COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2009

David R. Schanker
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. 2008AP424 **Cir. Ct. No. 2004CV31**

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

LOIS ANN JOHNSON, PERSONALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JACOB JOHNSON, AND ESTATE OF JACOB JOHNSON,

PLAINTIFFS-APPELLANTS,

V.

WOOD COUNTY AND JACQUELINE GREISSINGER,

DEFENDANTS-APPELLANTS,

WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN,

DEFENDANT,

WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Lois Ann Johnson and the Estate of Jacob Johnson ("Johnson") appeal the circuit court's order dismissing Wisconsin County Mutual Insurance Corporation ("WC Mutual") from Johnson's suit against Wood County, WC Mutual, and others. The dispute between Johnson and WC Mutual arises out of an incident at a County group home that led to Jacob Johnson's death. Johnson argues that WC Mutual breached its duty to defend its insured (the County), that the County's insurance policy through WC Mutual provides coverage for the incident, and that WC Mutual's costs should be reduced. We reject Johnson's arguments and affirm the circuit court's order.

Background

¶2 Jacob Johnson was developmentally disabled and placed at a Wood County group home for three nights per week. While giving Jacob Johnson a bath in May 2003, a County employee left him unattended in the bathtub. As a result, he nearly drowned, and died a few days later.

¶3 The County's corporation counsel directed the County's director of safety and purchasing, Brian Margan, to investigate insurance coverage for the incident. Margan's job responsibilities included purchasing liability insurance and overseeing risk management issues.

¶4 In July 2003, Margan spoke over the phone with a WC Mutual authorized agent. Margan reported that there may have been an accidental death of a resident at one of the County's group homes and inquired as to whether there

was liability coverage under the County's policy with WC Mutual. The agent told Margan that WC Mutual did not provide coverage for the County's group homes.

¶5 Margan also contacted another County insurer, Wisconsin Health Care Liability Insurance Plan ("Health Care Insurance"). Health Care Insurance agreed to defend and indemnify the County for at least some of Johnson's damages.

¶6 Johnson commenced suit against the County, the County employee involved in the incident, and Health Care Insurance in January 2004. The County did not notify WC Mutual of the suit at that time because, in the County's view, WC Mutual had already denied coverage.

¶7 Approximately three years later, in January 2007, the parties to Johnson's suit reached a tentative settlement. The County notified WC Mutual of the suit, asserted that the WC Mutual policy provided coverage, and requested that WC Mutual contribute to the settlement.

¶8 Under the terms of the settlement, Johnson, the County, and Health Care Insurance agreed to a total judgment of $2.5 million. The County agreed to pay Johnson $100,000, and Health Care Insurance agreed to pay Johnson $1 million. The parties to the settlement further agreed that Johnson would not execute on the judgment against the County but instead would execute for up to $1.5 million only against the County's insurers, including WC Mutual.

¶9 WC Mutual was joined in Johnson's suit and objected to the settlement. WC Mutual sought summary judgment, arguing that its duty to defend was not triggered because the County did not notify WC Mutual of Johnson's suit. WC Mutual also argued that the County's policy did not cover the incident

involving Jacob Johnson. The circuit court agreed with both arguments. Accordingly, the court granted WC Mutual's motion and dismissed WC Mutual from Johnson's suit. The clerk taxed WC Mutual's proposed costs of $12,341.16 against Johnson. Johnson appeals.[1] We reference additional facts as needed below.

Discussion

¶10 We address three issues: whether WC Mutual breached its duty to defend, whether the WC Mutual policy covers the incident involving Jacob Johnson, and whether WC Mutual's costs should be reduced. We resolve each issue in favor of WC Mutual.

A. Whether WC Mutual Breached Its Duty To Defend

¶11 The existence of the duty to defend depends solely on the nature of the claim being asserted against the insured and does not depend on the merits of the claim. ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis. 2d 39, 43, 577 N.W.2d 366 (Ct. App. 1998). The duty to defend is "broader than the separate duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage." ***Id.*** at 44. An insurer that declines to defend does so at its peril. ***Production Stamping Corp. v. Maryland Cas. Co.***, 199 Wis. 2d 322, 327, 544 N.W.2d 584 (Ct. App. 1996). "When an insurer wrongfully refuses to defend on the grounds that a claim against its insured is not within the coverage of the

[1] The County and the County employee involved in the incident assigned their rights under the WC Mutual policy to Johnson. There is no dispute that Johnson may pursue those rights in the County's stead.

policy, the insurer cannot later contest coverage, but is liable to the insured." ***Radke***, 217 Wis. 2d at 48.

¶12 Ordinarily, the duty to defend is determined by "comparing the allegations of the complaint to the terms of the insurance policy." *See* ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845; *see also* ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666; ***Smith v. Katz***, 226 Wis. 2d 798, 806, 595 N.W.2d 345 (1999). This case, however, is not an ordinary one, and we cannot simply compare the complaint to the policy to determine whether WC Mutual breached its duty. WC Mutual does not argue that, if the allegations in Johnson's complaint are compared to the terms of the WC Mutual policy, there is not at least "arguable" coverage. Instead, the duty-to-defend dispute in this case arises because the County did not notify WC Mutual of Johnson's suit until January 2007.

¶13 Johnson's primary argument is that the July 2003 phone conversation between Margan and WC Mutual's agent was a notice of an occurrence and that this notice was sufficient to tender a defense and trigger WC Mutual's duty to defend. We disagree.

¶14 Johnson's argument implicates several interacting provisions in the County's WC Mutual policy. The interpretation of an insurance policy to determine the scope of an insurer's duty to defend is a question of law that we review *de novo*. ***Estate of Sustache***, 311 Wis. 2d 548, ¶18.

¶15 The pertinent provisions include the provisions describing the insurer's duty to defend, the policy definitions of "occurrence" and "suit," and the provisions describing the insured's duty to notify the insurer:

We have the right and duty to defend any *suit* against the *insured* seeking monetary damages on account of *bodily injury*, *personal injury*, *property damage* or *errors and omissions* or any combination thereof, but:

….

2. *We* may, at *our* discretion, investigate any *occurrence* and settle any claim or *suit* that may result even if the settlement amount is exclusively within the *insured's* deductible, and

3. Our right and duty to defend end when *we* have used up the Limit of Insurance in the payment of judgments or settlements under Coverages A, B or C. This applies to both claims and *suits* pending at that time and those filed thereafter.

….

Occurrence means … [a]n event during the policy period, including continuous and repeated exposure to the same general harmful conditions, the *insured* neither expected or intended….

….

Suit means a civil proceeding in which damages because of *bodily injury*, *property damage*, *personal injury* or *errors and omissions* to which this insurance applies are alleged. Suit includes an arbitration proceeding alleging such damages [if certain conditions are met].

….

1. If *you* … think that an *occurrence* is likely to result in a claim, *you* … must see to it that *we* … are promptly notified ….

….

2. If a claim is received by any *insured you* must:

a. Immediately record the specifics of the claim and the date received, and

b. Notify *us* as soon as practicable, and provide written notice to *us* as soon as practicable.

3. *You* and any involved *insureds* must:

> a. Immediately send *us* copies of any demands, notices, summaries or legal papers received in connection with the claim or *suit* ….

¶16 The above provisions show that the policy plainly distinguishes among occurrences, claims, and suits. Indeed, Johnson concedes as much. The provisions also show that the policy imposes on the County the duty to notify WC Mutual of (1) an occurrence likely to result in a claim, (2) claims, and (3) papers received in connection with claims or suits. In addition, the policy imposes on WC Mutual the duty to defend a "suit," meaning a "civil proceeding" or "arbitration proceeding."

¶17 As Johnson's argument recognizes, the July 2003 notice was of an "occurrence," not a "claim" or a "suit." And, we find nothing in the policy to support Johnson's argument that a notice of an occurrence triggers WC Mutual's duty to defend. Rather, the policy requires WC Mutual to defend a "suit" and gives WC Mutual the discretion to investigate an "occurrence."

¶18 Johnson argues that the policy's use of the undefined term "claim" implies a duty to defend pre-suit assertions of liability against the insured. Whether this is true or not, an occurrence is not an assertion of liability. Accordingly, the July 2003 notice of occurrence was not a tender of defense to WC Mutual that triggered a WC Mutual duty to defend.

¶19 Our conclusion based on the policy language is supported by case law. The general rule is that "[a] tender of defense occurs once an insurer has been put on notice of a *claim* against the insured." ***Towne Realty, Inc. v. Zurich Ins. Co.***, 201 Wis. 2d 260, 267, 548 N.W.2d 64 (1996) (emphasis added); *see also* ***Loosmore v. Parent***, 2000 WI App 117, ¶12, 237 Wis. 2d 679, 613 N.W.2d 923; ***Delta Group, Inc. v. DBI, Inc.***, 204 Wis. 2d 515, 523, 555 N.W.2d 162 (Ct. App.

1996). As used in this context, "claim" appears to refer to a suit. *See* ***Towne Realty***, 201 Wis. 2d at 268; ***Loosmore***, 237 Wis. 2d 679, ¶¶5-6, 12; ***Delta Group***, 204 Wis. 2d at 523. Moreover, these cases do not equate the term "claim" with "occurrence."

¶20 Johnson's reliance on ***Three T's Trucking v. Kost***, 2007 WI App 158, 303 Wis. 2d 681, 736 N.W.2d 239, is misplaced. The "duty to defend" at issue in ***Three T's*** was between two business entities that had entered into an indemnification contract. *See* ***id.***, ¶¶3-4, 7-14, 20. Johnson asserts, with little explanation, that there is no meaningful difference, for purposes of the duty to defend, between an indemnification contract between businesses and the insurance policy here. We question that assertion but, even if it is true, ***Three T's*** is distinguishable.

¶21 The notice in ***Three T's*** expressly stated that the noticing party was "tendering this *claim* … at this time," and the notice attached and referenced correspondence from the claimant's attorney. *See* ***id.***, ¶¶5, 9 (emphasis added). Thus, the notice in ***Three T's*** was a notice of a claimant's assertion of liability against the indemnified party—not a mere notice of an occurrence that might *later* result in an assertion of liability. We acknowledge that we explained in ***Three T's*** that a duty to defend could attach before a suit is filed. *See* ***id.***, ¶¶10-12. We did not, however, hold that notice of an occurrence alone is sufficient to tender a defense and trigger the duty to defend.

¶22 We emphasize that we do not address whether an insurer's duty to defend may arise *only* upon notice to the insurer of a suit. Here, it is sufficient to say that neither the WC Mutual policy nor case law supports Johnson's argument that the County's July 2003 notice of occurrence could trigger the duty.

¶23 Finally, Johnson argues that WC Mutual breached its duty to defend because, in WC Mutual's response to the July 2003 notice of occurrence, WC Mutual informed the County that there was no coverage. Johnson argues that the County reasonably relied on this denial of coverage and suggests that, but for the denial, the County would have kept WC Mutual informed of the subsequent developments.

¶24 We reject Johnson's reliance argument because we are not persuaded that the County could *reasonably* rely on WC Mutual's agent's statement to Margan during their July 2003 phone conversation as a final denial of coverage. There is no dispute that Margan was responsible for the County's risk management and that corporation counsel was aware of WC Mutual's agent's general statement that there was no coverage for the County's group homes. However, a reasonable insured in the position of Margan and corporation counsel would have, at a minimum, independently reviewed the policy and revisited the matter with WC Mutual within a reasonable time after Johnson first asserted that the County was liable for Jacob Johnson's death. Instead, the County waited to notify WC Mutual until three years after Johnson filed suit and only when the existing parties to the suit reached a tentative settlement implicating WC Mutual.[2]

[2] In her reply brief, Johnson argues that WC Mutual's agent's 2003 statement constituted an "anticipatory breach" of the insurance policy. We need not address arguments raised for the first time in a reply brief. ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Accordingly, we do not address whether the agent's 2003 statement could be analyzed as an anticipatory breach, nor do we address what consequences would flow from such a breach.

B. Whether The WC Mutual Policy Covers The Incident Involving Jacob Johnson

¶25 Johnson argues that the circuit court erred by concluding that the WC Mutual policy does not cover the incident involving Jacob. Again we must interpret the policy, a question of law for our *de novo* review. *See* ***Estate of Sustache***, 311 Wis. 2d 548, ¶18.

¶26 The policy obligates WC Mutual to cover damages arising out of bodily injury caused by an occurrence. The parties agree that these policy requirements are met. The dispute centers on whether the following exclusion applies:

> This policy does not apply to … liability arising out of any hospital, nursing home, mental health facility or other operation which provides *medical professional services* ….

The policy defines "medical professional services" as:

> 1. Medical, surgical, psychiatric, dental, X-ray or nursing services or treatment, or the furnishing of food or beverages in connection with such services;
>
> 2. Cosmetic or tonsorial services or treatment; or
>
> 3. The furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances.

¶27 Focusing on the bathing activity that led to Jacob's death, Johnson argues that bathing is not a "medical professional service" and, therefore, the exclusion does not apply. This argument misses the mark because the exclusion is defined in terms of the nature of the *facility*, not the activity resulting in injury. The question is whether the County's facility provided "medical professional services."

¶28 On this same topic, Johnson argues that the exclusion is, at a minimum, ambiguous and can reasonably be read as a particular activity-based exclusion. She points out that the policy is occurrence-based and that the exclusion contains exceptions for certain activities. As indicated, the exclusion reads:

> This policy does not apply to … liability arising out of any hospital, nursing home, mental health facility or other operation which provides *medical professional services* ….

Excepted from this exclusion are:

> activities of (1) a public health nurse while acting within the scope of his or her employment by *you*, (2) to activities of exclusively outpatient facilities for treatment of drug or alcohol dependency disabilities or their employees who are not physicians or employees not authorized to prescribe medications, or (3) *emergency medical personnel*.

¶29 We disagree that the exclusion is ambiguous as applied here. Johnson's argument rests on the faulty assumption that it is illogical to exclude a given type of facility from occurrence-based insurance coverage, or to exclude a given type of facility from such coverage while making exceptions for particular categories of activities that might sometimes take place at the facility. We see nothing inherently illogical about either approach.

¶30 We acknowledge the rule that "[e]xclusions are narrowly or strictly construed against the insurer if their effect is uncertain." *See* ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. Similarly, we acknowledge that ambiguities in an insurance policy are construed in favor of the insured, that is, in favor of coverage. *See, e.g*, ***Folkman v. Quamme***, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857. These rules do not, however, mean that courts should strain to find uncertainty or

ambiguity in insurance policies. We see no such uncertainty or ambiguity here; rather, the exclusion unambiguously applies to *facilities* that provide medical professional services. It is not defined in terms of covered and non-covered activities.

¶31 Johnson argues that a canon of policy construction favors her view. The canon provides that "the general word is construed to embrace only items similar in nature to the enumerated items." ***State v. Popenhagen***, 2008 WI 55, ¶47, 309 Wis. 2d 601, 749 N.W.2d 611. Regardless whether the group home here is similar to the enumerated facilities, the canon is inapplicable. As already indicated, the term "operation" is modified by the phrase, "which provides medical professional services." Because the policy specifically defines "medical professional services," we conclude that this definition, not the canon, determines whether an operation is an excluded facility.[3]

¶32 We turn our attention to whether the particular group home here is a facility that "provides *medical professional services*" as defined in the policy. We agree with the circuit court and WC Mutual that it is. More specifically, applying summary judgment standards, we agree with the circuit court and WC Mutual that WC Mutual's summary judgment materials demonstrated that it was entitled to judgment on this question.

[3] Johnson argues in her reply brief that the exclusion language was modified by a policy endorsement. The modified exclusion language is similar except that it omits "nursing home" from the list of excluded facilities and includes an additional exception to the exclusion for "*your* owned and operated *nursing home* and its' [sic] employees who are not physicians." We are perplexed at Johnson's attempt to make an issue of the difference in language because Johnson herself relies on the original exclusion language in her brief-in-chief. In any event, our analysis would be the same, regardless whether we consider the original language or the modified language.

¶33 In seeking summary judgment, WC Mutual submitted the affidavit of Kim Heim, a registered nurse with a specialty in the care of developmentally delayed and cognitively disabled adults. Nurse Heim reviewed documents from the group home, including copies of Jacob's medical records kept by the group home, treatment and progress records developed and recorded by the group home, and job descriptions and internal policies of the group home employees.

¶34 Nurse Heim averred that she is familiar with facilities like the group home, with the services they provide, and with state licensure and regulatory requirements for such group homes. The group home here is in a class of community-based residential facilities under WIS. ADMIN. CODE ch. DHS 83 that accepts residents requiring the highest level of services.[4] In such group homes, certain services that are usually provided by licensed nurses in other facilities may be performed by "non-medically licensed staff," as long as the staff completes certain training. The staff at the group home completed such training and took Jacob's blood pressure, temperature, pulse, and weight. The staff duties also included controlling, monitoring, and administering residents' prescription medications.

¶35 Nurse Heim further averred that the group home was required under WIS. ADMIN. CODE § DHS 83.32(2) to develop an "individualized service plan" for each resident, which included "[a]n assessment of the medications taken by the resident" and "[n]ursing procedures needed by the resident and the number of hours per week of nursing care need[ed] by the resident." In addition, one of the

[4] All references to the Wisconsin Administrative Code ch. DHS 83 are to the November 2008 version. The parties cite to code provisions by their previous designation of "HFS," but it is plain that the parties are referring to ch. DHS 83.

position descriptions for the group home is for a "Group Home Registered Nurse" who "act[s] as a consultant to all Group Home staff surrounding medical issues and care needs of residents" and "[i]nforms and instructs patient care staff, patients and families regarding medication, treatment, and care." The group home registered nurse oversaw the residents' care plans and provided guidance to other staff using her expertise as a nurse.

¶36 We conclude that, in light of this evidence, WC Mutual made a prima facie case for summary judgment because the evidence, if not contradicted, establishes that the group home provides nursing services. Accordingly, we turn to the evidence on which Johnson relies. *See* ***Swatek v. County of Dane***, 192 Wis. 2d 47, 62, 531 N.W.2d 45 (1995) (if the moving party has made a prima facie case for summary judgment, we then examine the other party's proof to decide whether there are disputed material facts).

¶37 Johnson relies primarily on the affidavit of the group home's former supervisor. Johnson does not, through this affidavit or otherwise, dispute a number of the factual assertions in Nurse Heim's affidavit. Johnson does not dispute that the group home staff took Jacob's blood pressure, temperature, pulse, and weight; that the group home staff oversaw the administration of resident medications; or that the group home was required to develop the type of individualized care plans Heim described.

¶38 In addition, the supervisor conceded that "Wood County did employ a part-time nurse who visited each Group Home on a periodic basis for the purpose of completing paperwork to determine the appropriate billing for Medicare/Medicaid as well as to review the individual care plans for the residents." The supervisor averred, however, that this nurse "was not a member of

the staff" at any particular group home. We deem it immaterial whether the nurse was considered to be "a member of the staff" of the particular group home at which Jacob's accident occurred. Johnson does not dispute, via the supervisor's affidavit or otherwise, that the nurse was employed by the County and that the nurse's job duties included providing the services indicated at the group home in question.[5]

¶39 We recognize that the supervisor averred in her affidavit that the nurse "was not at the Group Home to provide nursing or medical services when she was present." But this averment is nothing more than a bald assertion that nursing or medical services were not provided by the nurse. It is too general to rebut specific evidence showing that nursing services were provided, such as Nurse Heim's averment that the group home registered nurse oversaw the residents' care plans and provided guidance to other staff using her expertise as a nurse.

¶40 Notably, we likewise do not rely on Nurse Heim's conclusory opinion that the group home provides "nursing services."

¶41 Johnson's remaining argument is purely legal, not factual. Johnson argues that WIS. ADMIN. CODE § DHS 83.03(1) prohibits group homes from providing "nursing services." We disagree.

[5] As previously indicated, one of the exceptions to the exclusion allows liability for "a public health nurse while acting within the scope of his or her employment by *you*." Johnson does not argue that the nurse who periodically visits the group home is a "public health nurse" under the policy or that this exception otherwise applies.

¶42 WISCONSIN ADMIN. CODE § DHS 83.03(1) states that group homes like the one here are facilities at which "care, treatment or services above the level of room and board *but not including nursing care* are provided to residents." (Emphasis added.) "Nursing care" is defined in WIS. ADMIN. CODE ch. DHS 83 as "nursing procedures, excluding personal care, which are permitted under ch. N 6 to be performed only by a registered nurse or a licensed practical nurse directly on or to a resident." *See* WIS. ADMIN. CODE § DHS 83.04(41). Accordingly, "nursing care" for purposes of ch. DHS 83 refers somewhat narrowly to a limited set of procedures that may be performed only by a registered nurse or a licensed practical nurse.

¶43 Johnson does not explain why "nursing services" under the policy should necessarily be limited to "nursing care" or "nursing procedures" as defined in WIS. ADMIN. CODE ch. DHS 83. "Nursing services" is not defined in the policy, and we interpret undefined terms in an insurance policy consistent with what a reasonable insured would expect, giving those terms their ordinary and accepted meaning. *See* ***Acuity v. Bagadia***, 2008 WI 62, ¶13, 310 Wis. 2d 197, 750 N.W.2d 817 ("We interpret undefined words and phrases of an insurance policy as they would be understood by a reasonable insured."); ***Doyle v. Engelke***, 219 Wis. 2d 277, 289, 580 N.W.2d 245 (1998) (undefined terms in an insurance policy are given their common and everyday meaning). Absent a more developed argument by Johnson as to why "nursing services" in the policy should be defined in a narrower and more technical manner, by reference only to WIS. ADMIN. CODE

§ DHS 83.03(1), we are satisfied that the services described in Nurse Heim's and the supervisor's affidavits are "nursing services" under the policy.[6]

¶44 Johnson's reliance on the code definition is also unpersuasive because the definition excludes "personal care" nursing procedures. WIS. ADMIN. CODE § DHS 83.04(41) ("nursing procedures, *excluding personal care*, which are …" (emphasis added)). Thus, even if the definition applies, Johnson does not explain why the nursing activities described in the Heim affidavit do not include "personal care" nursing procedures that would constitute "nursing services" under the policy.

¶45 In sum, WC Mutual has demonstrated that the group home provides nursing services and, therefore, is an "operation which provides *medical professional services*." Accordingly, the exclusion applies, and the County has no coverage under its policy with WC Mutual.[7]

C. Whether WC Mutual's Costs Should Be Reduced

¶46 Johnson argues that several items of WC Mutual's costs should be reduced, resulting in a total reduction from $12,341.16 to $7,628.60.

[6] Johnson acknowledges that WIS. STAT. § 50.01(1g) appears to allow group homes like the one here to provide up to three hours of "nursing care" per week per resident. We need not address whether the administrative code conflicts with the statute because Johnson does not explain why WIS. ADMIN. CODE § DHS 83.03(1)'s reference to "nursing care" should control the definition of "nursing services" in the policy.

[7] WC Mutual argues that the group home also provides medical professional services because the group home is required by law to "furnish" and "dispense" medication. We do not address that argument; it is sufficient to conclude that the group home provides nursing services.

¶47 The procedure for taxation of costs is set forth in WIS. STAT. § 814.10.[8] Upon proper notice of costs by the prevailing party, a party opposing taxation of any costs "shall file with the clerk a particular statement of the party's objections." Section 814.10(3). If the clerk subsequently allows costs over an objection, "[the clerk's] action may be reviewed by the court on motion of the party aggrieved made and served within 10 days after taxation." Section 814.10(4).

¶48 Here, the clerk allowed WC Mutual's proposed costs over Johnson's objection. Other than pointing out that she filed such an objection, Johnson does not address the procedure set forth in WIS. STAT. § 814.10. In particular, nothing in Johnson's briefing, including her record citations, indicates that she followed the § 814.10 procedure by moving the court for review of the clerk's action, nor does Johnson suggest some reason why she was not required to make such a motion. Accordingly, we conclude that Johnson has waived any challenge to costs on appeal. *See* ***Bornemann v. City of New Berlin***, 27 Wis. 2d 102, 111, 133 N.W.2d 328 (1965) (a party's failure to move for court review as specified in the statute barred that party from raising any issue on appeal regarding costs taxed).[9]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[8] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[9] ***Bornemann v. City of New Berlin***, 27 Wis. 2d 102, 133 N.W.2d 328 (1965), appears to address precisely the situation here under a previous version of the statute. *See* ***id.*** at 111. Even without ***Bornemann***, however, we would reach the same conclusion based on the procedures set forth in WIS. STAT. § 814.10 and general principles of waiver.