holds as to Johnson's failure to reinstate Lengyel following the Committee hearing. The action of the Committee left Johnson in a quandary as to which tie vote he was supposed to follow. Moreover, the Committee failed to additionally recommend pursuant to WIS. ADM. CODE § HFS 5.07(3) whether its decision was "recommendatory or enforceable on the employer." As such, Johnson was clearly required to exercise his discretion. And, as with Wondergem, we see nothing in the summary judgment record which even remotely suggests that Johnson's decision to not reinstate Lengyel was made in violation of Lengyel's statutory or constitutional rights of which a reasonable person would have been aware. *See* ***Dowd***, 137 Wis.2d at 562, 405 N.W.2d at 75.

We reverse the trial court's denial of summary judgment to Johnson on this claim.

Substantive Right to Bodily Integrity

Finally, Lengyel contends that the County's actions deprived him of his "substantive right to preserve his bodily integrity by punishing him for defending himself against a physical attack." The trial court granted summary judgment to the County on this claim because it "does not set forth a cause of action [upon] which relief may be granted."

Lengyel concedes on appeal that there is no precedent which supports his claim based on the facts of this case. However, Lengyel argues that "well established principles call for the development of the law to provide a remedy for infringement of the well recognized right to be free from state-mandated physical coercion." This court's primary function is error correcting. *See* ***Cook v. Cook***, 208 Wis.2d 166, 188, 560 N.W.2d 246, 255 (1997). Although in certain instances we necessarily define and develop the law, *see* ***id***., we decline Lengyel's invitation to do so in this case. In the absence of any precedent supporting Lengyel's claim, we agree with the trial court that there is no genuine issue of material fact. The County is entitled to summary judgment as a matter of law.

CONCLUSION

We reverse the trial court's grant of summary judgment to the County on Lengyel's claim for a writ of mandamus and we reverse the court's concurrent denial of Lengyel's motion for summary judgment as to this claim. We remand with directions that the court issue the writ.

We affirm the trial court's grant of summary judgment to the defendants on Lengyel's defamation and negligence claims and the court's denial of Lengyel's summary judgment motion as to these claims.

We reverse the trial court's denial of summary judgment to the defendants on Lengyel's due process claims pursuant to 42 U.S.C. § 1983.

We affirm the trial court's grant of summary judgment to the defendants on Lengyel's "bodily integrity" claim.

Costs denied to both sides.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.