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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT I**

May 24, 2022

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You are hereby notified that the Court has entered the following opinion and order:

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2020AP444

Jean Fugina v. Brian Thurmond (L.C. # 2017CV11306)

Before Brash, C.J., Donald, P.J., and White, J.

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

Jean Fugina appeals an order denying her request for taxable costs for what she contends were “electronic communications.” *See* WIS. STAT. § 814.04(2) (2019-20).<sup>1</sup> Based upon our

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm.

This appeal centers on Fugina’s Bill of Costs totaling \$3,641.49, which included \$428 related to 1,712 pages that were described as electronic communications. In support of this claim, Fugina’s counsel attached a one-page charge showing that the electronic communications were for “scan counter,” or pages placed into a scanner. Integrity Mutual Insurance Company (“Integrity”) objected to the \$428 amount on grounds that “the statute does not state whether scanning is a recoverable expense.” Fugina responded, arguing that the costs were explicitly recoverable under WIS. STAT. § 814.04(2). The judgment clerk disagreed with Fugina and reduced the requested amount accordingly.

Fugina then filed a motion to assess taxable costs. The circuit court held a hearing during which Fugina’s counsel explained the nature of the intra-office document management system at issue:

So, we have a software system that allows us to input every document that comes in the office for every case that we have, whether it’s a pleading, a complaint, a discovery request, a letter, medical records, medical bills, and we have to take that out of the envelopes. We have to process it through the scanner machine, and then it’s e-mailed to our data person who then inputs it into a specific spot into the case management system. It’s electronic communication.

The circuit court subsequently inquired:

So tell me what’s involved. So an individual takes and scans in these documents. Why is that done rather than maintaining a paper file?

[FUGINA’S COUNSEL]: Because it creates efficiencies on behalf of the client.

THE COURT: Who is the communication with?

[FUGINA’S COUNSEL]: The communication is interoffice communication, whether it’s from an opposing counsel, from the court’s clerk, from the judge, a decision and order, all the information that comes in electronically has to be sorted and put in the client’s file.

In denying Fugina’s request to recover the scanning costs, the circuit court explained: “I don’t believe that the system that you’ve described to me involves electronic communications... This was scanning and internal storage of documents[.]” The circuit court concluded that scanning documents for such purposes does not constitute electronic communications as drafted and intended by the statute.<sup>2</sup> The circuit court additionally held that the circumstances did not warrant a discretionary award beyond the items specifically delineated in the statute. This appeal follows.

Under WIS. STAT. § 814.01(1), a prevailing plaintiff is entitled to recover costs. WISCONSIN STAT. § 814.04(2) authorizes imposition of costs for “[a]ll the necessary disbursements ... allowed by law.” This includes amounts paid for electronic communications. *Id.* Whether the scanning of documents into an intra-office document management system is an allowable electronic communications cost under § 814.04(2) is a question of statutory interpretation and application subject to our independent review. *See Zurich Am. Ins. Co. v. Wisconsin Physicians Servs. Ins. Corp.*, 2007 WI App 259, ¶42, 306 Wis. 2d 617, 743 N.W.2d 710.

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<sup>2</sup> Fugina incorrectly asserts that Integrity waived its ability to raise arguments on appeal because it did not file a response brief in the circuit court. *See Doe v. General Motors Acceptance Corp.*, 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7 (“A respondent may advance on appeal, and we may consider, any basis for sustaining the [circuit] court’s order or judgment”).

“[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. In construing a statute we are to give deference to the policy choices made by the legislature in enacting the law. *See id.* To that end, if the statutory language is plain and unambiguous, we apply the statute by giving it its usual and common meaning. *See id.*, ¶45.

*Zurich* controls the outcome of this appeal. In that case, the issue was whether the word “photocopying” could be stretched to cover scanned documents. *See id.*, 306 Wis. 2d 617, ¶¶41-42. In concluding that it could not, we adopted the circuit court’s reasoning that the costs statute should be narrowly construed and that the ordinary meaning of the term photocopying did not embrace digital electronic reproduction contained on electronic media. *See id.*, ¶¶42-43. We explained:

As the statute [i.e., WIS. STAT. § 814.04(2)] currently reads, “photocopying” must be narrowly construed to include only hard copy photocopies, rather than electronic imaging. Although both serve essentially the same ultimate purpose, they are not physically the same. Thus, unless the legislature revises the statute to add electronic reproduction/imaging to the statute as an item of cost, imaging costs do not fall within the costs statutes and the [circuit] court properly exclud[ed] this item of costs from what Zurich is entitled to recover.

*See id.*, ¶43.

This same logic applies here. Wisconsin case law specifically requires a narrow reading of the cost statute. *See Ramsey v. Ellis*, 163 Wis. 2d 378, 385, 471 N.W.2d 289 (Ct. App. 1991) (reiterating that courts are “not free to take a broad view of the costs statute”). A cost that is not specifically authorized by a statute is not recoverable. *See Kleinke v. Farmers Coop. Supply & Shipping*, 202 Wis. 2d 138, 147-48, 549 N.W.2d 714 (1996). While electronic communications

are specifically authorized, Fugina has not convinced us that scanning documents for purposes of an intra-office document management system qualifies as such.

First, in terms of giving deference to the policy choices made by the legislature in enacting the electronic communications language into the statute, Integrity argues—and Fugina does not refute—that scanning documents into an internal document management program was not a concept used or known at the time the legislature added electronic communications as a recoverable cost. *See* 2003 A.B. 651. Second, the usual and common meaning of the term electronic communications does not encompass scanning documents for purposes of an intra-office document management system.

The word “communications,” in ordinary language, entails the exchange of information.<sup>3</sup> We fail to see how scanning documents in the context presented qualifies as the exchange of information. Insofar as Fugina is attempting to recover the costs of data management more generally, we note that “[t]he right to recover costs is not synonymous with the right to recover the expenses of litigation.... [T]o the extent that a statute does not authorize the recovery of specific costs, they are not recoverable.” *See generally State v. Foster*, 100 Wis. 2d 103, 106, 301 N.W.2d 192 (1981).

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<sup>3</sup> “Communications” means “a system (as of telephones or computers) for transmitting or exchanging information[.]” *Merriam-Webster.com*, <https://www.merriam-webster.com/dictionary/communications> (last visited May 3, 2022).

As we held in *Zurich*, the legislature will need to revise the statute to add scanning as an item of cost, if it deems it appropriate to do so. *See id.*, 306 Wis. 2d 617, ¶43. As it stands, Fugina’s scanning costs are not recoverable under WIS. STAT. § 814.04(2).<sup>4</sup>

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*

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<sup>4</sup> The circuit court retains discretion in determining whether claimed disbursements are necessary. *See DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P’ship*, 2004 WI 92, ¶54, 273 Wis. 2d 577, 682 N.W.2d 839 (“A circuit court may, in its discretion, determine that the requested item of cost was not a “necessary” disbursement, and deny a party costs on that basis.”). However, because we have concluded that the scanned documents do not constitute electronic communications under the plain language of the statute, we need not address whether the claimed disbursements were necessary. *See Water Well Sols. Serv. Grp., Inc. v. Consolidated Ins. Co.*, 2016 WI 54, ¶33 n.18, 369 Wis. 2d 607, 881 N.W.2d 285 (“We decide cases on the narrowest grounds possible.”); *see also Kleinke v. Farmers Coop. Supply & Shipping*, 202 Wis. 2d 138, 149, 549 N.W.2d 714 (1996) (explaining that “[n]either [WIS. STAT. § 814.036] nor the catch-all provision in WIS. STAT. § 814.02 grants the [circuit] court the power to allow costs which are not explicitly authorized by statute”).