COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2026

Samuel A. Christensen
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. 2025AP2287 **Cir. Ct. No. 2024CV3398**

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

DONIEL CARTER, DAVEY & GOLDMAN LAW FIRM, AND CADE LAW GROUP,

PLAINTIFFS-APPELLANTS,

ERIKA WATSON,

INVOLUNTARY-PLAINTIFF,

V.

STATE OF WISCONSIN - DEPARTMENT OF ADMINISTRATION AND
STATE OF WISCONSIN - DEPARTMENT OF CORRECTIONS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Before Graham, P.J., Kloppenburg, and Nashold, JJ.

¶1 KLOPPENBURG, J. Following a jury trial, a federal district court awarded Doniel Carter punitive damages and attorney fees on his claim that Erika Watson violated his Eighth Amendment rights by sexually assaulting and sexually harassing him when she was a correctional officer and he was an inmate at Fox Lake Correctional Institution. Watson did not seek indemnification by the State of Wisconsin ("the State"), and the Wisconsin Department of Justice did not represent Watson, in the federal proceeding.[1] Carter and the attorneys who represented him in the federal proceeding ("Carter and counsel") filed this action against the Wisconsin Department of Administration and the Wisconsin Department of Corrections (collectively also, "the State"), naming Watson as an involuntary plaintiff. In their amended complaint ("the complaint"), Carter and counsel sought an order, declaratory judgment, or a writ of mandamus, under WIS. STAT. §§ 895.46 and 806.04 (2023-24), requiring the State to indemnify Watson for the federal court judgment and to pay the judgment to them.[2]

¶2 The State and Watson each moved to dismiss the complaint. The circuit court granted the motions to dismiss based on the State's sovereign immunity. The court specifically concluded that: sovereign immunity bars Carter and counsel's claim under WIS. STAT. § 895.46 because only state employees may seek indemnification from the state under that statute; Watson is not a necessary party who must be joined under WIS. STAT. § 803.03, so as to allow Carter and counsel to litigate an indemnification claim by Watson; and sovereign immunity

[1] To clarify, we use "the State" to refer to the State of Wisconsin or its agencies in their role as a party to this or the related federal case and use "the state" to refer to the State of Wisconsin or its agencies in general.

[2] All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

bars Carter and counsel's claim for declaratory judgment or writ of mandamus under WIS. STAT. § 806.04 because the claim "at its core seeks to fix the State's responsibility to respond to a monetary claim."

¶3 On appeal, Carter and counsel make numerous arguments in an attempt to show that the circuit court erred in not allowing their indemnification claim to circumvent sovereign immunity under WIS. STAT. § 895.46 by naming Watson as an involuntary plaintiff.[3] We conclude that none of their arguments have merit and, therefore, affirm.

BACKGROUND

¶4 In 2019, Carter filed suit in federal district court against the Wisconsin Department of Corrections, former correctional officer Watson, and other correctional officers. Carter alleged that while he was incarcerated at Fox Lake Correctional Institution, Watson sexually assaulted Carter, demanded that he perform degrading acts, and threatened him with punishment if he refused to do so. Carter alleged that Watson's alleged conduct was "not for a legitimate purpose." Carter also alleged that other correctional officers demonstrated deliberate indifference by failing to report Watson's conduct. Carter alleged that Watson's and the other officers' alleged conduct violated his Eighth Amendment rights.

¶5 Shortly after Carter filed the federal lawsuit, the Department of Corrections sent Watson a letter explaining that it was not requesting Department

[3] Carter and counsel make no argument in their appellants' brief directed at the circuit court's dismissal of their claim for declaratory judgment and a writ of mandamus under WIS. STAT. § 806.04. Accordingly, we do not further address that claim.

of Justice representation for Watson because "the allegations against [Watson] fall outside of [Watson's] job duties and scope of employment." Watson subsequently retained private counsel. In her answer to Carter's complaint, Watson "reserve[d] [her] right … to have the State … pay the damages as she was acting within the scope of her employment at all times." The State moved to dismiss the Department of Corrections, and the federal court granted the motion. The case proceeded to trial against Watson and another correctional officer, Tara Weidemann. The Department of Justice represented Weidemann.

¶6 At the trial in the federal court proceeding in November 2021, the jury found that Watson had violated Carter's Eighth Amendment rights and had been "deliberately indifferent to … Carter's health and safety." The jury found that Weidemann had not violated Carter's rights. The jury awarded Carter no compensatory damages and $125,000 in punitive damages. Before and during the trial no party requested, and the jury was not provided, a jury instruction or verdict question on whether Watson had been acting within the scope of her employment.

¶7 After the trial in the federal court proceeding, the State moved to intervene and for a declaratory judgment that Watson was not acting within the scope of her employment and, therefore, the State was not liable for indemnification. The federal court denied the State's motion to intervene and for a declaratory judgment. The court explained that the State's motion was not ripe because neither Carter nor Watson had made a claim for indemnification, and that the motion was untimely because it was based on facts that had been developed in a different legal context. The court also awarded Carter approximately $141,000 in attorney fees. In November 2023, Watson filed a petition for bankruptcy, seeking to discharge the federal court judgment.

¶8 In November 2024, Carter and counsel filed this action against the State, naming Watson as an involuntary plaintiff. Carter and counsel sought an order under WIS. STAT. § 895.46, requiring that the State indemnify Watson and pay Carter "the verdict and attorney fees awarded" in the federal lawsuit, plus attorney fees in this action.

¶9 The State filed a motion to dismiss the complaint as barred by sovereign immunity. Pertinent here, the State argued that under WIS. STAT. § 895.46, only a public employee may maintain an action for indemnification against the state and, therefore, Carter and counsel could not bring a claim seeking indemnification, whether or not Carter and counsel named Watson as an involuntary plaintiff. Watson submitted a letter to the circuit court asking that the complaint be dismissed and stating that "I do not wish to file for indemnification.... It is also factual that I have informed all parties in this case that I am not filing for indemnification rights, nor did I agree to be a party in this case or sign an admission of service agreement."

¶10 The circuit court granted the State's and Watson's motions and dismissed the complaint with prejudice. Carter and counsel appeal.

DISCUSSION

¶11 "A motion to dismiss based on sovereign immunity challenges a court's personal jurisdiction." ***DNR v. Timber & Wood Prods. Located in Sawyer Cnty.***, 2018 WI App 6, ¶17, 379 Wis. 2d 690, 906 N.W.2d 707 (2017). We independently review the circuit court's decision granting a motion to dismiss. ***State ex rel. Lawton v. Town of Barton***, 2005 WI App 16, ¶9, 278 Wis. 2d 388, 692 N.W.2d 304 (2004).

¶12 The state's sovereign immunity derives from article IV, section 27 of the Wisconsin Constitution, which provides, "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." Courts have repeatedly and consistently construed this provision to mean that the legislature has the exclusive right to consent to a suit against the state, and that such consent must be clearly and expressly stated. ***Erickson Oil Prods., Inc. v. DOT***, 184 Wis. 2d 36, 52-53, 516 N.W.2d 755 (Ct. App. 1994). The state cannot be sued without the legislature's consent, and a lawsuit against a state agency is a lawsuit against the state for purposes of sovereign immunity. ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶51, 317 Wis. 2d 656, 766 N.W.2d 599. Unless the legislature has "specifically consented to the suit," "sovereign immunity deprives the court of personal jurisdiction over the State." ***Id.***

¶13 Here, as stated, Carter and counsel sought an order under WIS. STAT. § 895.46 requiring the State to indemnify Watson and to pay Carter "the verdict and attorney fees awarded" in the federal lawsuit, plus attorney fees in this action. We conclude that the circuit court properly dismissed Carter and counsel's complaint because their claim under § 895.46 is barred by sovereign immunity.[4]

[4] As we repeat throughout this opinion, Carter and counsel in their complaint sought an order requiring the State to pay the judgment against Watson entered in the federal proceeding, including damages and attorney fees. Then, in their appellate briefing, they ask that we reverse with directions that the circuit court enter such an order or, alternatively, that we reverse with directions that the circuit court hold an evidentiary hearing on whether Watson acted within the scope of her employment. Because we affirm the circuit court's dismissal of the complaint, we need not address what the remand order would say were we to reverse.

¶14 WISCONSIN STAT. § 895.46 addresses indemnification of public officers and employees by the state.[5] Under § 895.46(1)(a), the state shall pay a judgment as to damages and costs, in excess of applicable insurance, entered against a state employee when the court or jury finds that the employee acted within the scope of the employee's employment:

> If the defendant in any action or special proceedings is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee [with an exception not relevant here], in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee.

¶15 Also under WIS. STAT. § 895.46(1)(a), if the state does not provide counsel for the employee in the action, the state must pay the employee's attorney fees and costs of defending the action unless the court or jury finds that the employee did not act within the scope of employment:

> Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment.

¶16 In addition, WIS. STAT. § 895.46(1)(a) provides that the attorney general may appear in the action against the employee to contest whether the

[5] WISCONSIN STAT. § 895.46 also applies to the indemnification of state agents by the state and to the indemnification by political subdivisions of officers and employees of the political subdivisions. Because this appeal concerns a state employee, we refer only to the state and state employees, or simply to employees, except when quoting language in the statute.

employee was acting within the scope of employment, without waiving the state's sovereign immunity from suit:[6]

> If the employing state agency or the attorney general denies that the state officer, employee or agent was doing any act growing out of or committed in the course of the discharge of [the defendant's] duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit.

¶17 WISCONSIN STAT. § 895.46(1)(a) further provides that an employee is not entitled to indemnification if the employee fails to give timely notice of the action against the employee, refuses the state's offer of legal counsel, or refuses to cooperate in the defense of the litigation.

¶18 Wisconsin courts have long held that WIS. STAT. § 895.46 does not provide the express legislative consent necessary for a tort victim to bring a direct action against the state as an indemnitor of a state employee. ***Fiala v. Voight***, 93 Wis. 2d 337, 343, 347-48, 286 N.W.2d 824 (1980); ***Carlson v. Pepin Cnty.***, 167 Wis. 2d 345, 356, 481 N.W.2d 498 (Ct. App. 1992) (Section 895.46 "does not permit a tort victim to sue the state directly."). Instead, the focus of the statute is on protecting state employees. The statutory history of § 895.46 "shows that the legislature has attempted to offer the *broadest protection reasonably available to public officials and to public employees*." ***Schroeder, Gedlen, Riester & Moerke***

[6] This part of WIS. STAT. § 895.46(1)(a) uses the phrase "doing any act growing out of or committed in the course of the discharge of [the defendant's] duties." As quoted, another part of the statute provides that the state shall indemnify a state employee who is sued "because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment." The parties do not argue that the two phrases "growing out of or committed in the course of the discharge of … duties" and "within the scope of employment" differ in any way that matters for purposes of this appeal. For ease of reading, we generally use the phrase "acting within the scope of employment."

v. Schoessow, 108 Wis. 2d 49, 67, 321 N.W.2d 131 (1982) (emphasis added). By "*providing this protection [to employees]*, the statute encourages public employees to perform their duties without hesitation or fear that they will be personally liable." ***Crawford v. City of Ashland***, 134 Wis. 2d 369, 377, 396 N.W.2d 781 (Ct. App. 1986) (emphasis added). The indemnification statute "*protects the employee* against financial loss from a judgment in favor of a tort victim and is not intended to affect the victim's rights *against the employee*." ***Yotvat v. Roth***, 95 Wis. 2d 357, 370-71, 290 N.W.2d 524 (Ct. App. 1980) (emphasis added).

¶19 This case law makes clear that WIS. STAT. § 895.46 does not protect a non-employee against the state, and does not provide legislative consent for a non-employee to sue the state directly for payment of a judgment for an employee's conduct. Accordingly, Carter and counsel's complaint suing the State for just such payment under § 895.46 is barred by sovereign immunity. We now explain why Carter and counsel's numerous arguments to the contrary lack merit, and we group those arguments under subheadings for ease of reading.

Liberal construction of consent to sue statute

¶20 Carter and counsel argue that WIS. STAT. § 895.46 "is a clear, express, and broadly worded consent to sue statute" and, therefore, must be liberally construed. The case cited by Carter and counsel to support this argument concerns a direct action by state patrol officers for wages under a statute, WIS. STAT. § 109.03(5) (1995-96), that provided a "clear, express and broadly worded consent to suit." ***German v. DOT***, 223 Wis. 2d 525, 531-33, 589 N.W.2d 651 (Ct. App. 1998) (Section 109.03(5) (1995-96) provided that "[e]ach employe[e] shall have a right of action against any employer for the full amount of the employe[e]'s wages due."). However, Carter and counsel do not point to any such broadly

worded consent to sue language in § 895.46. Nor do Carter and counsel point to any language in that statute that specifically consents to suit by a non-employee for payment against the State. We see nothing in ***German*** that supports Carter and counsel's argument. To the contrary, the case law cited above clearly states that the remedy of indemnification under § 895.46 belongs only to the employee.

Post-judgment indemnification actions by third parties

¶21 Carter and counsel assert that the case law bars tort victims from suing the state for indemnification only pre-judgment in the underlying tort actions and allows post-judgment indemnification actions by employees. From these two assertions, Carter and counsel appear to argue that WIS. STAT. § 803.30 allows the tort victim, by naming the employee as an involuntary plaintiff, to sue the state in a separate post-judgment action for indemnification under WIS. STAT. § 895.46.

¶22 However, Carter and counsel cite no case law that supports this proposition. They cite the following cases: ***Forseth v. Sweet***, 38 Wis. 2d 676, 680, 688, 690, 158 N.W.2d 370 (1968) (ruling that a tort plaintiff may not join the state as an indispensable party in the underlying tort action, but noting that the tort plaintiff "may seek to have [the plaintiff's] judgment paid by the state after verdict" when there has been a finding that the employee was acting within the scope of employment); ***Cords v. Ehly***, 62 Wis. 2d 31, 37-38, 214 N.W.2d 432 (1974) (concluding that the indemnification statute, which was intended to protect employees from monetary loss, does not apply until after a judgment of liability is entered, and is not an agreement to a direct suit by the employees); ***Fiala***, 93 Wis. 2d at 344-45 (noting that the indemnification statute was intended to protect employees and ruling that the statute does not apply until after a judgment of liability against an employee is entered); ***Yotvat***, 95 Wis. 2d at 366-67 (noting that

the indemnification statute was intended "to protect a public employee from personal financial loss because of a judgment resulting from an act committed within the scope of employment" and that the statute "does not permit a tort victim to bring suit against the state").

¶23 While these cases were reviewing claims against the State pre-judgment, none of them hold, or even suggest, that WIS. STAT. § 895.46 allows a non-employee to sue the State post-judgment for indemnification of the liable employee. To the contrary, the holdings in these cases are broadly stated to apply to tort victims without limitation, regardless of the procedural posture of their claims, and to interpret the indemnification statute as allowing claims only by employees under the circumstances specified in the statute.

¶24 Specifically, in ***Forseth***, the court expressly distinguished the liability for an employee's tort, which is imposed on the state by the indemnification statute, from the state's consent to suit by the tort victim, which is absent in that statute. ***Forseth***, 38 Wis. 2d at 680-84. The language quoted by Carter and counsel—"while [the tort plaintiff] may seek to have [the plaintiff's] judgment paid by the state after verdict"—is not tethered to any language in the indemnification statute or any other statute consenting to suit by the plaintiff against the state to collect that payment. ***Id.*** at 690. Nothing in that case or the other cases cited by Carter and counsel supports the proposition that a tort victim may sue the state directly for an indemnification payment. As the ***Cords*** court in 1974 observed, the courts had for over 70 years consistently interpreted the indemnification statute to disallow suits against the state by non-employees. ***Cords***, 62 Wis. 2d at 36. Carter and counsel cite no case law in the 50 years since loosening that interpretation based on the clear and express language in the statute.

Waiver of sovereign immunity

¶25 Carter and counsel argue that the State waived its sovereign immunity because it moved to intervene in the federal litigation after trial to argue that Watson did not act within the scope of employment, and that motion was denied. Their argument fails because it disregards the language in WIS. STAT. § 895.46(1)(a) that provides that the attorney general "may appear" to contest whether the employee was acting within the scope of employment "without waiving the state's sovereign immunity to suit." They point to no language in the statute that waives sovereign immunity when the attorney general does so. They also point to the State's failure to request a scope of employment verdict question during the federal trial, but they do not explain how that failure would result in the State waiving its sovereign immunity.

Watson sought indemnification

¶26 Carter and counsel assert that Watson has in this case made a claim for indemnification under WIS. STAT. § 895.46 because she filed motions in the circuit court, other than her motion to dismiss, seeking a reduction in the amount of the federal judgment and asserting that her conduct was within the scope of her employment. We do not address whether Carter and counsel are correct because, regardless of whether Watson made a claim for indemnification, Carter and counsel do not develop an argument explaining that, if so, § 895.46 provides consent for them to file their own lawsuit against the State. Accordingly, their conclusory assertion fails.

Joinder of Watson as an involuntary plaintiff

¶27 Carter and counsel argue that the joining of Watson as an involuntary plaintiff under WIS. STAT. § 803.03 allows them to sue the State directly for an indemnification payment under WIS. STAT. § 895.46. Carter and counsel rely again on ***German***, 223 Wis. 2d 525, to support their argument that, read together, these two statutes require that a judgment creditor may sue on behalf of a non-indemnified state employee to require the circuit court to hold a hearing to determine whether the employee's conduct forming the basis of the judgment falls with the scope of the employee's conduct. However, as explained above, ***German*** addresses neither statute.

¶28 Carter and counsel argue that, nevertheless, Watson is a proper involuntary plaintiff under WIS. STAT. § 803.03. Carter and counsel's arguments fail because they turn on the faulty premise that they are entitled to relief under WIS. STAT. § 895.46.

¶29 Under WIS. STAT. § 803.03(1)(a), a person shall be joined as a party to the action if "[i]n the person's absence complete relief cannot be accorded among those already parties." However, as explained above, WIS. STAT. § 895.46 protects state employees, not third parties; it expressly waives the state's sovereign immunity to allow claims against the state for indemnification for judgments of damages and costs and attorney fees only by state employees. Thus, § 895.46 does not provide relief from the State to "those already parties" to the action here because they are not state employees. *See* § 803.03(1)(a).

¶30 Under WIS. STAT. § 803.03(1)(b), a person shall be joined if the person "claims an interest relating to the subject of the action" and the disposition of the action in the person's absence may: "impair or impede the person's ability

to protect that interest;" or leave those already parties subject to the "risk of … multiple or … inconsistent obligations" by reason of the person's claimed interest. Here, Watson does not claim an interest in Carter and counsel's claim for the State's indemnification of Watson. And, while Carter and counsel claim an interest in the State's indemnification of Watson, for reasons explained above, that claim is not actionable against the State under WIS. STAT. § 895.46. Accordingly, there is no "risk of … multiple or … inconsistent obligations" and, therefore, no basis under § 803.03(1)(b) for Watson to be joined as an involuntary plaintiff in this action by Carter and counsel.

¶31 Carter and counsel focus their arguments to the contrary on Watson's purported interest "in resolving the scope of employment and indemnification claim." However, these arguments disregard the language in WIS. STAT. § 803.03(1) cited above that requires that Carter and counsel themselves have a claim against the State under WIS. STAT. § 895.46. Because the claim that they assert under that statute is barred by sovereign immunity, their arguments fail.

¶32 Carter and counsel assert that, "It cannot be that an unwilling state employee participant can derail a [WIS. STAT.] § 895.46 action but no other unwilling participant has a right to derail any other civil action because WIS. STAT. § 803.03 commands their participation." They further assert that rejecting joinder in such a situation would "defeat the legislature's intent in § 895.46." However, they point to no language in § 803.03 that circumvents sovereign immunity; nor do they point to language in § 895.46 that expresses the legislature's intent to waive sovereign immunity for claims by parties other than state employees. Carter and counsel also suggest that § 803.03 and § 895.46 conflict, but they identify no such conflict.

Scope of employment

¶33 Carter and counsel make a number of arguments directed at the "scope of employment" requirement in WIS. STAT. § 895.46. As stated, § 895.46(1)(a) allows a state employee to seek indemnification for damages and costs when "the jury or the court finds that the [employee] was acting within the scope of employment," and for attorney fees when the state does not provide legal counsel "unless it is found by the court or jury that the … employee did not act within the scope of employment." Given our conclusion that Carter and counsel's claim under § 895.46 is barred by sovereign immunity, their scope of employment arguments are not relevant. That is, regardless of whether Watson would be entitled to indemnification, Carter and counsel cannot under § 895.46 file a direct action seeking indemnification on her behalf. Accordingly, we do not further address Carter and counsel's scope of employment arguments. *See* ***Barrows v. American Fam. Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

Voidable fraudulent transaction

¶34 Carter and counsel argue that Watson's declining to seek indemnification constitutes a "voidable fraudulent transaction" under WIS. STAT. § 242.04. That statute provides: "A transfer made … by a debtor is voidable as to a creditor … if the debtor made the transfer … [w]ith actual intent to hinder, delay or defraud any creditor of the debtor." § 242.04(1)(a). Carter and counsel assert that they have a claim against Watson and are therefore creditors; Watson is the debtor liable on that claim; her entitlement to seek indemnification for that claim is an asset; and she has transferred her right of indemnification to the State by

refusing to seek indemnification. Thus, Carter and counsel argue, the State is an indispensable party with an interest in Watson's right of indemnification "and does not enjoy sovereign immunity." Even if Carter and counsel were correct as to the application of § 242.04 to the federal judgment against Watson in Carter's favor, they point to no law supporting the proposition that the State has waived sovereign immunity to allow them to obtain payment of that judgment against the State under WIS. STAT. § 895.46. We reject their argument under § 242.04 on that basis.

CONCLUSION

¶35 For the reasons stated, we affirm the circuit court's order dismissing Carter and counsel's complaint.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.