

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 2015

Diane M. Fremgen
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. 2014AP1498

Cir. Ct. No. 2012CV414

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JUDY MORETTO, AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF
THERESA MORETTO, JUDY MORETTO, DON MORETTO, JOHN MORETTO,
DEBBIE MORRISSEY, GLORIA BOTT, LEO MORETTO, JOANNE DIETRICH,
CECELIA MATHESON, MIKE MORETTO, BRIAN JOHNSON AND
JOE JOHNSON,**

PLAINTIFFS-APPELLANTS,

v.

**FREE BIRD LLC, D/B/A COUNTRY COMPANIONS AND JAMES RIVER
INSURANCE COMPANY,**

DEFENDANTS,

NORTHERN BRIDGES, INC. AND ONE BEACON PROFESSIONAL INSURANCE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Douglas County:
GEORGE L. GLONEK, Judge. *Affirmed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIUM. Judy Moretto, as special administrator of the estate of Theresa Moretto, and Theresa's heirs (collectively, the Morettos), appeal a judgment of the circuit court in favor of Northern Bridges. The Morettos brought suit against Northern Bridges asserting various claims of negligence against Northern Bridges related to Northern Bridges' role as Theresa's care management organization. The circuit court dismissed the Morettos' claims and entered judgment in favor of Northern Bridges on the basis that Northern Bridges is immune from liability under WIS. STAT. § 893.80(4) (2013-14).¹ For the reasons discussed below, we affirm.

BACKGROUND

¶2 The following facts are undisputed. Theresa died in December 2011. Prior to her death, it was determined that Theresa was a vulnerable adult suffering from mental illness and dementia and she was enrolled in Northern Bridges, which is a care management organization created under WIS. STAT. § 46.284, and a long-term care district under § 46.284(1)(a)(2). Northern Bridges contracts with the State of Wisconsin Department of Health Services for, among other services, the provision of family care services by community-based residential facilities. *See* § 46.284(2)(c).

¶3 In January 2011, at the recommendation of Northern Bridges, Theresa was placed under the care and supervision of Country Companions (d/b/a

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Free Bird LLC), which is a community-based residential facility.² On or around October 31, 2011, while under the care of Country Companions, Theresa fell and suffered a head injury and was hospitalized from then until the time of her death.

¶4 In October 2013, the Morettos filed an amended complaint against Northern Bridges, alleging that Northern Bridges was negligent in multiple respects with regard to Northern Bridges' role as Theresa's Care Management Organization. The Morettos alleged that Northern Bridges was negligent: in placing Theresa in the care of Country Companions; in failing to properly notify Theresa's family and the State of Wisconsin Department of Health Services when Theresa sustained injuries from falls while a resident at Country Companions; in failing to properly monitor, assess and re-evaluate the care provided to Theresa by Country Companions; in deviating from the accepted standard of care for a care management organization; and in failing to supervise Country Companions' care of Theresa.

¶5 Northern Bridges moved the circuit court to dismiss the Morettos' amended complaint, in part on the basis that governmental immunity under WIS. STAT. § 893.80(4) bars the Morettos' action against Northern Bridges.³ The

² A "[c]ommunity-based residential facility" is one in which:

5 or more adults who are not related to the operator or administrator and who do not require care above intermediate level nursing care reside and receive care, treatment or services that are above the level of room and board but that include no more than 3 hours of nursing care per week per resident.

WIS. STAT. § 50.01(1g).

³ Two days before the hearing on Northern Bridges' motion to dismiss was to be held, the Morettos requested that Northern Bridges' motion be converted to a motion for summary judgment, and the Morettos submitted a number of documents that are outside the pleadings. The circuit court declined to convert the motion.

circuit court agreed and granted Northern Bridges’ motion. The court determined that “all the duties [the Morettos] accuse Northern Bridges of violating ... are all inherently discretionary decisions which require Northern Bridges to exercise its judgment as to the time, mode and occasion for the performance.” The court concluded that Northern Bridges “is left with discretionary decisions as to when and how to notify, place, monitor, supervise, evaluate and provide care to its members,” and that because Northern Bridges’ actions or inactions are “discretionary and not ministerial, it is entitled to immunity from suit under WIS. STAT. § 893.80(4).” The court entered judgment in favor of Northern Bridges, from which the Morettos appeal.

DISCUSSION

¶6 The Morettos contend that the circuit court erred in granting Northern Bridges’ motion to dismiss their complaint. They argue that the duties Northern Bridges negligently performed were ministerial in nature and that Northern Bridges is therefore not immune from liability under WIS. STAT. § 893.80(4). We are not persuaded.

¶7 We review a circuit court’s decision to grant a motion to dismiss de novo. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶17-18, 356 Wis. 2d 665, 849 N.W.2d 693. When reviewing a motion to dismiss, we accept as true the factual allegations in the complaint, but we do not accept any legal conclusions. *Id.*, ¶19.

¶8 The Morettos do not dispute that Northern Bridges is a governmental agency and that as such, it is entitled to immunity from liability under WIS. STAT. § 893.80(4) for acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions. See *Caraher v. City of Menomonie*, 2002 WI App

184, ¶11, 256 Wis. 2d 605, 649 N.W.2d 344. Legislative, quasi-legislative, judicial, or quasi-judicial functions have been collectively interpreted as “includ[ing] any act that involves the exercise of discretion and judgment.” *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314. Thus, as a general rule, governmental entities “are immune from liability for damages resulting from their negligence or unintentional fault in the performance of discretionary functions.” *Lister v. Board of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976).

¶9 An exception to governmental immunity exists when a government entity’s act is associated with the performance of ministerial duties imposed by law. *Pries v. McMillon*, 2010 WI 63, ¶22, 326 Wis. 2d 37, 784 N.W.2d 648. In that situation, the entity is not entitled to immunity. *See id.*, ¶21. A ministerial duty is one that 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.” *Lister*, 72 Wis. 2d at 301. It is a duty that has been “positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated” and is “not [] dependent upon ... judgment or discretion.” *Lodl*, 253 Wis. 2d 323, ¶26 (quoted source omitted). To determine whether a written law or policy establishes a ministerial duty, we look to the language of the writing to determine whether the duty is “expressed so clearly and precisely, so as to eliminate the [] exercise of discretion.” *Pries*, 326 Wis. 2d 37, ¶26.

¶10 The Morettos assert that Northern Bridges’ duties in initially assessing Theresa and placing Theresa in the care of Country Companions, and its continued supervision and monitoring of the care Theresa received from Country

Companions, were all ministerial and that Northern Bridges is, therefore, not immune from liability for any negligence arising out of fulfilling those duties.⁴ We address each duty in turn below.

A. Initial Assessment

¶11 Pointing to WIS. ADMIN. CODE § DHS 10.44 (through July 2015), the “Standards for performance by CMOs” as well as what appears to be the standard contract between the Department of Health Services Division of Long-Term Care and CMOs⁵ (hereinafter, “Program Contract”), the Morettos argue that Northern Bridges had no discretion in its performance of “an []adequate and []complete initial assessment of [Theresa] and her needs.” The Morettos focus on three duties undertaken by Northern Bridges as part of Theresa’s initial assessment.

¶12 First, they assert that Northern Bridges did not have discretion in “sufficiently staff[ing]” the “Interdisciplinary Team” assembled to perform the initial assessment of Theresa and her needs. The Morettos point out that a provision in the Program Contract addressing “Interdisciplinary Team Composition” provides that the Interdisciplinary Team is “always” to include the

⁴ The Morettos do not argue that notification of Theresa’s family and the State of Wisconsin Department of Health Services of injuries sustained by Theresa was ministerial, nor do they argue that re-evaluation of the care provided to Theresa by Country Companions was ministerial. Accordingly, we do not address the circuit court’s determination that Northern Bridges is immune from liability for those particular acts.

⁵ The contract was taken from the Department of Health Services’ website by the Morettos and is captioned as follows: “<<PROGRAM>> CONTRACT between DEPARTMENT OF HEALTH SERVICES DIVISION OF LONG[-]TERM CARE and <<NAME OF [CMO]>> January 1, 2013 – December 31, 2013.” There is no allegation that the contract actually signed by Northern Bridges with the State was identical or even similar to this standard form.

enrollee, the social service coordinator, a registered nurse and “any other staff who are assigned or contracted by [Northern Bridges] to participate in the [Interdisciplinary Team].” The Morettos also point out that WIS. ADMIN. CODE § DHS 10.44(2)(a)-(c),⁶ which set forth the requirements for the staffing of CMOs and for the establishment of interdisciplinary teams, contain the mandatory word “shall.” See *Pries*, 326 Wis. 2d at 56 (describing the words “must” and “shall” as mandatory).

¶13 The portion of the Program Contract relied upon by the Morettos and WIS. ADMIN. CODE § DHS 10.44(2)(a)-(c) require that certain individuals be made part of an enrollee’s Interdisciplinary Team. However, the Program Contract provides that the Interdisciplinary Team “may include additional persons with specialized expertise for assessment, consultation, ongoing coordination efforts and other assistance as needed.” Similarly, § DHS 10.44(2) provides that additional members “shall” be designated to the Interdisciplinary Team “as necessary.” Both the Program Contract and § DHS 10.44(2) give Northern Bridges discretion to determine if and when individuals other than those otherwise

⁶ WISCONSIN ADMIN. CODE § DHS 10.44(2)(a)-(c) provide that care management organizations such as Northern Bridges:

- (a) ... shall meet staff qualification standards contained in its contract with the department.
- (b) ... shall designate for each enrollee a case management team that includes at least a social service coordinator and a registered nurse. The [care management organization] shall designate additional members of the team as necessary to ensure that expertise needed to assess and plan for meeting each member’s needs is available.
- (c) ... shall employ or contract with a sufficient number of case management personnel to ensure that enrollees’ services continue to meet their needs.

required should be included in an enrollee's Interdisciplinary Team. Accordingly, neither the Program Contract nor § DHS 10.44(2) can be said to leave nothing to judgment or discretion and, therefore, they do not create a ministerial duty with regard to the staffing on a member's Interdisciplinary Team.

¶14 The Morettos next assert that Northern Bridges did not have discretion in providing Theresa with an opportunity to discuss or negotiate her services at the time of her initial assessment, in evaluating certain issues identified in § DHS 10.44, or in developing a service plan for Theresa with Theresa's participation as well as the participation of any family members or other individuals Theresa wished to participate.

¶15 The Morettos reference "part i" in support of their assertion that Northern Bridges had a ministerial duty to provide Theresa with an opportunity to discuss or negotiate her services, and they reference "parts i and j" in support of their position that Northern Bridges had a ministerial duty to evaluate certain specified issues. It is unclear to us whether the Morettos are referring to provisions in the 288-page Program Contract, a subsection of § DHS 10.44, or something else. Furthermore, the Morettos have not presented this court with an argument explaining why these unidentified provisions create a ministerial duty. Accordingly, we do not further address this issue. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address inadequately briefed issues).

¶16 With regard to their assertion that Northern Bridges had a ministerial duty to develop an individual service plan for Theresa with the full participation of Theresa, Theresa's family members or any other individuals Theresa wished to participate, the Morettos point to WIS. ADMIN. CODE § DHS 10.44(2)(f).

However, they fail to present a developed argument explaining why this provision imposes ministerial obligations on Northern Bridges. Accordingly, we also do not further address this issue. *See id.*

B. Placement

¶17 The Morettos argue that Northern Bridges “did not have the discretion to place [Theresa] in housing that was unqualified to handle her well-documented and disabling medical issues.” The Morettos cite this court to pages 344 - 504 of the Program Contract as the source of law creating a ministerial duty regarding the placement of CMO members.

¶18 We decline to embark on a search through 160 pages of a contract, unguided by reference to specific provisions, to find support for the Morettos’ argument. WIS. STAT. RULE 809.19(1)(e) requires that parties include in their briefs on appeal “citations to the ... parts of the record relied on,” and we may refuse to consider a party’s argument when the party has failed to do so. *See Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. “[I]t is not the duty of this court to sift and glean the record in *extenso* to find facts which will support an [argument].” *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (quoted source omitted). We therefore decline to address this argument. *See* WIS. STAT. RULE 809.83(2).

C. Supervision and Monitoring

¶19 The Morettos assert that the contract and WIS. ADMIN. CODE § DHS 10.44 imposed the following ministerial duties on Northern Bridges:

- (1) establishing mechanisms to monitor subcontractors;
- (2) monitoring subcontractors;

- (3) conducting face-to-face visits with members on a quarterly basis; and
- (4) establishing policies and procedures regarding member safety and risk.

In support of this assertion, the Morettos point out that the Program Contract and WIS. ADMIN. CODE § DHS 10.44 set forth these duties with the terms “must” and “shall,” which they interpret as setting “clear mandates for action by Northern Bridges.”

¶20 As has been the problem throughout their brief, the Morettos have failed to present this court with a developed argument supporting their position. In the portion of their brief addressing their assertion that Northern Bridges’ duty to monitor and supervise Country Companions was ministerial, the Morettos devote a substantial argument on whether Northern Bridges complied with those duties. However, the issue here is not whether Northern Bridges violated a duty, which would be a concept relevant to whether they were negligent under tort law. Rather, the issue is whether any such duty was ministerial, which pertains to the separate legal question of government immunity from tort liability. In other words, until the Morettos overcome government immunity by demonstrating that a particular duty is ministerial, the question of whether the government entity breached the duty is not reached. Their argument as to whether the duties are ministerial is almost entirely lacking. The Morettos refer this court to provisions in the Program Contract and WIS. ADMIN. CODE § 10.44 that establish the duties set forth in the prior paragraph, but they do not explain to this court *why* those provisions should be construed as ministerial. The Morettos’ conclusory assertion that they are ministerial is not sufficient on appeal. *See Associates Fin. Servs. Co. of Wis., Inc. v. Brown*, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d

56 (generally, this court does not consider conclusory assertions and undeveloped arguments).

¶21 However, even if the Morettos' arguments were developed, we would not be persuaded that either the Program Contract or WIS. ADMIN. CODE § DHS 10.44 makes the duties ministerial. The Morettos appear to misunderstand the difference between the concept of a duty being mandatory and that same duty being ministerial. A government entity may have a mandatory duty but still have discretion or judgment in the time, place, or manner in which that duty is to be performed. Thus, mandatory and ministerial are neither synonymous nor mutually exclusive. They are simply different concepts that pertain to different legal issues, as explained in the previous paragraph. Here, even though the Program Contract provides that Northern Bridges "must ... [e]stablish mechanisms to monitor the performance of subcontractors," the manner in which Northern Bridges does so and what the mechanisms are, remain within Northern Bridges' discretion. As Northern Bridges argues, under the Program Contract provision relied upon by the Morettos, CMOs are "left to develop the mechanisms as long as they are consistent with certain undefined standards, laws, and regulations." As to WIS. ADMIN. CODE § DHS 10.44, paragraphs (3)(a)-(c) requires Northern Bridges to develop and implement certain standards, procedures and protocols. However, the content and substance of the standards, procedures and protocols remain a matter of discretion and judgment for Northern Bridges, and are thus not ministerial duties that would result in sovereign immunity being waived.

CONCLUSION

¶22 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

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

