COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3431-FT

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

LARRY C. OLSON,

PLAINTIFF-RESPONDENT,

V.

CHARLES H. THOMPSON AND EUGENE MCDONALD,

DEFENDANTS-APPELLANTS,

WILLIAM NIEMI, HOFFMAN CONSTRUCTION COMPANY
AND
RUBEN JOHNSON & SON, INCORPORATED,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Charles Thompson and Eugene McDonald, secretary and district director of the Wisconsin Department of Transportation, appeal a judgment dismissing Larry Olson's personal injury action against them but denying their motion to find that his action was frivolous.[1] In an earlier appeal, this court reversed a judgment in Olson's favor and remanded the cause with instructions to dismiss the complaint on the ground that Thompson's and McDonald's discretionary decisions were protected by public officer immunity. Thompson and McDonald then requested that the trial court find that Olson's action was frivolous because he should have known that they were immune from lawsuit from the release date of ***Kimps v. Hill***, 200 Wis.2d 1, 546 N.W.2d 151 (1996). The trial court concluded that the motion for costs was not timely filed and that the action was not frivolous. We conclude that the motion for costs was timely filed, but agree that the action was not frivolous. Therefore, we affirm the judgment.

The trial court incorrectly concluded that the motion for frivolousness costs was untimely. The court considered this court's decision to be the date of the judgment when calculating the time for filing the motion. Remittitur from this court did not occur until July 10, 1997. The trial court then entered the judgment dismissing the action on September 30, 1997. Therefore, the motion for a finding of frivolousness filed July 18, 1997, was timely.

The trial court properly denied the motion for costs and attorneys' fees under § 814.025, STATS., because the action was not frivolous. Whether an action is frivolous is a question of law. *See* ***Lamb v. Manning***, 145 Wis.2d 619,

[1] This is an expedited appeal under RULE 809.17, STATS.

628, 427 N.W.2d 437, 441 (Ct. App. 1988). The law regarding discretionary or ministerial duties of public officials is not so well settled that Olson's attorneys should have known that their position lacked merit. A noted authority on torts found the distinction between discretionary and ministerial acts "hazy." W. PROSSER, THE LAW OF TORTS § 132 at 988 (4th ed. 1971). Although, as a general rule, ministerial duties are imposed by statute or regulation and nonspecific duties are discretionary, that is not always the case. *See* ***Larsen v. Wisconsin Power & Light Co.***, 120 Wis.2d 508, 516, 355 N.W.2d 557, 552 (Ct. App. 1984). In addition, Olson reasonably argued that the exceptions for known and present dangers and for maintenance applied in this case. *See* ***Cords v. Anderson***, 80 Wis.2d 525, 541, 259 N.W.2d 672, 680 (1977); ***Foss v. Town of Kronenwetter***, 87 Wis.2d 91, 101-02, 273 N.W.2d 801, 807 (Ct. App. 1978). This court's rejection of those arguments does not suggest that Olson's arguments were so indefensible as to be labeled frivolous. *See* ***Sommer v. Carr***, 99 Wis.2d 789, 799, 299 N.W.2d 854, 860 (1981).

Thompson and McDonald assert that the decisions in ***Kimps*** and in ***Kellner v. Christian***, 197 Wis.2d 183, 539 N.W.2d 685 (1990), should have put Olson's attorneys on notice that their theories of recovery were untenable. They make no effort, however, to discuss the holdings of ***Kellner*** and ***Kimps*** or to develop their contention that these cases create such clear authority as to render Olson's position frivolous. This court declines to address issues raised on appeal that are inadequately briefed. *See* ***McEvoy v. Group Health Coop. of Eau Claire***, 213 Wis.2d 507, 530 n.8, 570 N.W.2d 397, 406 n.8 (1977); ***State v. Flynn***, 190 Wis.2d 31, 58, 527 N.W.2d 343, 354 (Ct. App. 1994). Accordingly, the circuit court's decision on this claim is affirmed.

By the Court.—Judgment affirmed.

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