

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2010

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. 2008AP2161

Cir. Ct. No. 2005CV1022

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TWEET/GAROT-AUGUST WINTER, LLC,

PLAINTIFF-RESPONDENT,

v.

YELLOW THUNDER CORPORATION,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

REGENT INSURANCE COMPANY,

INTERVENING-PARTY,

v.

STAR PIPE PRODUCTS, INC.,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County:
MARC A. HAMMER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Yellow Thunder Corporation appeals a judgment dismissing its third-party complaint against Star Pipe Products, Inc., as untimely. We conclude Yellow Thunder's third-party complaint was not timely filed under WIS. STAT. § 803.05(1) and affirm.¹

BACKGROUND

¶2 Tweet/Garot filed suit against Star Pipe, Mid-State Supply, Inc., and E.P. Sales, Inc. on May 27, 2005, alleging the defendants were liable for supplying 358 defective pipe valves used in the Lambeau Field redevelopment project. Tweet/Garot was granted a default judgment on August 11, 2005, upon Mid-State's failure to timely respond. The circuit court vacated the default judgment on December 14, 2005, on improper service grounds. Tweet/Garot filed an amended complaint on January 9, 2006, naming Yellow Thunder as a defendant in place of Mid-State. On March 2, 2006, a scheduling order was entered establishing May 2, 2006 as the final filing date for amendments to pleadings and impleading. In a subsequent scheduling order, the circuit court established May 7, 2007 as the final filing date. Star Pipe and E.P. Sales were dismissed from the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

case on October 23, 2007, pursuant to a stipulation with Tweet/Garot, leaving Yellow Thunder the sole non-insurer defendant in the action.²

¶3 On April 25, 2008, nearly three years after the filing of the original complaint and over two years since the first amended complaint, the parties stipulated to entry of an order permitting Tweet/Garot leave to file an amended complaint clarifying the claims it was pursuing against Yellow Thunder. The stipulation and subsequent order of the circuit court reserved to Yellow Thunder the right to respond to the amended complaint: “After service upon it, Defendant Yellow Thunder may respond to Plaintiff’s Third Amended Complaint pursuant to the time requirements and provisions set forth by statute.”³ Yellow Thunder responded to the amended complaint by filing an answer and a third-party complaint against Star Pipe seeking contribution and indemnification.

¶4 The circuit court dismissed the third-party complaint upon Star Pipe’s motion. It concluded Yellow Thunder’s third-party complaint was untimely and in violation of both state statutes and the court’s scheduling orders. The circuit court found Yellow Thunder’s lengthy delay in filing its contribution claim inexcusable:

In this case, I’m satisfied that Yellow Thunder knew or should have known that they had a right or claim of contribution against Star Pipe and should have exercised that discretionary right based upon the first amended complaint.

² Star Pipe impleaded other third-party defendants, all of whom were dismissed from the action at various times pursuant to stipulation or by summary judgment.

³ Though the parties described the amended pleading as Tweet/Garot’s third amended complaint, the record reflects the amendment was the complaint’s second and the pleading filed pursuant to the stipulation was entitled “Second Amended Complaint.”

When the first amended complaint was filed, ... Yellow Thunder was well aware they were being sued by the plaintiff based upon an implied warranty of merchantability. It's at that point in time in my opinion that Yellow Thunder should have viewed their [six-month countdown under WIS. STAT. § 803.05] as to whether or not they wanted to file a direct third-party claim against Star Pipe. They failed to do so.

Yellow Thunder appeals.

DISCUSSION

¶5 Resolution of this appeal requires us to interpret and apply WIS. STAT. § 803.05, and we do so de novo. *Christensen v. Sullivan*, 2009 WI 87, ¶42, 768 N.W.2d 798. Some well-established principles of statutory interpretation guide our analysis. If the language of a statute is unambiguous, we will ordinarily stop the inquiry and apply the statute in accordance with its plain meaning. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language will be given its common, ordinary, and accepted meaning. *Id.* “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*, ¶46. “[T]he court is not at liberty to disregard the plain, clear words of the statute.” *Id.* (citation omitted).

¶6 Yellow Thunder argues the circuit court erroneously exercised its discretion because it was required to find Yellow Thunder exhibited egregious conduct or bad faith before dismissing the third-party complaint. In *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898, our supreme court reiterated that dismissal with prejudice as a sanction for violating court orders is appropriate only where “the non-complying party has

acted egregiously or in bad faith.” Yellow Thunder attempts to fit this case within the *Marquardt* framework by emphasizing the circuit court’s statement that it was “satisfied that Yellow Thunder has violated the terms of the court’s previous scheduling orders.” Yellow Thunder makes too much of this isolated statement. The court made clear its decision rested upon its belief that Yellow Thunder’s third-party complaint was untimely. The circuit court spoke extensively about the time at which Yellow Thunder’s contribution claim arose, concluding the first amended complaint began the “six-month countdown” for impleading under WIS. STAT. § 803.05. We therefore reject Yellow Thunder’s reliance on *Marquardt* and turn our attention to that statute.

¶7 WISCONSIN STAT. § 803.05 governs third-party practice and establishes time limits for the filing of third-party complaints. As in any case involving statutory interpretation, we begin with the language of the statute. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶45. Subsection 803.05(1) limits the circumstances under which a defendant may file a third-party action:

At any time after commencement of the action, a defending party, as a 3rd-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff’s claim against the defending party, or who is a necessary party under s. 803.03. The 3rd-party plaintiff need not obtain leave to implead if he or she serves the 3rd-party summons and 3rd-party complaint not later than 6 months after the summons and complaint are filed or the time set in a scheduling order under s. 802.10; thereafter, the 3rd-party plaintiff must obtain leave on motion upon notice to all parties to the action.

Thus, § 803.05(1) establishes three ways in which a third-party plaintiff may implead a third-party defendant: (1) by serving a third-party summons and complaint within six months of the filing of the summons and complaint; (2) by

-serving a third-party summons and complaint within the time limits established in a scheduling order; or (3) by obtaining leave of the court.

¶8 Yellow Thunder argues its third-party complaint was timely filed because it was done within six months of the filing of the second amended complaint. This argument turns on the meaning of the statutory phrase “not later than 6 months after the summons and complaint are filed.” If this phrase refers to the original summons and complaint, Yellow Thunder’s third-party complaint is untimely and the circuit court’s dismissal was proper. If the phrase refers to the operative complaint in the action, Yellow Thunder’s third-party complaint was timely filed and the circuit court’s dismissal was an erroneous exercise of discretion.

¶9 We conclude the six-month time period identified in WIS. STAT. § 803.05(1) begins at the time the action is commenced. The legislature’s use of the phrase “after the summons and complaint are filed” refers to the commencement of an action under WIS. STAT. § 801.02(1).⁴ Nowhere does § 803.05(1) refer to an amended or operative complaint. Moreover, this interpretation is consistent with the logic of the remainder of the provision. Subsection 803.05(1) does not prohibit the filing of a third-party complaint once the six-month time period has expired, but permits impleader pursuant to scheduling orders or with leave of the circuit court. Thus, it appears the legislature recognized that impleading parties in later stages of an action could upend the entire litigation and appropriately left impleader to the circuit court’s discretion

⁴ In the recent past we have assumed identical language in WIS. STAT. § 802.09 referred to the filing of the original summons and complaint. See *Schuett v. Hanson*, 2007 WI App 226, ¶¶5, 8, 305 Wis. 2d 729, 741 N.W.2d 292.

under these circumstances. *See Paper Mach. Corp. v. Nelson Foundry Co.*, 108 Wis. 2d 614, 629-30, 323 N.W.2d 160 (Ct. App. 1982) (circuit court properly denied continuance motion to implead additional defendants made eight days before trial); Judicial Council Committee’s Note, 1977, WIS. STAT. § 803.05 (leave of court unnecessary if third-party complaint is filed not later than six months after summons and complaint in original action are filed).

¶10 We conclude no circumstances identified in WIS. STAT. § 803.05(1) permitted Yellow Thunder to file its third-party complaint in this case. First, as we have explained, Yellow Thunder’s third-party summons and complaint was not filed within six months of the commencement of the original action. Second, Yellow Thunder could not have filed its third-party complaint within time limits established by a scheduling order because no scheduling order was in effect at the time of the complaint’s filing.⁵ Finally, Yellow Thunder did not seek leave of the court before filing its third-party complaint and was not acting with permission of the circuit court. We therefore conclude the circuit court appropriately dismissed the third-party complaint.⁶

¶11 We must address Yellow Thunder’s final contention that the stipulation between it and Tweet/Garot permitted Yellow Thunder’s third-party complaint. The stipulation permitted Yellow Thunder to “respond to Plaintiff’s Third Amended Complaint pursuant to the time requirements and provisions set

⁵ It appears a third scheduling order was entered on May 30, 2008, ten days after Yellow Thunder filed its third-party complaint. Although this order does not appear in the record, it clearly could not have authorized the impleader, and is therefore irrelevant to our analysis.

⁶ Since Yellow Thunder never sought leave to file its third-party complaint, we need not address the parties’ arguments as to the time at which Yellow Thunder had adequate notice of its contribution claim.

forth by statute.” We do not construe the stipulation as reserving to Yellow Thunder the right to file a third-party complaint. The stipulation does not address, on its face, joinder of other parties, nor does the use of the word “respond” encompass the filing of a third-party complaint. Impleader is “[a] procedure by which a third party is brought into a lawsuit ... by a defendant who seeks to shift liability to someone not sued by the plaintiff.” BLACK’S LAW DICTIONARY 757 (7th ed. 1999). It is therefore not a response to the plaintiff’s allegations, but a strategic assessment that, if the allegations are true, another party shares liability. The stipulation therefore does not alter our conclusion that the circuit court correctly dismissed Yellow Thunder’s third-party complaint pursuant to WIS. STAT. § 803.05(1).

By the Court.—Judgment affirmed.

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

