

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 8, 1997

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.

NOTICE

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No. 95-3009

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN R. CHIC,

PLAINTIFF-APPELLANT,

V.

OFFICER FOOTS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. John R. Chic appeals from a judgment dismissing his complaint, awarding costs to defendant Officer Foots, and ordering him to pay Dodge County for the cost of transporting him to court. We affirm.

Chic submitted to the trial court a proposed personal injury complaint against Foots, along with a request under § 814.29, STATS., to proceed without payment of costs or fees. The court granted the petition, allowing the complaint to be filed. Apparently Chic later used a writ of habeas corpus to have himself brought to court for trial, although the writ is not of record. At trial, the court found in favor of Officer Foots and dismissed the complaint. The court awarded \$169.20 in costs to Officer Foots and \$410.82 to Dodge County for expenses incurred in transporting and holding Chic for trial. The latter award was apparently made pursuant to § 782.45, STATS.

On appeal, Chic's only argument is that the award of costs must be limited to the amount in his inmate account at the time of the judgment. His argument is based on § 814.29, STATS. Under § 814.29(1)(a), any person may commence or prosecute any action in any court without being required to give security for costs or to pay any service or fee if the court finds that because of poverty the person is unable to pay the costs of the action or proceeding or to give security for those costs. Paragraph (3)(b) then provides a way to recover the waived costs or fees from prisoners. It provides in relevant part:

If the affiant is a prisoner, ... a request for leave to commence ... an action ... without being required to pay fees or costs or to give security for costs ..., if the judgment is in favor of the opposing party, constitutes consent for the court to order the institution to deduct the unpaid fees and costs ... from the amount in the inmate's account at the time the judgment was rendered.

Chic argues that this subsection limits an award of costs to the amount in his inmate account. However, this provision is only relevant here if the costs assessed against Chic are ones which were initially waived by the granting of his petition under § 814.29(1), STATS. This is because the provision limiting

recovery to the amount in his inmate account relates only to the recovery of fees and costs which remain “unpaid” due to a waiver granted under subsec. (1). If the fees and costs assessed against Chic were not initially waived by the granting of his petition, then para. (3)(b) has no effect here. Therefore, we must consider whether those fees and costs were waived by the granting of a waiver under § 814.29(1)(a).

We first consider the award to defendant Officer Foots. This award was made under § 814.03, STATS., which provides that a prevailing defendant is entitled to costs, and under § 814.04, STATS., which describes the items that shall be allowed as costs. The question is whether a plaintiff’s obligation to pay such costs is relieved by the granting of a fee waiver under § 814.29, STATS.

We find no case law answering this question. Therefore, we turn to the language of the statute itself. The terms “costs” and “fees” generally have different meanings in ch. 814, STATS. “Costs” refers to those expenses of litigation which are paid by one party to another at the end of litigation. *See* §§ 814.01 to 814.49, STATS. “Fees” refers to money paid to the clerk of court or others for services provided to the parties. *See* §§ 814.51 to 814.72, STATS. It might be argued that the granting of a waiver under § 814.29(1)(a), STATS, does not waive costs because the statute provides that the indigent person may proceed without being required to give “security for costs or to pay any service or fee.” On its face, this provision does not waive “costs,” but only “security for costs.”

However, the Wisconsin Supreme Court, when applying an earlier version of the statute that included this same phrase, held that the legislature used the terms “costs” and “fees” interchangeably in the statute. *State ex rel. Girouard v. Circuit Court*, 155 Wis.2d 148, 158 n.5, 454 N.W.2d 792, 796 (1990). Nothing

in the newer version of the statute, drafted by the supreme court, appears to alter *Girouard*'s conclusion that these terms are interchangeable within it.¹ Therefore, the distinction between “costs” and “fees” that generally prevails in ch. 814, STATS., provides little guidance in applying § 814.29, STATS.

We conclude the best guidance comes from the language which provides that indigent persons may “commence, prosecute or defend” an action without payment. Section 814.29(1)(a), STATS. The purpose of the statute appears to be to allow indigent persons access to the courts. To achieve this purpose, certain fees must be waived to commence an action, such as the filing fee. As another example, the supreme court held in *Girouard* that the transcript fee must be waived to allow an indigent person to prosecute an appeal. However, an indigent person is able to commence and prosecute an action without a waiver of the costs awarded to a prevailing defendant under §§ 814.03 and 814.04, STATS., because those costs are awarded at the end of the case. The purpose of the statute is not thwarted by such an award because the indigent person has already pursued the case to its conclusion. Therefore, we conclude that a post-litigation award of costs to defendants is not waived by the granting of a petition to proceed under § 814.29. Because it is not, the provision in § 814.29(3)(b) relating to recovery of “unpaid” costs from inmate accounts is not applicable to such an award.

¹ The first sentence of the statute, quoted above, continues to provide that only fees and security for costs are waived. However, other parts of the statute are written as if costs themselves are waived. *See, e.g.*, § 814.29(1)(d)3, STATS. (“to pay or give security for fees and costs”); § 814.29(3)(a) and (3)(b) (“to pay fees or costs or to give security for costs”). *See also* Judicial Council Note, 1993, § 814.29 (“the procedure for determining when costs and fees for indigent persons should be waived”).

We turn next to the award of costs to Dodge County.² This award was made under § 782.45, STATS. That statute provides, as relevant to this case, that when an inmate is brought into court in response to a writ of habeas corpus in a civil action, the expense of transporting the inmate to court shall be paid by the party requesting his or her presence. Chic was transported to court, on his own writ of habeas corpus, by Dodge County.

The question here is the same as with the costs to Officer Fouts: Is this fee waived by the granting of a petition to proceed under § 814.29, STATS.? Section 782.45, STATS., does not expressly state when the person requesting the presence of the inmate must pay the transportation fee. However, the mechanism for collecting the fee, which is described in § 782.45(1), requires the clerk of the circuit court to “certify the expenses.” This process suggests that the fee need not be paid in advance. Indeed, Chic was transported to court without having to pay the fee in advance. Therefore, as with the post-litigation award of costs to the defendant, we conclude that the transportation fee is not one which is waived under § 814.29 to allow an indigent person to commence or prosecute an action, and thus the provision relating to recovery of “unpaid” costs from inmate accounts is not applicable.

² We note that Dodge County is not a party to this appeal and has not made an appearance. It is not clear how defendant Officer Fouts, an employee of the Department of Corrections, is in a position to defend the county’s award on appeal, as he does in his brief. However, Chic does not make this argument, and we do not consider the issue further.

By the Court.—Judgment affirmed.

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

