COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2014

Diane M. Fremgen
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. 2013AP1624 **Cir. Ct. No. 2011CV63**

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

WILLIAM (BILLY) PARKER,

PLAINTIFF-APPELLANT,

V.

SAPPI CLOQUET, LLC D/B/A SAPPI FINE PAPER NORTH AMERICA, SAPPI LIMITED, CATERPILLAR, INC. D/B/A PRENTICE, BLOUNT, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY AND BAUGHMAN TRUCKING & EXCAVATING, LLC,

DEFENDANTS-RESPONDENTS,

BAUGHMAN TRANSIT, LLC AND ACUITY,

DEFENDANTS.

APPEAL from an order of the circuit court for Chippewa County: JAMES M. ISAACSON, Judge. *Reversed and cause remanded for further proceedings*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. William Parker appeals a nonfinal order granting a WIS. STAT. § 801.63 motion to stay the proceeding and permit trial in a foreign forum.[1] Parker argues the court erroneously exercised its discretion because the motion was untimely and the court applied the wrong legal standard. Parker further argues that any argument for enlarging the time for filing the motion under WIS. STAT. § 801.15(2) was forfeited, and that, regardless, there was no excusable neglect as required by that statute. We agree with Parker that the motion was untimely. We therefore reverse and remand.

BACKGROUND

¶2 Parker was severely injured when delivering a load of pulp wood for his Chippewa County employer, Baughman Transit, LLC, at the Sappi Paper Mill in Minnesota. The injury occurred in September 2009 while Parker was preparing the boom on a Prentice loader for transport. As he retracted the boom, a number of the bolts by which Blount, f/k/a Prentice, fastened the loader to the semi-trailer failed. The loader fell and crushed Parker.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. We granted the petition for leave to appeal the nonfinal order on September 18, 2013.

¶3 Parker sued Caterpillar Inc., d/b/a Prentice, Blount, Inc., in Chippewa County.[2] Caterpillar was served on February 28, 2011, with its answer due on April 14. Caterpillar instead petitioned to remove the case to federal court on March 30, and filed its answer there. After Parker amended his complaint, the federal court remanded the case to Chippewa County on August 3. In late October 2012, Caterpillar replaced its Wisconsin counsel with Minnesota counsel.

¶4 In April 2013, approximately one year and eight months after the remand from federal court, Caterpillar moved to dismiss the case under the doctrine of forum non conveniens, seeking to move the case to Minnesota. Caterpillar's motion was heard in May, and it agreed with the circuit court that the only procedural mechanism by which such a motion could be filed would be under Wisconsin's codification of the concept of forum non conveniens, WIS. STAT. § 801.63.[3]

¶5 At the hearing, the court indicated it was primarily concerned with the WIS. STAT. § 801.63(2) provision requiring that the motion "shall be filed prior to or with the answer …." Caterpillar's attorney responded:

> I can state this very simply. We believe that the comments to the rule allow us to bring this. We would have liked to have brought this earlier. It wasn't done. I'm not going to sit here before the Court and tell you that we could have and we should have and it wasn't done. I took this case over just a few months ago and there is—it is what it is.

[2] We will refer to the respondents on appeal collectively as Caterpillar. Only Caterpillar filed a response brief, although American Guarantee & Liability Insurance Company and Sappi Cloquet, LLC, joined that response.

[3] *See* ***Mayer v. Mayer***, 91 Wis. 2d 342, 350, 283 N.W.2d 591 (Ct. App. 1979) ("Section 801.63 … is the [f]orum non conveniens provision generally applicable in civil actions."); ***Littmann v. Littmann***, 57 Wis. 2d 238, 245, 203 N.W.2d 901 (1973) ("[Former WIS. STAT. §] 262.19 … is the Wisconsin codification of the concept of forum non conveniens.").

> The timing is such that we are bringing this motion. That motion could have been brought previously. It wasn't.

Ultimately, the circuit court determined it had discretion to hear the motion despite its tardiness. The court stated it found that discretion in ***U.I.P. Corp. v. Lawyers Title Insurance Corp.***, 65 Wis. 2d 377, 222 N.W.2d 638 (1974), although the court did not elaborate. The court concluded it was more convenient to hear the case in Minnesota, and therefore granted the motion. Parker moved for reconsideration, which the court denied. Parker appeals.

DISCUSSION

¶6 Parker's primary argument, and the only issue we resolve, is that the circuit court erroneously determined it had discretion to entertain Caterpillar's tardy WIS. STAT. § 801.63 motion to stay the proceeding and permit trial in a foreign forum. This presents an issue of statutory interpretation.

¶7 Interpretation and application of a statute to undisputed facts presents a question of law subject to de novo review. ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273. Statutory interpretation begins with the language of the statute. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. ***Id.*** Statutes must be interpreted in context, and reasonably, to avoid absurd results. ***Id.***, ¶46. Further, a court must seek to avoid surplusage and give effect to every word in the statute. ***Id.*** Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. ***Id.*** A statute is ambiguous if the statute's ability to support two reasonable

constructions creates an ambiguity that cannot be resolved through the language of the statute itself. ***Orion Flight Servs., Inc. v. Basler Flight Serv.***, 2006 WI 51, ¶17, 290 Wis. 2d 421, 714 N.W.2d 130.

¶8 As relevant, WIS. STAT. § 801.63 provides:

> **801.63 Stay of proceeding to permit trial in a foreign forum. (1)** STAY ON INITIATIVE OF PARTIES. If a court of this state, on motion of any party, finds that trial of an action pending before it should as a matter of substantial justice be tried in a forum outside this state, the court may in conformity with sub. (3) enter an order to stay further proceedings on the action in this state. ... A stay order may be granted although the action could not have been commenced in the alternative forum without consent of the moving party.
>
> **(2)** TIME FOR FILING AND HEARING MOTION. The motion to stay the proceedings shall be filed prior to or with the answer unless the motion is to stay proceedings on a cause raised by counterclaim, in which instance the motion shall be filed prior to or with the reply. The issues raised by this motion shall be tried to the court in advance of any issue going to the merits of the action and shall be joined with objections, if any, raised by answer or motion pursuant to s. 802.06(2). The court shall find separately on each issue so tried and these findings shall be set forth in a single order.
>
> **(3)** SCOPE OF TRIAL COURT DISCRETION ON MOTION TO STAY PROCEEDINGS. The decision on any timely motion to stay proceedings pursuant to sub. (1) is within the discretion of the court in which the action is pending. In the exercise of that discretion the court may appropriately consider such factors as:
>
> (a) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;
>
> (b) Convenience to the parties and witnesses of trial in this state and in any alternative forum;
>
> (c) Differences in conflict of law rules applicable in this state and in any alternative forum; or
>
> (d) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

¶9 We agree with Parker's argument that the circuit court lacked discretion to consider Caterpillar's motion. Parker argues that by using the term "shall," WIS. STAT. § 801.63(2) clearly and unambiguously precludes consideration of any motion that is not filed prior to or at the same time as the answer. "Shall" is presumed mandatory when it appears in a statute, and that interpretation is particularly apt when, like here, the statute also uses the term "may." *See* ***Scanlon v. City of Menasha***, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962). Indeed, in another case, the moving party did not dispute that the § 801.63(2) filing deadline was precisely that—a hard deadline. *See* ***Mayer v. Mayer***, 91 Wis. 2d 342, 350, 283 N.W.2d 591 (Ct. App. 1979) ("[Section 801.63] requires inconvenient forum motions to be made with or prior to the answer.").

¶10 Additionally, Parker contends his interpretation is bolstered for two reasons. First, WIS. STAT. § 801.63(3) states that a court's discretion in resolving motions extends only to "any *timely* motion." (Emphasis added.) Second, § 801.63(2) expressly sets forth a single exception to filing motions prior to or with an answer, thereby implying no other exceptions are permitted. Stated otherwise, why would the legislature set forth any exception if the rule was intended as merely a permissive guideline?

¶11 Caterpillar all but ignores Parker's arguments and the rules of statutory construction.[4] Instead, it focuses on the following language from WIS. STAT. § 801.63(2): "The issues raised by this motion shall be tried to the court in

[4] Caterpillar asserts the circuit court's determination, that it had discretion to consider the motion despite it being filed long after the answer, "is reasonable and entitled to deference, especially in the context of the discretionary authority committed to the court by [WIS. STAT. §] 801.63." Given the statute's clear language and the applicable standard of review, this assertion does not merit further attention.

advance of any issue going to the merits of the action ….” Caterpillar argues this language demonstrates the legislature’s concern was merely that motions be brought and decided prior to trial, or, at the very least, prior to any substantive decisions in the case. Additionally, Caterpillar argues the filing deadline is not controlling in the present case because it removed to federal court and filed its answer there. Finally, Caterpillar contends the court could exercise inherent authority to consider the motion.

¶12 Caterpillar’s attempt to discern an implicit legislative intent fails. The statute says what it says, clearly and unambiguously. Ignoring language is not proper statutory interpretation. “A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect.” ***Donaldson v. State***, 93 Wis. 2d 306, 315-16, 286 N.W.2d 817 (1980).

¶13 We also reject Caterpillar’s federal-court argument. First, Caterpillar could have simply filed its motion prior to seeking removal to federal court. Second, Caterpillar’s inability to file the motion at the same time it filed its answer in federal court was self-imposed. “[A] deliberate choice of strategy, even if it backfires, amounts to a waiver binding upon the defendant and this court.” ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971). Third, Caterpillar did not file its motion promptly upon the federal court’s remand; it waited twenty months. That substantial delay renders the argument farcical.

¶14 We also reject the argument that the court had inherent authority to consider the tardy motion. Caterpillar asserts, “Wisconsin’s appellate courts have long recognized the inherent authority of lower courts to manage their dockets, individual cases, and untimely motions.” It then concludes its argument with three quotes from two cases, without explication. We deem the argument inadequately

developed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (We will not decide issues that are inadequately briefed.). Further, neither of the cases Caterpillar cites is on point, and they both recognize that inherent authority is limited. Indeed, one of Caterpillar's quotations states inherent power is exercisable "'consistent with[] the Constitution and *statutes* ….'" ***Neylan v. Vorwald***, 124 Wis. 2d 85, 94, 368 N.W.2d 648 (1985) (emphasis added) (sources omitted). The court's action here conflicted with WIS. STAT. § 801.63.

¶15 We have concluded WIS. STAT. § 801.63(2) clearly and unambiguously required Caterpillar to file its motion prior to or with its answer, and subsection (3) limits a court's discretion to considering only timely motions. Parker further argues this timeliness requirement constitutes a prerequisite under ***M&I Bank v. Kazim Investment, Inc.***, 2004 WI App 13, 269 Wis. 2d 479, 678 N.W.2d 322. There, even though the circuit court was sitting in equity, we held, "Where a clear and unambiguous statute establishes a prerequisite to an act or judicial order, a court has no discretion to alter or eliminate that prerequisite." ***Id.***, ¶9. Caterpillar fails to respond to this argument, and therefore concedes the point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶16 Because we reverse solely on Parker's statutory interpretation argument, we need not address his additional arguments. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive). Nonetheless, we comment on two matters.

¶17 Parker argues the court erroneously exercised its discretion when applying the WIS. STAT. § 801.63(3) factors because it granted the motion only

upon its finding that Minnesota would be the more convenient forum. We agree that is not the proper test. The supreme court has explained the purpose and general rules underlying the statute as follows:

> "Its purpose is to permit trial … in another state upon a convincing showing that trial of the cause in Wisconsin is so inconvenient that substantial injustice is likely to result.
>
> ….
>
> Occasionally it is seriously inappropriate for a court to proceed with a case, within its jurisdiction, that is pending before it. ... The stay should be allowed only when required in the interests of doing substantial justice between the parties. Mere inconvenience to the court is not enough. Nor is inconvenience to the parties or witnesses enough unless that inconvenience appears likely to result in substantial injustice to one of the parties."

Littmann, 57 Wis. 2d at 245 (source and citations omitted).

¶18 Finally, Caterpillar suggests in a footnote that we remand for the circuit court to consider whether it could enlarge the time for filing its motion pursuant to WIS. STAT. § 801.15(2)(a). Neither Caterpillar nor the circuit court mentioned that statute below. Caterpillar therefore forfeited its right to raise the issue. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Regardless, given Caterpillar's attorney's lacking explanation for the delay in filing the motion, as a matter of law, Caterpillar would be unable to satisfy § 801.15(2)(a)'s excusable neglect standard.

By the Court.—Order reversed and cause remanded for further proceedings.

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