STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 2023-AP-382

W.C.B.,

Plaintiff-Appellant,

v.

EMCASCO INSURANCE COMPANY
and
SCHOOL DISTRICT OF DURAND-ARKANSAW,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS EMCASCO INSURANCE COMPANY AND SCHOOL DISTRICT OF DURAND ARKANSAW

Appeal from a Final Order of 21-CV-22
Pepin County Circuit Court,
the Honorable Thomas W. Clark Presiding

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

EMCASCO Insurance Company and the School District of Durand-Arkansaw (collectively, the "District") do not believe oral argument will assist the Court in resolving the issues presented. Publication is unnecessary because the issues in the appeal involve the application of well-settled rules of law and the issues may be decided by controlling precedent. Wis. Stat. § 809.23(1)(b)2; 3.

STATEMENT OF THE CASE

The present appeal filed by WCB seeks review of the Circuit Court's summary judgment decision on the application of governmental immunity to WCB's negligence claim against the District, as well as statutorily-mandated award of costs to the District after prevailing on WCB's claims.

WCB's appeal is baseless. WCB asserted a claim against the District for negligence and he has argued on appeal that the District's failure to discipline a staff member constituted negligence and was not subject to statutory governmental

immunity. (He has also frivolously argued that there are disputed facts pertaining to the underlying negligence claim itself such that summary judgment was inappropriate; that assertion is completely baseless as it is well-settled that a court assumes negligence for purposes of evaluating governmental immunity.) WCB's argument is premised on his assertion that vague, non-specific (and inapplicable) policies and handbook provisions imposed a ministerial duty on the District to discipline the staff member such that immunity did not apply, but even a cursory review of those provisions clearly establishes that they are too vague and non-specific to impose ministerial duties. Finally, WCB has claimed that the staff member posed a known and compelling danger, but his argument suffers from the fatal flaw of lack of knowledge.

WCB has also argued that his failure to file a timely statutory Notice of Injury should be excused because the District had timely actual notice of his claim. However, he has not demonstrated that the District did, indeed, have notice of his

intent to hold the District liable for the intentional, criminal actions of a staff member (who, WCB has acknowledged, was acting outside the scope of her employment with respect to those actions). Accordingly, his argument fails, and the Circuit Court correctly concluded that his negligence claim was limited in time and scope by the submission date of his Notice of Injury.

In addition to challenging the merits ruling on his negligence claim against the District, WCB has challenged the imposition of statutory costs. He has raised no valid legal challenge to the imposition of costs and his challenge is frivolous.

For the reasons stated more fully herein, this Court should affirm the ruling of the Circuit Court.

STATEMENT OF FACTS

I. Heskin and WCB Purportedly Engaged in a Secret, Hidden Relationship From October 2018 through May 2019.

Sarah Heskin taught middle school English at the Durand-Arkansaw School District (the "District") during the 2018-2019 school year. [R. 39:272 (8:21-9:5).] Plaintiff WCB, who was in

eighth grade that school year, was one of Heskin's students. [R. 39:273 (11:24-12:1); R. 39:8 (20:14-16).]

WCB began communicating with Heskin outside of class, over social media accounts, on October 31, 2018. [R. 39:10 (26:24-27:6).] The communication occurred on Heskin's "classroom" account – which she created to post photos of classroom activities, homework reminders, and general classroom maintenance. [R. 39:273 (12:8-13:9).] At that point, WCB did not perceive the relationship with Heskin as anything beyond a student-teacher relationship. [R. 39:10 (28:7-11).] WCB also began to spend additional time in Heskin's classroom between October 31 and December 25, 2018. [R. 39:11 (29:17-21).] However, he did not recall being in her classroom alone during that timeframe. [R. 39:11 (30:16-21).]

On approximately December 25, 2018, WCB perceived that his communications with Heskin morphed from student-teacher

to "something different."[1] [R. 39:10 (28:12-23).] The change occurred, in his mind, because he had begun to develop feelings for Heskin and WCB told her about his feelings on December 25, 2018. [R. 39:10-11 (28:24-29:3).] At that point, Heskin created a different Instagram account specifically to communicate with WCB and to keep her conversations with him private. [R. 39:274 (14:11-15:6).] WCB also created a second Instagram account in mid-January 2019 to communicate with Heskin. [R. 39:11 (31:9-16).] WCB purposefully created the new Instagram account to keep his communications with Heskin secret. [R. 39:12 (34:1-4).] At that point in time, WCB still perceived his relationship with Heskin was merely a friendship. [R. 39:11 (32:18-24).]

WCB perceived that his online communications with Heskin changed from "friends to a more romantic" nature in mid-February 2019. [R. 39:13-14 (40:23-41:9).] To WCB's recollection, the communications changed at that time because Heskin was

[1] Heskin perceived her communications with WCB turned personal in approximately November or December 2018. [R. 39:274 (14:9-12).] Heskin and WCB's respective beliefs about when communications turned personal is immaterial. *See Strasser v. Transtech Mobile Fleet Service, Inc.,* 2000 WI 87, ¶ 32, 236 Wis. 2d 435, 613 N.W.2d 142.

intoxicated on one occasion and WCB asked her a sexual question. [R. 39:14 (42:10-15).] (That was the first time WCB recalled his communications with Heskin turning inappropriate. [R. 39:14 (42:16-20).]) During that specific conversation, WCB and Heskin texted and then video chatted. [R. 39:15 (45:12-46:1).] The video chat became sexual; WCB turned his camera off and Heskin touched herself on camera. [R. 39:15 (47:5-14).]

WCB estimated that he video chatted with Heskin approximately 20-30 times after that initial instance in mid-February 2019. [R. 39:16 (49:20-50:4).] WCB classified each of those 20-30 video chats as either inappropriate or sexual. [*Id.*] All of the video chats occurred while Heskin was off school property. [R. 39:16 (50:10-14).]

WCB claimed to have physical contact with Heskin for the first time in late February in her classroom during lunch. [R. 39:22 (74:1-8).] According to WCB, the two kissed and hugged. [R. 39:23 (77:24-78:5).] The contact occurred behind a closed door, along the same wall as the door, and lasted approximately 10

minutes. [R. 39:23 (77:9-11; 78:9-18).] WCB purportedly returned to Heskin's classroom after school that same day for approximately 10 to 12 minutes and the two kissed and hugged. [R. 39:23 (79:14-20; 80:6-8).]

WCB claimed to have physical contact with Heskin approximately 15-20 times after that first contact with Heskin in late February. [R. 39:23 (80:13-17).] He claimed that the two engaged in physical contact before school, during lunch, and after school. [R. 39:23 (80:21-23).] He claimed to have digitally penetrated Heskin on four or five occasions. [R. 39:24 (82:5-9).] In addition to kissing and hugging Heskin, he claimed to have also groped her breasts. [R. 39:25 (86:4-11).] WCB alleged that most instances of physical contact lasted approximately 10 to 15 minutes, although WCB recalled one instance lasting 20 to 30 minutes and another lasting 30 to 45 minutes. [R. 39:24 (83:3-9).] WCB claimed that the last time he had physical contact with Heskin was mid-April 2019. [R. 39:24 (83:10-13).] WCB recalled that the physical contact stopped at that point because he was no

longer allowed in Heskin's classroom. [R. 39:24 (84:6-8).] He did, however, continue to communicate with Heskin over social media after that time. [R. 39:25 (88:5-8).]

Between October 31, 2018 and May 2, 2019, WCB communicated with Heskin mostly via Instagram, though he did communicate with her on a few occasions via Snapchat, via handwritten letters, via email, and in person. [R. 39:13 (38:19-40:22).] However, Heskin avoided communicating with WCB using her school email account because she did not want anyone at the District to go through her emails, finding out about the communications, or finding out about the extent of her relationship with WCB. [R. 39:274 (15:7-14).] WCB also purposefully avoided emailing Heskin with his school email account to keep their communications secret. [R. 39:12 (34:5-9).]

None of the sexual communications between Heskin and WCB took place when Heskin was on school property. [R. 39:274 (16:13-17).] Similarly, WCB never engaged in sexual or inappropriate electronic communications with Heskin during

school hours or while he was on school property. [R. 39:14 (43:22-44:13).]

During the time when WCB was engaging in physical contact with Heskin, he never told anyone about the contact because he wanted to keep it a secret. [R. 39:25 (87:20-88:1).] Heskin told WCB not to tell anyone about their contact because she did not want to get in trouble. [R. 39:280 (38:21-39:1).] Similarly, Heskin never told anyone about the nature of her communications with WCB. [R. 39:275 (19:24-20:3).] Heskin also asked WCB not to tell people about their communications because she was afraid of being caught and afraid of the ramifications. [R. 39:277 (28:19-24).] WCB did not discuss his relationship with Heskin with any staff members because he wanted to keep the relationship secret and because he thought it "would come off as weird if the student in that situation was trying to talk to the teachers." [R. 39:21-22 (72:20-73:5).] WCB confirmed that he would have denied the relationship if staff would have asked him. [R. 39:22 (73:6-8).]

II. Allegations Regarding Heskin and WCB's Hidden Physical Relationship were Brought to the District's Attention in May 2019.

Katherine Walsh-Kallstrom ("Walsh") was the school nurse for the District. [R. 39:260 (5:18-24).] On May 1, 2019, a female high school student asked to speak with Walsh. [R. 39:261 (9:4-10:1).] When the student met with Walsh, the student reported that another student had told her there was inappropriate contact between WCB and a teacher; specifically, "there was possibly a make-out that happened in the classroom and social media contacts of a sexual or inappropriate nature." [R. 39:261 (11:16-12:5).] The female student told Walsh she had received the information from her brother, who was a friend of WCB.[2] [R. 39:262 (13:13-21).]

After the meeting with the student, Walsh called the high school principal, Bill Clouse. [R. 39:262 (16:15-19).] Since Clouse was not immediately available, Walsh called Michelle Zagozen,

[2] In approximately mid-April, 2019, WCB told a friend, DB, about his sexual communications with Heskin; WCB showed his friend DB a recording that WCB had taken during a sexual video chat with Heskin. [R. 39:15-16 (48:10-49:7).] DB ultimately conveyed that information to his sister, who conveyed it to Walsh. [R. 39:261-262 (9:12-18; 11:18-12:9; 13:13-17).]

who was her direct supervisor. [R. 39:262 (16:19-21); R. 39:260 7:4-7).] Walsh met with Zagozen and relayed the information the student had conveyed to her. [R. 39:263 (18:10-15).] Zagozen then told Clouse and the District Administrator, Greg Doverspike, about the report. [R. 39:60 (40:1-5); R. 39:130 (24:8-14).] Clouse and Doverspike then contacted the school resource officer and started an investigation. [R. 39:60 (40:22-24); R. 39:131 (25:6-9).] The administrators contacted the student who made the report to Walsh to conduct an interview with law enforcement. [R. 39:61 (41:8-10; 42:1-3).] Doverspike, Clouse, the school resource officer, and the chief of police began interviewing individuals. [R. 39:131 (25:10-16).] The District's investigation was parallel to law enforcement's investigation. [R. 39:131 (25:17-20).] The District sought an interview with Heskin after May 2, 2019, but Heskin declined to appear and resigned her employment with the District. [R. 39:292 (87:8-13).]

III. The District had no Prior Knowledge of Any Sexual or Physical Relationship Between Heskin and WCB.

a. Staff had no knowledge of a sexual or physical relationship between Heskin and WCB.

While some staff members were aware that Heskin and WCB spoke outside of the allotted class time, it is undisputed that District staff had no knowledge of the sexual and physical relationship between Heskin and WCB until May 2019. And, upon the District learning of the sexual and physical nature of the relationship, the District took immediate action and law enforcement was promptly advised.

Trish Bantle, who taught middle school during the 2018-2019 school year, recalled seeing WCB in Heskin's classroom outside of normal instructional times. [R. 39:81-83 (28:11-16; 29:7-23; 33:21-24).] She recalled having what she described as "uncomfortable feelings" about the relationship between WCB and Heskin in the fall of 2018. [R. 39:84-85 (40:8-18; 41:8-14).] Bantle's feelings, however, were premised only on her seeing WCB in Heskin's classroom or doorway outside of normal class

time. [R. 39:85 (41:15-42:2).] Bantle admitted she had no evidence of any physical relationship between Heskin and WCB prior to Heskin's arrest. [R. 39:87 (52:7-10).] Further, Bantle never observed any behavior between WCB and Heskin that she considered to amount to sexual harassment. [R. 39:87-89 (52:24-53:3).]

Kassy Weiss, another staff member, recalled having conversations with other staff in late November or early December 2018 whereby the topic of WCB being in Heskin's classroom frequently was brought up. [R. 39:84 (40:22-25); R. 39:229 (19:13-20:13).] Weiss's initial thought was concern and the need to protect Heskin from people misconstruing why WCB was in her room so often. [R. 39:230 (21:11-19).] During her conversations with other staff members, there was never a discussion regarding concerns about an inappropriate relationship between Heskin and WCB; the conversations always involved concerns about the appearance of an inappropriate relationship. [R. 39:234 (37:4-14).] Weiss confirmed that she

never observed any behavior or contact between Heskin and WCB that she perceived as sexual harassment during the 2018-2019 school year. [R. 39:238 (54:5-9).] She also acknowledged that she "never ever would have guessed what was going on" and never would have guessed that WCB and Heskin were "secretly dating or anything." [R. 39:235 (43:16-21).]

Other staff members also observed nothing unusual between WCB and Heskin. Chris Radle, a middle school teacher, never observed WCB spending excess time with Heskin or spending time with her outside of his assigned classroom hour. [R. 39:153 (8:2-5).] In fact, he never observed the two of them alone together. [R. 39:153 (5:20-6:5; 7:16-8:1).] Jerry Schade, another middle school teacher, never observed any sort of close relationship between WCB and Heskin. [R. 39:315 (5:1-11); R.39:16 (10:10-14).] Stephanie Hotujec, the school psychologist, never observed any issues with Heskin and her boundaries with any students, including WCB. [R. 39:250 (6:1-24); R. 39:252 (14:18-22).] Further, Hotujec did not recall any staff member

raising any concerns about Heskin's boundaries with students or WCB. [R. 39:252 (15:7-12).] Clay Hocking, another staff member, did not have any belief that Heskin had any sort of inappropriate relationship with any student. [R. 39:171 (36:13-17).] Likewise, prior to her arrest, Hocking never heard from any other staff members that they held a belief that Heskin had an inappropriate relationship of any kind with any student. [R. 39:171 (36:18-23).] (Hocking defined "inappropriate" as "anything from too much personal communication, it could be something on social media, it could be anything physical or sexual, anything that really doesn't belong in the classroom…." [R. 39:171 (35:20-36:3).]) Prior to Heskin's arrest, Hocking also had no idea whatsoever that Heskin was communicating with students on social media. [R. 39:187 (99:15-23).]

b. Prior to her arrest, Principal Clouse spoke with Heskin about spending time with WCB and managing her classroom, but District Administration had no information or reason to suspect any sexual or physical relationship between Heskin and WCB.

In later October or early November, a staff member spoke with Clouse and expressed concerns about Heskin's relationship with WCB. [R. 39:53 (11:8-12; 12:1-2).] Clouse understood that the staff member's concern related to classroom management issues and students in Heskin's personal space in her classroom (such as students being behind Heskin's desk). [R. 39:53-54 (12:20-13:9).] The staff member also relayed that WCB had been in Heskin's classroom after hours. [R. 39:56 (21:6-9).]

The same day the staff member spoke with Clouse, Clouse overheard kids at lunch joking that WCB's girlfriend was the new teacher. [R. 39:54 (14:6-12).] Clouse did not believe the joke was any indication that there was anything beyond a student-teacher relationship between WCB and Heskin; while WCB may have had a crush on Heskin, there was no indication that Heskin was reciprocating. [R. 39:54 (14:23-15:17).] Based on Clouse's

experience, students having crushes on teachers "happen[ed] more than [one would] think." [R. 39:54 (15:3-9).]

After speaking with the staff member, Clouse spoke with Heskin and she assured him that she would speak with WCB. [R. 39:54 (13:19-20); R.39:55 (18:1-4).] Clouse started observing Heskin's classroom during non-instructional times (after school and during lunch or Heskin's prep hour) and noted that the amount of time WCB spent in Heskin's classroom decreased after he spoke with Heskin. [R. 39:55-56 (18:8-13; 20:15-21:2).]

At some point prior to April 2019, Clouse had a conversation with another staff member, Bob Zika, about Heskin's classroom management. [R. 39:57 (25:12-21).] (Zika's classroom was next door to Heskin's classroom. [R. 39:57 (25:20-21).]) Zika reported to Clouse that students were occasionally rowdy and disruptive to his class. [R. 39:57 (26:5-7).]

At another time during the 2018-2019 school year, Clouse spoke with Radle about WCB possibly having feelings for Heskin which, to Clouse, sounded like a student having a crush on a

teacher. [R. 39:57 (26:23-27:5).] Radle offered to speak with WCB because he had a good relationship with WCB. [R. 39:57 (27:9-19).]

In March 2019, Clouse had a conversation wherein Schade expressed concerns about WCB being in Heskin's classroom during lunch and after school. [R. 39:57 (28:12-15).]

In early April 2019, Weiss and Bantle spoke with Clouse and expressed concern about how much time WCB spent in Heskin's room. [R. 39:58 (29:18-24).] Up until that point, Clouse believed, based on his observations, that WCB spent less time in Heskin's classroom, so his observations were different than what Weiss and Bantle reported to him. [R. 39:58 (29:25-30:10).] Clouse advised Weiss and Bantle that he would speak with Heskin, and then Clouse did in fact speak with Heskin that same day. [R. 39:58 (31:1-8).] During that conversation, Heskin represented to Clouse that her time spent with WCB was benign and innocent. [R. 39:58-59 (32:25-33:5).]

Clouse never observed anything relative to Heskin that caused him concerns other than poor classroom management insofar as students were a bit rowdy and not on task. [R. 39:59 (33:8-14).] Prior to Heskin's arrest, Clouse had no understanding that there was any sort of sexual harassment or sexual relationship between Heskin and WCB. [R. 39:65 (60:9-22).] At most, Clouse received reports of WCB spending time in Heskin's classroom and potentially having a close relationship. [R. 39:60 (38:14-21).] Clouse never instigated any formal investigation because there was no evidence to warrant an investigation. [R. 39:59 (34:4-9).] Likewise, Clouse did not contact WCB's parents because he had no evidence of an inappropriate relationship. [R. 39:60 (38:6-13).] Clouse was "surprised, if not shocked, by what came out at the police investigation" regarding Heskin's actions. [R. 39:63 (52:10-13).]

IV. WCB's Inaccurate and/or Unsupported Factual Representations

WCB's brief contained certain proposed facts that are unsupported by any evidence and/or supported by inadmissible

hearsay testimony. These facts, laid out herein, should be disregarded by the Court when considering this appeal.

First, WCB asserted that "[t]he School District was aware of inappropriate interactions between Heskin and W.C.B." [Appellant's Brief, p. 9.] That is an overstated exaggeration of the facts. As explained *supra,* staff were aware that Heskin was spending time outside of class with WCB and other students, but staff members' knowledge was limited and no one – not a single teacher or administrator – suspected sexual harassment or suspected that the relationship between Heskin and WCB rose to the level of what was discovered later. Indeed, the majority of reported conversations between staff cited by WCB involved Heskin and multiple other students – not just WCB.

Second, WCB alleged that when Heskin spoke with Tim Hartmann, Heskin "connected the conversation to her relationship with W.C.B." even though "W.C.B. was not mentioned during the conversation…." [Appellant's Brief, p. 11.] To the extent WCB is suggesting that Heskin made the

connection to WCB at the time of the conversation, that is patently contrary to Heskin's testimony. Heskin testified that she did not make the connection that Hartmann was referring to WCB until after she was arrested and going through the criminal case. The relevant deposition testimony is as follows:

> Q Okay. Given that he did not reference W.C.B., why did you identify his conversation when I asked you has any staff member spoken to you about W.C.B.?
>
> A Because it wasn't until -- so at the time when this conversation happened, I did not make that connection that -- I just didn't -- that he could be talking about what was going on. And it wasn't until after I was arrested and going through my criminal case that I made kind of a -- when I found out that he was one of the people who reported or said something was happening, I made that connection in my head.

[R. 39:276 (22:9-21).]

Third, though Schade asked Clouse to "look into" the situation [Appellant's Brief, p. 11], Schade's observations were benign; Schade's recollection of his conversation with Clouse pertained to his observations that WCB would store his basketball in Heskin's classroom as opposed to his locker. [R. 39:317-318 (16:15-18:11).]

Fourth, the proposed facts regarding Robert Zika in the first and second paragraphs on page 12 of Appellant's Brief are all inadmissible; the factual propositions (excluding the single fact that Heskin did not recall a conversation with Zika) are all supported by hearsay testimony; WCB attempted to rely on his testimony about what Heskin had conveyed to him about her purported conversations with others. This use of double hearsay is clearly improper, and these factual propositions must be disregarded. See Wis. Stat. § 908.01(3); *see Novakofski v. State Farm Mut. Auto. Ins. Co. of Bloomington, Ill.*, 34 Wis. 2d 154, 159-60, 148 N.W.2d 714 (1967).

Fifth, WCB claims that "[d]uring the [criminal] investigation, Heskin admitted to the conduct in great detail." [Appellant's Brief, p. 13.] This proposition is completely unsupported by any citation to the record. [*Id.*] Further, it is unclear what "conduct" Heskin purportedly admitted to. Absent evidence to support the statement, and clarification of what WCB

is exactly proposing was admitted to, the statement should be disregarded.

V. Procedural Posture

On August 27, 2019, WCB, through his attorney, served the District with a Notice of Claim for Damages. [R. 38:1 (¶ 4); R. 38:3.]

WCB subsequently filed a complaint against the District on July 16, 2021. [R. 3.] The complaint asserted that the District was negligent in discovering and preventing the sexual relationship between WCB and his middle school teacher, negligent for failing to report the relationship to WCB's parent, and negligent in the hiring, training, and supervision of the teacher. [*See* R. 3:4-5.]

On July 28, 2021, Attorney Biegert filed a Consent of Guardian Ad Litem for WCB. [R. 12.] The Circuit Court issued an order appointing Attorney Biegert as WCB's guardian ad litem on July 29, 2021. [R. 13.]

After discovery was completed, the District moved for summary judgment on October 21, 2022 and argued that the District was entitled to summary judgment on WCB's claims because (1) the majority of his claims were time-barred by WCB's untimely submission of a notice of injury; (2) the District was not liable for Heskin's actions because they were intentional and outside the scope of her employment; and (3) the District was immune from liability on WCB's negligence claim. [*See* R. 37.] After the motion was fully briefed by the parties, the Circuit Court held oral arguments and issued an oral ruling. [*See generally* R. 84.] The Circuit Court held that WCB's Notice of Claim for Damages only allowed him to pursue claims against the District for actions which occurred on or after April 29, 2019 – 120 days prior to his August 27, 2019 Notice of Claim for Damages. [*See* R. 84:18-19 (18:16-19:2).] The Circuit Court also held that the District's responses (or claimed lack thereof) to a close relationship between WCB and Heskin were discretionary and immunized under Wis. Stat. § 893.80(4). [R. 84:19 (19:14-

19).] The Circuit Court rejected WCB's arguments that District policies and handbooks imposed a ministerial duty to investigate, discipline, or contact WCB's parents. [R. 84:19-20 (19:20-20:19).] Next, the Circuit Court rejected WCB's argument that the known and compelling danger exception to immunity applied. [R. 84:21 (21:6-23).] Finally, the Circuit Court held that Heskin's actions were outside the scope of her employment and intentional, and that there was no liability on the part of the District for her actions. [R. 84:21-22 (21:24-22:11).] The Circuit Court dismissed the claims against the District and subsequently entered a written order on January 18, 2023 dismissing WCB's Complaint with prejudice and with costs. [R. 84:22; R. 57.]

Prior to the entry of the written order, the parties were unable to agree whether the District was entitled to statutory costs; the District advised the Circuit Court that the District was entitled to costs, while WCB asserted that the District was not entitled to costs because (1) WCB was a minor and (2) imposing costs violated WCB's Due Process and Equal Protection rights.

[R. 52; R. 55.] After the District responded to WCB's written objection, the Court entered the January 18, 2023 written order which dismissed WCB's claims against the District and awarded the District costs. [R. 56; R. 57.] Notice of Entry of Judgment was filed on January 18, 2023. [R. 58.]

On January 25, 2023, the District submitted a proposed Bill of Costs, which totaled $10,480.52. [R. 60.] WCB filed an objection and argued that costs should be reduced to $6,310.63. [R. 61.] On February 1, 2023, the District filed an Amended Bill of Costs (which corrected errors in the original submission) which totaled $7,901.31. [R. 68; R. 67.] On February 7, 2023, the Clerk of Court issued notice that costs were taxed in the amount of $7,745.63. [R.74.]

On February 21, 2023, WCB filed a Notice of Motion and Motion pursuant to Wis. Stat. § 814.10(3). [R. 75.]

WCB filed a Notice of Appeal on March 1, 2023, and the Court Record was filed with the Court of Appeals that same day. [R. 82; R. 83.]

A proposed order for the taxation of costs in the amount of $7,620.63 was filed in the Circuit Court on March 13, 2023. [R. 86.]

STANDARDS OF REVIEW

Appellate courts review a summary judgment decision *de novo* and apply the same legal principles to the analysis as the circuit court. *Chapman v. B.C. Ziegler and Co.*, 2013 WI App 127, ¶ 2, 351 Wis. 2d 123, 839 N.W.2d 425 (citation omitted). A party is entitled to summary judgment when there are no issues of material fact and the moving party demonstrates that it is entitled to judgment as a matter of law. *Mach v. Allison*, 2003 WI App 11, ¶ 14, 259 Wis. 2d 686, 656 N.W. 2d 766 (citing Wis. Stat. § 802.08(2)). A genuine factual issue arises when "a reasonable jury could return a verdict for the nonmoving party." *Strasser v. Transtech Mobile Fleet Serv.*, 2000 WI 87, ¶ 32, 236 Wis. 2d 435, 613 N.W.2d 142 (citation omitted). A fact is "material" when it "impacts the resolution of the controversy." *Id.*

The party opposing summary judgment cannot rely upon pure speculation or conjecture to defeat summary judgment. *Hoskins v. Dodge Cty.*, 2002 WI App 40, ¶ 43, 251 Wis. 2d 276, 642 N.W.2d. Rather, the non-moving party may only defeat a motion for summary judgment if the party shows through evidence that there are genuine issues of material fact or competing inferences when those inferences are both reasonable and drawn from undisputed facts in the record. *Jahns v. Milwaukee Mut. Ins. Co.*, 37 Wis. 2d 524, 530, 155 N.W.2d 674 (1968); *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980) (citation omitted).

In determining whether governmental immunity pursuant to Wis. Stat. § 893.80(4) applies to a claim against a governmental entity, a factual dispute related to the underlying facts of a negligence claim will not preclude summary judgment. That is because the immunity analysis under Wis. Stat. § 893.80(4) assumes negligence; the focus at summary judgment is whether the municipal action or inaction upon which liability

is premised is subject to immunity under Wis. Stat. § 893.80(4) (and if so, whether an exception to immunity applies). *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 29, 262 Wis. 2d 127, 663 N.W.2d 715 (citing *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 94, 596 N.W.2d 417, 421 (1999) and *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 17, 253 Wis. 2d 323, 646 N.W.2d 314). As stated by the Court in *Lodl*:

> The immunity defense assumes negligence…[and] the application of the immunity statute and its exceptions involves the application of legal standards to a set of facts, which is a question of law.

Lodl, 2002 WI 71 at ¶ 17 (emphasis added).

Since negligence is assumed, the existence of factual disputes as to whether the governmental official or entity was negligent does not prevent the granting of summary judgment on the grounds of immunity. *Meyers v. Schultz*, 2004 WI App 234, ¶ 10, 277 Wis. 2d 845, 690 N.W.2d 873.

Appellate courts review a circuit court's award of statutory costs *de novo* because the award of costs is simply "a matter of

statutory interpretation." *Rhiel v. Wisconsin County Mut. Ins. Corp.*, 212 Wis. 2d 46, 51, 568 N.W.2d 4 (Ct. App. 1997).

ARGUMENT

I. ANY ALLEGED QUESTION OF FACT PERTAINING TO THE UNDERLYING NEGLIGENCE CLAIM IS IMMATERIAL.

WCB's first argument – that there is a genuine issue of material fact as to the District's negligence such that summary judgment should not have been granted – is inapposite and patently frivolous.

It is black-letter Wisconsin law that the governmental immunity defense pursuant to Wis. Stat. § 893.80(4) assumes negligence on the part of the governmental agency or agent. *Lodl*, 2002 WI 71, ¶ 17. As such, any alleged dispute regarding a governmental agency or agent's negligence is completely immaterial on summary judgment and, subsequently, immaterial on appeal. *American Family Mut. Ins. Co. v. Outagamie County*, 341 Wis. 2d 413, 421 n. 4, 816 N.W.2d 340 (Ct. App. 2012).

WCB's argument on this matter is patently contrary to well-established Wisconsin law and is legally frivolous. *See Riley*

v. Isaacson, 156 Wis. 2d 249, 263, 456 N.W.2d 619 (Ct. App. 1990). Accordingly, it should be summarily rejected.

II. WCB'S CLAIMS PREMISED ON ACTIONS PRIOR TO APRIL 29, 2019 ARE BARRED BY HIS UNTIMELY SUBMISSION OF THE NOTICE OF INJURY.

As a preliminary matter, the timing of WCB's submission of his Notice of Injury curtails his claim against the District; his negligence claim can only be premised on actions (or claimed inactions) starting April 29, 2019. Any events prior to that date are time-barred by Wis. Stat. § 893.90(1d)(a).

Wis. Stat. § 893.80(1d) requires that certain notice be provided to a government entity by a claimant prior to that claimant filing suit against the entity or any agent thereof. The statute requires two forms of notice: a notice of injury and a notice of claim. *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 593, 530 N.W.2d 16 (Ct. App. 1995) (citations omitted). The two forms of notice serve different governmental interests, but both must be provided to the entity or agent before a litigant may commence suit. *Id.*

The first form of required notice is the notice of injury. Wis. Stat. § 893.80(1d)(a). Service of the notice of injury must be served on the government entity within 120 days after the event that is the subject of the claim. Wis. Stat. § 893.80(1d)(a).

One exception exists for this requirement: a claimant does not need to provide notice of injury if they can demonstrate (1) that the entity had actual notice of the claim and (2) that the entity has not been prejudiced by the failure to provide notice. *E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶ 48, 335 Wis. 2d 720, 800 N.W.2d 421 (citation omitted); *Clark v. League of Wisconsin Municipalities Mutual Insurance Company*, 2021 WI App 21, ¶ 14, 397 Wis. 2d 220, 959 N.W.2d 648. This actual notice "savings clause," which can excuse a plaintiff's failure to file a timely notice of injury, "may actually be more difficult to meet than formal notice" because the plaintiff must establish lack of prejudice and actual notice "'of the *claim*' rather than of the mere 'circumstances' that may later give rise to a claim." *Clark*, 2021 WI App 21, ¶ 14 (emphasis in original). Actual notice must

"include some indication that the injured party intends to hold the defendant liable." *Id.* ¶ 20 (citation omitted). Notice of injuries without notice that a claimant may seek to hold the defendant liable is insufficient for establishing actual notice under Wis. Stat. § 893.80(1d)(a). *Id.* ¶ 21.

The second form of required notice is the notice of claim. The notice of claim must specifically list an itemized amount sought for the claimant's claim. *Gutter v. Seamandel*, 103 Wis. 2d 1, 12-13, 308 N.W.2d 403 (1981) (citations omitted); Wis. Stat. § 893.80(1d)(b). The notice of claim must be filed prior to filing suit on state law claims.

A "cause of action is not properly commenced when a plaintiff prematurely files a summons and complaint, without first complying with notice requirements" set forth in Wis. Stat. § 893.80. *Colby v. Columbia County*, 202 Wis. 2d 342, 362, 550 N.W.2d 124 (1996).

Whether a plaintiff has complied with Wis. Stat. § 893.80(1d)(a), "either through formal notice or substantial

compliance, is ultimately a question of law that may be appropriate for summary judgment." *Clark*, 2021 WI App 21, ¶ 16 (citations omitted). At summary judgment, the plaintiff bears the burden of "introducing sufficient evidence [to] rais[e] a genuine issue of material fact as to when the defendant received actual notice and whether the defendant was prejudiced by the plaintiff's failure to give formal notice." *Id.* (citation omitted).

WCB's counsel submitted a Notice of Injury (entitled "Notice of Claim for Damages"; hereinafter referred to as "Notice of Injury") on August 27, 2019. [R. 38:3.] The Notice of Injury alleges that "from November 2018 to May 2019, [WCB] was harmed when he was sexually assaulted and exposed to sexually explicit content on multiple occasions by his teacher, Sarah Heskin." [R. 38:3.] It goes on to claim that Heskin's supervisors, including Clouse, "knew or should have known about the incidents and taken action to stop them." It further claims that the harm to WCB was caused by the "tortious conduct" of the

District, "its agents and employees, including Sarah Heskin and William Clouse." [R. 38:3.]

WCB's Notice of Injury is only timely as to the claim premised on actions or events which occurred on or after April 29, 2019 – 120 days prior to the notice of injury dated August 27, 2019.[3] *See* Wis. Stat. § 893.80(1d)(a). Accordingly, WCB's claim against the District can only be premised upon the District's purported action or inaction which occurred on or after April 29, 2019.[4]

WCB has argued that "[t]he District had notice of the circumstances giving rise to W.C.B.'s claim on or about May 1, 2019…." [Brief of Appellant, p. 26.] However, nowhere in WCB's

[3] To the extent WCB attempts to argue that his August 27, 2019 Notice of Injury was timely as to events prior to April 29, 2019 because of a continuing violation theory, that argument has already been unequivocally rejected by the Wisconsin Supreme Court. *E-Z Roll Off*, 2011 WI 71, ¶ 46.

[4] Any attempt to argue actual notice of the claim prior to August 27, 2019 would be futile. It is undisputed that the District had absolutely no knowledge of any sexual or physical relationship between Heskin and WCB until May 1, 2019. More importantly, however, the District had no notice that WCB would attempt to hold the District liable for his secret relationship with Heskin until it received WCB's Notice of Injury on August 27, 2019. [R. 38:1 (¶ 4).] As such, there was no actual notice of WCB's claim until WCB's Notice of Injury dated August 27, 2019. *See Clark*, 2021 WI App 21, ¶ 20.

brief does WCB demonstrate – let alone argue – that WCB actually met his burden of demonstrating actual notice on May 1, 2019 of the claim against the District as required under Wisconsin case law or the statute.

As *Clark v. League of Wisconsin Municipalities Mutual Insurance Company* has made abundantly clear, the actual notice "savings clause" under Wis. Stat. § 893.80(1d)(a) requires a claimant to prove that the defendant had notice of the claim against them – not merely notice of the circumstances. *Clark,* 2021 WI App 21, ¶ 14.

At best, the District had notice of the circumstances of the events (not the claim) as of May 1, 2019 when law enforcement was contacted. But, as noted by *Clark*, that is not sufficient to trigger the "actual notice" savings clause pursuant to Wis. Stat. § 893.80(1d)(a). To trigger that savings clause, WCB needs to prove that the District had "actual notice of the claim," which he has not done. *Clark*, 2021 WI App 21, ¶ 14 ("…actual notice must be

'of the claim,' rather than of the mere 'circumstances' that may later give rise to a claim.").

It is undisputed that the District had no notice that WCB would attempt to hold the District liable for his secret relationship with Heskin until the District received WCB's Notice of Injury on August 27, 2019. [R. 38:1 (¶ 4).] Accordingly, WCB cannot satisfy the actual notice savings clause under Wis. Stat. § 893.80(1d)(a), and his claims cannot be premised on any actions occurring prior to April 29, 2019. Therefore, WCB's claim cannot be premised on the physical contact between Heskin and WCB, because all physical contact between Heskin and WCB ended prior to mid-April 2019. [R. 39:25 (87:13-19).] His claim could only be premised on his secret online communications with Heskin between April 29, 2019 and May 1, 2019. [R. 39:25 (88:5-20).]

III. THE DISTRICT IS IMMUNE FROM LIABILITY FOR WCB'S NEGLIGENCE CLAIM.

WCB's Complaint asserts two general claims against the District: (1) negligence in failing to recognize and stop the contact

between Heskin and WCB and in failing to notify WCB's parent and (2) negligent training, hiring, and supervision of Heskin. [R. 3:4-5 (¶¶ 11, 12).]

On appeal, WCB argues that the District is not immune from suit because District Policy 3213 and a 2022-2023 Student and Family Handbook imposed ministerial duties on the District. [Appellant's Brief, pp. 19-22.] Additionally, WCB argues that Heskin's involvement with WCB was a known and compelling danger which required the District to act. [Appellant's Brief, pp. 22-25.]

The District's allegedly negligent actions are all discretionary in nature and, therefore, the District is immune from suit pursuant to Wis. Stat. § 893.80(4). WCB asserts that the District was negligent in failing to investigate, stop, or limit contact between WCB and Heskin (and advise WCB's parent of the contact), and was negligent in hiring, training, and supervising Heskin. WCB's claims are premised upon

discretionary actions by the District and therefore the District is entitled to governmental immunity.

a. The District's actions or purported inactions were all discretionary and, therefore, the District is entitled to governmental immunity.

WCB's claims against the District are premised on discretionary acts and the District is immunized against those claims pursuant to Wis. Stat. § 893.80(4).

First, as to the claim that the District should have further investigated the relationship between Heskin and WCB, stopped or limited contact between Heskin and WCB, or contacted WCB's parents, those actions are all inherently discretionary. *See Santiago v. Ware,* 205 Wis. 2d 295, 338, 556 N.W.2d 356, 373 (Ct. App. 1996) ("A discretionary act is one that involves choice or judgment." (citations omitted)). Clouse exercised his judgment and chose how to follow up with Heskin when staff members spoke with him about Heskin and WCB; he spoke with Heskin and monitored her classroom. While WCB may wish that Clouse took a different course of action, like interrogating Heskin,

contacting WCB's parent, or somehow prohibiting WCB from speaking with Heskin outside of class time, there is no dispute that Clouse relied on his judgment to select a course of action. That choice involved his discretion and judgment and, therefore, his decision is afforded immunity. *See Recore v. County of Green Lake*, 2016 WI App 131, ¶ 22, 368 Wis. 2d 282, 879 N.W.2d 131 ("The scope and breadth of the County's investigation of the reported abuse falls within their discretion rather than being a ministerial act.").

Second, as to WCB's claim of negligent hiring, training, and supervision, it is well-settled that such claims are barred by governmental immunity. Courts have repeatedly and expressly held that the hiring, training, and supervision of government employees are inherently discretionary acts such that governmental immunity would apply. *See, e.g.*, *Sheridan v. City of Janesville*, 164 Wis. 2d 420, 430, 474 N.W.2d 799 (Ct. App. 1991) (failure to train and supervise); *Salerno v. City of Racine*, 62 Wis. 2d 243, 248-49, 214 N.W.2d 446 (1974) (failure to

discharge); *Wedgeworth v. Harris*, 592 F. Supp. 155, 163-64 (W.D. Wis. 1984) (failure to discharge); *Liebenstein v. Crowe*, 826 F. Supp. 1174, 1188 (E.D. Wis. 1992) (failure to train).

Because WCB's claims against the District are premised on inherently discretionary actions, the claims against the District are barred by governmental immunity and should be dismissed with prejudice.

b. There was no District policy that imposed a ministerial duty to investigate or take any further actions with respect to Heskin and WCB.

WCB argued that District Policy 3213 and a 2022-2023 handbook "created a ministerial duty requiring the District to act" and that the breach of that duty abrogates governmental immunity. [*See* Appellant's Brief, pp. 19-22.] WCB is incorrect; neither the policy nor the handbook imposed any ministerial duty on the District. Further still, there is no evidence of any breach of any alleged duty and, finally, there is no evidence that any alleged breach would have even been a cause of WCB's claimed

injuries. Therefore, the ministerial duty exception does not apply and the District retains its immunity.

The ministerial duty exception under Wis. Stat. § 893.80(4) applies when a public employee or official negligently performs "a purely ministerial duty." *Pries v. McMillon*, 2010 WI 63, ¶ 22, 326 Wis. 2d 37, 784 N.W.2d 648 (quoting *Kimps v. Hill*, 200 Wis. 2d 1, 546 N.W.2d 151 (1996)). A duty is ministerial "when it 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." *Pries*, 2010 WI 63, ¶ 22 (citing *Lister v. Board of Regents of University of Wisconsin System*, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976)). "Law" means an act of government. *Meyers*, 2004 WI App 234, ¶ 19, 277 Wis. 2d 845, 690 N.W.2d 873, 690 N.W.2d 873. It includes "statutes, administrative rules, policies or orders; it includes plans adopted by a governmental unit; it includes

contracts entered into by a governmental unit. *Id.* at ¶ 19 (internal citations omitted).

In assessing whether the ministerial duty exception applies, it is important to remember that a government agency only loses governmental immunity "where the injury results from the negligent performance of a 'ministerial' duty…." *Walker v. Univ. of Wis. Hosps.*, 198 Wis. 2d 237, 249, 542 N.W.2d 207 (Ct. App. 1995) (emphasis added; citation omitted; overruled on other grounds by *Bicknese v. Sutula*, 2003 WI 31, ¶ 18, 260 Wis. 2d 713, 726, 660 N.W.2d 289, 296). In other words, in order for the exception to apply, the alleged breach of a ministerial duty must have been a cause of the plaintiff's injuries. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶123, 319 Wis. 2d 622, 769 N.W.2d 1 (Ziegler, J., dissenting); *see also Robinson v. Rohr*, 73 Wis. 436, 444, 40 N.W. 668, 671 (1889). This requirement makes sense, as it precludes a plaintiff from working backwards from an incident to locate any possible law, policy, or regulation that could have been applicable, and then claiming that the law, policy, or regulation

was violated so the plaintiff can sidestep governmental immunity. The government actor's breach or failure to abide by a law or regulation must have actually been a cause of the plaintiff's injuries in order to create an exception to immunity. *Walker*, 198 Wis. 2d at 249.

i. Policy 3213 did not impose a ministerial duty on the District, the District did not violate the policy, and any claimed violation did not cause WCB's injury.

Before discussing why WCB's argument on Policy 3213 fails, it is worth noting that there were two different versions of Policy 3213 (Student Supervision and Welfare) applicable during the 2018-2019 school year; one version was in effect until March 20, 2019, and another was in effect through the remainder of that school year.[5] [R. 38:1 (¶¶ 5, 6); R. 38:4; R. 38:9-10.] WCB's brief

[5] The version of Policy 3213 that was in effect until March 20, 2019 reads, in full, as follows:

> Professional staff members because of their proximity to students are frequently confronted with situations which, if handled incorrectly, could result in liability to the District, personal liability to the professional staff member, and/or harm to the welfare of the student(s). It is the intent of the Board of Education to direct the preparation of guidelines that would minimize that possibility.

improperly asserted that the two separate policies were one in the same. [*See* Appellant's Brief, p. 19.]

In pertinent part, the version of Policy 3213 that was applicable at times pertinent to WCB's pending claims noted that District employees should:

> maintain a standard of care for the supervision, control, and protection of students commensurate with his/her assigned duties and responsibilities which include, but are not limited to the following standards:
> …
> H. A professional staff member shall not associate with students at any time in a manner which gives the appearance of impropriety, including, but not limited to, the creation or participation in any situation or activity which could be considered abusive or sexually suggestive or involve illegal substances such as tobacco, alcohol, or drugs. Any sexual or other inappropriate conduct with a student by any staff

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> A professional staff member, or a person who works or volunteers with children, who is found to have had sexual contact with a student, including a student age sixteen (16) or older, shall be referred to the proper authorities and be subject to discipline up to and including discharge.
>
> This policy should not be construed as affecting any obligations on the part of staff to report suspected child abuse under Wis. Stats. 48.981 and Policy 8462.
>
> Pursuant to the laws of the State and Board Policy 8462, each professional staff member shall report to the proper legal authorities immediately, any sign of suspected child abuse or neglect.

[R. 38:4.] Given that WCB's claims pre-dating April 29, 2019 are barred for the reasons identified in Section II, *supra*, this version of the policy is inapplicable.

> member will subject the offender to potential criminal liability and discipline up to and including termination of employment.
>
> This provision should not be construed as precluding a professional staff member from associating with students in private for legitimate or proper reasons or to interfere with familial relationships that may exist between staff and students.
> …
> L. Staff members are discouraged from engaging students in social media and online networking media, for appropriate academic, extra-curricular, and/or professional uses only.

[R. 38:9-10.]

WCB argues that Policy 3213 imposed a duty on the District to "discipline a staff member for *any inappropriate conduct* with a student." [Appellant's Brief, p. 19 (emphasis in original).] WCB is incorrect.

While Heskin may have been in violation of Policy 3213 insofar as she was "associat[ing] with students…in a manner which gives the appearance of impropriety", "engaging students in social media" or generally not "maintaining a standard of care for the supervision, control, and protection of students…," her actions are not the subject of this Court's immunity analysis. Rather, the question is whether this policy imposed a ministerial duty on the District (or its employees who were actually acting

within the scope of their employment)[6], and whether that duty was breached. The answer to both questions is no.

Contrary to WCB's argument, Policy 3213 did not impose a ministerial obligation on the District to discipline staff members because the policy lacks the requisite specificity. In order for the Court to conclude that Policy 3213 imposed a ministerial duty to discipline a staff member, the policy would have required specificity as to what conduct warranted discipline. Policy 3213 does not define "inappropriate conduct" and therefore the District has discretion to determine whether such conduct is covered by the policy and subject to discipline. While WCB summarily asserted that "the amount of isolated time Heskin spent with W.C.B.…qualified as inappropriate conduct," there is no language in the policy which actually supports such a contention. [Appellant's Brief, p, 20; R. 38:9-10.]

In addition to lacking the requisite specificity regarding the type of conduct that may be subject to potential discipline, the

[6] WCB conceded that Heskin's actions were outside the scope of her employment. [Appellant's Brief, p. 16.]

policy is silent on the type of discipline a staff member may receive. [R. 38:9-10.] Under this vaguely written policy, discipline could be interpreted to include conversations with administrators – which occurred in this case. (Accordingly, there would be no breach of the policy.)

Because Policy 3213 is not "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," it did not impose a ministerial duty to discipline Heskin for spending time with WCB. *Pries*, 2010 WI 63, ¶ 22.

Finally, even if Policy 3213 imposed a duty on the District to discipline Heskin (it did not), there is no evidence of causation between an alleged breach of the policy and WCB's injuries, which is a required finding before the Court can hold that immunity does not apply. *See Walker*, 198 Wis. 2d at 249. As noted *supra*, Heskin and WCB were determined to continue their

inappropriate, sexual relationship notwithstanding the fact that Heskin tried to distance herself from WCB and they both knew their relationship was inappropriate. Accordingly, it would be reasonable to conclude that they would have continued their online communications notwithstanding any alleged discipline, so any claimed breach of the policy would be immaterial because it would not have caused WCB's injuries.

Because Policy 3213 did not impose a ministerial duty, there was no evidence of a breach, and no evidence of causation, WCB's argument fails, and the District is entitled to immunity.

ii. The District Handbook did not impose a ministerial duty on the District, the District did not violate the Handbook, and any claimed violation did not cause WCB's injury.

WCB next argues that a 2022-2023 Student & Families Handbook (the "Handbook") imposes a "non-discretionary, on-going duty to inform parents when concerns arise." [Appellant's Brief, p. 21.] This argument must be summarily rejected because

there is no evidence that the 2022-2023 Handbook was in effect during the 2018-2019 school year.[7]

Notwithstanding the inapplicability of the Handbook – which was generated years after the conduct at issue – the provision referenced by WCB is vague, non-specific, and does not impose a ministerial duty. The provision reads, in pertinent part:

> Parents/guardians have the right to know how their child is succeeding in school and will be provided information on a regular basis and as needed, when concerns arise. Many times it will be the responsibility of the student to deliver that information. If necessary, the mail or hand delivery may be used to ensure contact. Parents/guardians are encouraged to build a two-way link with their child's teachers and support staff by informing the staff of suggestions or concerns that may help their child better accomplish their educational goals. Parents/families are encouraged to use Skyward Family Access to monitor their child's progress.

[R. 45:79 (emphasis added).] The provision is absurdly vague and WCB's argument that it imposes a ministerial duty is borderline frivolous. The provision fails to identify who communicates information to the parents (the provision actually notes that "many times" it is the student's responsibility, so is it

[7] The 2022-2023 Student & Families Handbook was never authenticated; it was simply attached to WCB's counsel's affidavit in opposition to the District's Motion for Summary Judgment. [*See* R. 45:2 (¶ 8); R. 45:67-129.]

the student, a teacher, or an administrator who communicates?). It also fails to specifically identify the frequency of the communication (what constitutes a "regular basis" – daily, weekly, monthly, or some other interval?). Likewise, there is absolutely no information regarding how any information is conveyed. Further, the provision does not identify the type of information that will purportedly be communicated – is it academic progress, disciplinary concerns, or other general concerns? Further, what constitutes a "concern" – a formal complaint, a verbal disciplinary warning, a formal discipline action, or a staff member's subjective assessment of the student's well-being? Given any semblance of specificity, the Handbook cannot impose a ministerial duty on the District.

Finally, notwithstanding the total lack of evidence regarding the applicability of the Handbook and the fact that the vague language cannot impose a ministerial duty, there is no evidence (and, indeed, no argument by WCB) that any alleged

failure to communicate with WCB's mother was a cause of WCB's injury.

Because the Handbook was not applicable, it did not impose a ministerial duty, there was no evidence of a breach, and no evidence of causation, WCB's argument fails, and the District is entitled to immunity.

c. Heskin's association with WCB was not a "known and compelling danger."

Lastly, WCB argues that "Heskin's involvement with W.C.B. was a known and compelling danger" such that the District is not entitled to governmental immunity. [Appellant's Brief, p. 22.] WCB's argument is premised on an overly-simplistic (and inaccurate) understanding of the known and compelling danger exception to immunity and is simply not correct. The exception does not apply in this case because (1) the District had no knowledge of the sexual relationship between Heskin and WCB, (2) the only information the District had (that Heskin and WCB spoke outside of classroom hours) did not constitute a danger (let alone a compelling one), and (3) when the District did

obtain knowledge of the possibility of a sexual relationship between Heskin and WCB, the District immediately and appropriately acted.

The "known danger" exception to immunity is a "narrow, judicially-created exception" that arises only where there is a danger "that is known and compelling enough to give rise to a ministerial duty on the party of the municipality or its officers." *Lodl*, 253 Wis. 2d 323 (emphasis added). There are three steps to creating a known and compelling danger before the exception to immunity can be applied: "First, something happens to create compelling danger. Second, a government actor finds out about the danger, making it a known and compelling danger. And third, the government actor either addresses the danger and takes one or more precautionary matters, or the actor does nothing and lets the danger continue." *Heuser ex rel. Jacobs v. Community Ins. Corp.*, 2009 WI App 151, ¶ 28, 321 Wis. 2d 729, 774 N.W.2d 653.

The focus for evaluating whether the known and compelling danger exception applies is "on the specific act the

public officer or official is alleged to have negligently performed or omitted" rather than what the condition or danger may be, or how the official could have responded. *Lodl*, 2002 WI 71, ¶ 40 (emphasis added). Unless there is only one possible negligent act or omission in response to a known danger, a ministerial duty cannot not arise as a matter of law and the exception does not apply. *See C.L. v. Olson*, 143 Wis. 2d 701, 723, 422 N.W.2d 614 (1988) (ministerial duty "explicit as to time, mode and occasion…"). The known and compelling danger exception does not apply when an individual retains discretion regarding how to respond to a situation, no matter how dangerous the situation may be. *See, e.g., Lodl*, 2002 WI 71, ¶¶46-47 (finding a known danger but refusing to apply exception to immunity because actor retained discretion regarding response to danger); *see also Am. Fam. Mut. Ins. Co. v. Outagamie County*, 2012 WI App 60, ¶¶ 28-30, 341 Wis. 2d 413, 816 N.W.2d 340 (same).

To be deemed a "compelling danger," the danger must be "compelling enough that a self-evident, particularized, and non-

discretionary municipal action is required." *Lodl*, 2002 WI 71, ¶ 40 (emphasis added). It is not enough that the municipal officer be required to "do something" in order to qualify as a ministerial duty; "[a] ministerial duty is not an undifferentiated duty to act but a duty to act in a particular way…" *Id.* ¶ 44 (emphasis in original). A ministerial duty "is explicit as to time, mode, and occasion for performance, and does not admit any discretion." *Id.* Therefore, if "a situation is dangerous but the danger is of such a nature that the municipal officer or employee could reasonably respond in more than one way, this exception does not apply." *Edwards ex rel. Edwards v. Baraboo School District,* 2011 WI App 121, ¶ 22, 337 Wis. 2d 90, 803 N.W.2d 868.[8] The mere possibility of an injury is not sufficient to create a ministerial duty; the danger must rise "to such a degree of probability" that there is no room for discretion to act. *C.L.*, 143 Wis. 2d at 723 (emphasis added).

[8] Pursuant to Wis. Stat. § 809.23(3)(b), the decision is being cited for persuasive value. The decision was authored by a member of a three-panel judge and was issued after July 1, 2009. A copy of the decision is included in the District's Appendix.

In this matter, the District was not aware of any compelling risk or danger. As such, the exception does not apply.

With respect to the knowledge requirement, WCB has incorrectly argued that "knowledge of the general danger of the circumstances" is sufficient for the known and compelling danger exception to apply. [Appellant's Brief, p. 22.] WCB's position is a drastic and inaccurate oversimplification of the exception. For the "known" danger exception to apply, the compelling danger must be known to the municipal actor. *See Baumgardt v. Wausau Sch. Dist. Bd. Of Educ.*, 475 F. Supp. 2d 800, 809 (W.D. Wis. 2007) ("The known danger exception is fairly self-explanatory…: when a public official is aware of a dangerous condition that is 'clear' and 'absolute,' his knowledge transforms a discretionary duty into a ministerial duty." (emphasis added)); *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶ 5, 385 Wis. 2d 86, 921 N.W.2d 714 ("The known danger exception to governmental immunity… applies when an obviously hazardous situation known to the public officer or employee is of such force that a ministerial duty

to correct the situation is created." (emphasis added)). The compelling danger itself must be known to the municipal actor. Knowledge that a situation could later change and become more dangerous is not sufficient.

At most, the District was aware that Heskin and WCB spoke outside of class and often spoke in Heskin's room outside of class hours. That, in and of itself, is not a compelling danger on the same level as the danger associated with a 90-foot drop off near a trail, a van submerged below water with occupants, or a downed tree on a public road. *Lodl*, 2002 WI 71, ¶¶ 32-33 (citing *Cords v. Anderson*, 80 Wis. 2d 525, 541, 259 N.W.2d 672 (1977)); *Linville v. City of Janesville*, 174 Wis. 2d 571, 497 N.W.2d 465 (Ct. App. 1993), *aff'd,* 184 Wis. 2d 705, 516 N.W.2d 427 (1994); *Domino v. Walworth County*, 118 Wis. 2d 488, 347 N.W.2d 917 (Ct. App. 1984). Indeed, as WCB conceded, Heskin spent time in her classroom with many other students without issue. [*See* Appellant's Brief, p. 23.] The District had no knowledge of the risk of the truly compelling danger posed by Heskin. Many

teachers spend time with students outside of the classroom for legitimate, pedagogical reasons. To conclude that teachers who do so are "known dangers" would result in a gross enlargement of the known danger exception to immunity. That result is not and cannot be the law in Wisconsin.

No one at the District had notice of the sexual relationship between Heskin and WCB prior to May 2019 and, when the District received notice, it acted promptly and appropriately. Accordingly, the known danger exception to immunity does not apply.

IV. THE CIRCUIT COURT CORRECTLY AWARDED THE DISTRICT COSTS AS THE PREVAILING PARTY.

The last argument raised by WCB is that the Circuit Court erred when it assessed costs against WCB. This argument is also frivolous and WCB has set forth no legal basis to support his position.

Pursuant to Wis. Stat. § 814.03(1), if a plaintiff is not entitled to costs, "the defendant shall be allowed costs to be computed on the basis of the demands of the complaint." Wis.

Stat. § 814.03(1). The statutory language is clear and unequivocal that costs shall be awarded, and that the award of costs is mandatory, not discretionary. *See Aul v. Golden Rule Ins. Co.,* 2007 WI App 165, ¶ 44, 304 Wis. 2d 227, 737 N.W.2d 24. Further, there is absolutely no statutory authority which exempts the award of damages against minors or indigent individuals. *See* Wis. Stat. Ch. 814. (And, notably, WCB has not cited any such statutory authority.)

WCB's "argument" against the imposition of costs in this case is undeveloped and unclear. He provides a general, high-level background on the law of Substantive Due Process and Equal Protection in Wisconsin, but then he fails to articulate how the statutory award of costs violated either of those laws. [*See* Appellant's Brief, pp. 27-28.] Instead, he asserted that he was legally required to have a guardian ad litem and that he could not control the litigation. However, WCB is, again, patently incorrect. Under Wisconsin law, only minor plaintiffs under the age of 14 are required to have a guardian ad litem appointed on

their behalf. Wis. Stat. § 803.01(3)(b)2.[9] WCB was sixteen when he commenced this action. [*See* R. 10:1 (¶ 1).] As such, he only needed an attorney to appear on his behalf (which he had). Wis. Stat. § 803.01(3)(a). So that argument is inapposite.

Next, WCB argues, baselessly, that he lacks the capacity to earn funds to pay the costs. Notably, he cited absolutely no evidence in the record to support such a contention and, even so, his alleged inability to pay does not somehow strip the Circuit Court of its obligation to award the District costs.[10]

Finally, WCB makes a last-ditch effort to plead a public policy argument regarding costs against children. Again, WCB is not a child, he had the legal ability to bring and control this

[9] In his brief, WCB cites "Wis. Stat. § 879.21(1)" for the proposition that "[a] guardian ad litem shall be appointed for any person interested who is a minor…" [Appellant's Brief, p. 29.] Presumably, WCB mis-typed and meant to cite to Wis. Stat. § 879.23(1) (as Sec. 879.21 does not contain that language or any subsections). Regardless, the citation is completely inapposite and inapplicable, as the statute applies to minors or individuals adjudicated incompetent in probate proceedings.

[10] Further still, WCB is no longer a minor; his 18th birthday was January 1, 2023. [R. 10:1 (¶ 1).] It is entirely unclear how or why he is somehow incapable of earning funds because of his age.

lawsuit, and his position lacks any legal basis. [*See* Footnote 10.] *See* Wis. Stat. § 803.01(3)(b)2.

WCB has set forth no credible, articulated basis as to how the imposition of statutory costs violates his constitutional rights because it does not violate his rights. WCB is not constitutionally protected from statutory costs when he loses his case simply because he had an attorney and a guardian ad litem; in fact, the Constitution does not protect any litigant from the imposition of costs in a case. *See State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 524, 261 N.W.2d 434 (1978) (citation omitted).

WCB's argument is frivolous and should be summarily rejected by this Court. WCB participated in this litigation and if his attorney (who was also his guardian ad litem) failed to make him aware of the risks associated with bringing the lawsuit, that does not warrant a complete upheaval of a clearly mandated statutory award of costs. The imposition of statutorily required costs is proper and not unconstitutional.

CONCLUSION

For the reasons stated herein, this Court should affirm the Circuit Court's decision.

Dated this 9th day of June, 2023.

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FORM, LENGTH, AND APPENDIX CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), & (c) as to form and certification for a brief and appendix produced with a proportional serif font (Century 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this brief, including the statement of the case, the argument, footnotes, and the conclusion (and excluding other content) is 10,687 words.

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19 (2) (a) and that contains a copy of any unpublished opinion cited under Wis. Stat. § 809.23 (3) (a) or (b).

Dated this 9th day of June, 2023.

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