COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2019

Sheila T. Reiff
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. 2017AP2340 **Cir. Ct. No. 2014CV43**

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

AMBER DEGRAFF AND MICHAEL DEGRAFF,

PLAINTIFFS-APPELLANTS,

V.

JEFFREY S. SKATRUD, JULIANNA C. SMITH, NICOLE GROFFY, DIANE K. TERTIN, GREEN COUNTY AND WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Green County: THOMAS J. VALE, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Amber DeGraff and Michael DeGraff appeal orders dismissing their complaint and awarding costs to the respondent defendants. The issues relate to governmental immunity and whether the defendants waived costs by not including language about costs in the dismissal order. We affirm.

¶2 The DeGraffs filed suit in their capacities as mother and step-father of her minor son who was alleged to have died while in custody at the Green County Jail at the age of seventeen. The individual defendants who are now respondents on appeal were alleged to have been employees of Green County at that time. The complaint alleged that the son died from an overdose of a drug given to him by his adult cellmate, Danny Mitchell. The circuit court dismissed the complaint on the summary judgment motion of the defendants on the ground of governmental immunity.

¶3 The DeGraffs argue that governmental immunity should not apply here because there was a known danger. Under the known danger exception to immunity, a dangerous situation creates a ministerial duty when there is a known danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion. ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶38, 253 Wis. 2d 323, 646 N.W.2d 314.

¶4 The DeGraffs argue that the placement of her son in a cell with Mitchell created a known danger because Mitchell was being supervised as a sex offender due to his conviction for incest with a child. However, this argument fails because the DeGraffs do not identify any potential causal connection between that alleged danger and the death of her son. We are unable to see, and the

DeGraffs do not explain, why there would be an exception to governmental immunity when a known danger may exist but does not cause the harm that is the subject of the claim.

¶5 The DeGraffs make several arguments that appear to assume that one or more of the defendants had ministerial duties, not based on a known danger but, instead, imposed by law or policy, regarding security classification of inmates and the conducting of cell checks. However, the DeGraffs do not develop an argument to show that these acts were ministerial, rather than discretionary. Therefore, we do not further address whether any ministerial duty apart from the known danger exception existed, or the arguments that are based on that assumption. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court need not consider undeveloped legal arguments).

¶6 The DeGraffs also argue that the circuit court erred by awarding costs to the defendants. Their first argument is that the defendants waived the right to costs by not including costs in the draft dismissal order they submitted to the circuit court. They assert that the clerk is not permitted to tax costs to a defendant unless costs have first been allowed by the court. They base this argument on WIS. STAT. § 814.03(1) (2017-18)[1], which provides: "If the plaintiff is not entitled to costs …, the defendant shall be allowed costs to be computed on the basis of the demands of the complaint." They argue that the phrase "shall be allowed" means that a decision must be made by the court to allow costs.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

¶7 The DeGraffs cite no other legal authority for this argument, and we reject it. We see no basis to conclude that the use of the term "allowed," by itself, means that only the court can approve costs to a defendant. The DeGraffs do not point to any other language in the relevant statutes that supports that interpretation, and we see other language that is contrary to it.

¶8 Most significantly, the statute on taxation of costs requires a party opposing taxation of costs, or of particular items of costs, to file objections with the clerk. WIS. STAT. § 814.10(3). The statute then further requires the clerk to "note on the bill all items *disallowed*, and all items *allowed*, to which objections have been made." Sec. 814.10(4) (emphasis added). The statute then further allows a party to seek court review by motion after the clerk taxes costs. Therefore, contrary to the DeGraffs' argument, it is apparent that this statute uses the term "allowed" to refer to decisions on costs that are made by the clerk. The use of that term does not imply that only the court may approve costs.

¶9 Furthermore, that statute is inconsistent with the DeGraffs' argument because it creates a procedure in which a court decision on costs occurs *after* taxation by the clerk, not before. That procedure for court review appears to apply regardless of which party the costs were taxed to or against. Accordingly, we reject the argument that the defendants waived costs by not including language about costs in the dismissal order.

¶10 The DeGraffs also argue that the defendants were not entitled to costs because they were not the "prevailing party," as that term is used in WIS. STAT. § 814.23. They argue that the defendants were not successful because, in applying the defense of governmental immunity, a court assumes that the defendants were negligent. We reject this argument. By any normal meaning of

the term "prevail," defendants who obtained complete dismissal of the plaintiffs' claims have prevailed, regardless of the specific nuances of the legal theory on which they did so.

¶11 We add two cautionary notes for the parties' attorneys. As to DeGraffs' counsel, we are concerned about this sentence in the reply brief: "The trial court clearly felt the need to resolve this disputed fact in favor of Deputies Smith, Groffy, and the County in order to grant them summary judgment on governmental immunity." To the extent this sentence was intended to suggest that the circuit court favored certain parties in making a particular decision, it is beyond the bounds of zealous advocacy and not appropriate.

¶12 As to respondents' counsel, their brief cites to and attaches an unpublished per curiam opinion of this court. While unpublished opinions issued after July 1, 2009, may be cited for persuasive value, this is true only as to *authored* opinions, which do not include per curiam opinions. *See* WIS. STAT. RULE 809.23(3).

By the Court.—Orders affirmed.

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