COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2830-FT **Cir. Ct. No. 02CV001328**

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

QUALITY STATE OIL COMPANY, INC., WARA ENTERPRISES, INC., CROATT OIL COMPANY, INC., AND VALLEY PETROLEUM, LLC,

PLAINTIFFS-APPELLANTS,

V.

MICHAEL VANDAALWYK AND SARAH VANDAALWYK, D/B/A BADGER PHILLIPS 66,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. The plaintiffs appeal from orders[1] dismissing their claim alleging a violation of Wisconsin's Unfair Sales Act, WIS. STAT. § 100.30, against Michael and Sarah VanDaalwyk, d/b/a Badger Phillips 66.[2] The circuit court concluded Michael had no ownership interest in Badger and, therefore, was

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The relevant parts of the Unfair Sales Act are:

> WISCONSIN STAT. § 100.30(3) provides in part:
>
> ILLEGALITY OF LOSS LEADERS. Any sale of any item of merchandise either by a retailer, wholesaler, wholesaler of motor vehicle fuel or refiner, at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare and is unfair competition and contrary to public policy and the policy of this section. Such sales are prohibited….
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> WISCONSIN STAT. § 100.30(5m) provides:
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> PRIVATE CAUSE OF ACTION. Any person who is injured or threatened with injury as a result of a sale or purchase of motor vehicle fuel in violation of sub. (3) may bring an action against the person who violated sub. (3) for temporary or permanent injunctive relief or an action against the person for 3 times the amount of any monetary loss sustained or an amount equal to $2,000, whichever is greater, multiplied by each day of continued violation, together with costs, including accounting fees and reasonable attorney fees, notwithstanding s. 814.04 (1) . An action under this subsection may not be brought after 180 days after the date of a violation of sub. (3).
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> WISCONSIN STAT. § 100.30(2)(e) provides:
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> (e) "Retailer" includes every person engaged in the business of making sales at retail within this state, but, in the case of a person engaged in the business of selling both at retail and at wholesale, such term shall be applied only to the retail portion of such business.

not a proper party to the claim. It also concluded Sarah had no notice of the lawsuit prior to the expiration of the 180-day statute of limitations and rejected the plaintiffs' motion to apply the relation back statute. We affirm the orders.

¶2 The plaintiffs are a group of convenience store/gasoline stations operating in the Appleton area. They commenced this action initially against Michael, claiming that he had violated Wisconsin's Unfair Sales Act by selling unleaded motor vehicle fuel below cost on two different occasions. In his answer, Michael denied that he had an ownership interest in Badger. After the 180-day statute of limitations had run, the plaintiffs filed an amended complaint adding Sarah, the owner of Badger, as a defendant. Both Michael and Sarah filed a motion to dismiss the complaint, which the court granted. It is undisputed that Michael is an employee of Badger and his daughter, Sarah, is the owner of Badger, a sole proprietorship.

¶3 There are two issues before this court. The first is whether Michael, an employee of Badger, is a retailer within the meaning of WIS. STAT. § 100.30(2)(e), and the second is whether the circuit court reasonably exercised its discretion when refusing to apply the relation back statute, WIS. STAT. § 802.09(3).

¶4 Questions of statutory construction or the application of a statute to undisputed facts are questions of law we decide independently of the circuit court. ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315 (Ct. App. 1997). When we interpret and apply statutes, our aim is to discern the intent of the legislature, and we look first to the language of the statute. ***McEvoy v. Group Health Coop.***, 213 Wis. 2d 507, 528, 570 N.W.2d 397 (1997). If the language clearly and unambiguously sets forth the legislative intent, we apply that language

to the facts at hand. ***Reyes v. Greatway Ins. Co***., 227 Wis. 2d 357, 365, 597 N.W.2d 687 (1999). Only when statutory language is ambiguous may we examine other construction aids, such as legislative history, context, and subject matter. ***State v. Waalen***, 130 Wis. 2d 18, 24, 386 N.W.2d 47 (1986).[3]

¶5 As to the first issue, the plaintiffs contend Michael is a retailer because he assisted his daughter Sarah in running the business, signed his tax return as manager of Badger, lowered the fuel prices under his authority as manager, and admitted he was working on behalf of the owner. In response, Michael argues that he cannot be deemed a retailer under the statutes because an employee is not the owner of the gasoline and does not have an invoice cost of the gasoline, transportation or any other costs related to the cost of the fuel. Additionally, as an employee he does not report the income, claim the business expenses and pay tax on the profits. He also argues that as a matter of public policy it would be absurd to think the legislature meant that people working in the gas station would be subject to the law where they could be penalized $2,000 per day.

¶6 When reading the Unfair Sales Act, it is apparent that the prohibition is directed at a retailer who sells motor vehicle fuel at less than cost, which is arrived at by considering a series of statutory cost factors applicable to the owner,

[3] However, some recent supreme court decisions involving statutory construction seem to suggest that this standard has been "relaxed," i.e., extrinsic aids have been employed without an explicit determination of ambiguity. For example, in ***Village of Lannon v. Wood-Land Contractors, Inc***., 2003 WI 150, 267 Wis. 2d 158, 672 N.W.2d 275, the supreme court indicated: "[w]hen interpreting a statute, our purpose is to discern legislative intent. To this end, we look first to the language of the statute as the best indication of legislative intent. Additionally, we may examine the statute's context and history." ***Id.***, ¶13.

but not to an employee.[4] "Cost" for retail sales of motor vehicle fuel, as relevant to this case, is defined as the higher of two computations, one using the seller's invoice or replacement cost as a base (invoice/replacement formula) and the other using the average posted terminal (APT) price as a base (APT formula). WIS. STAT. § 100.30(2)(am)1m.b and c. Motor vehicle fuel is purchased at terminals. The APT price is defined by statute and, in general terms, is the terminal price as published by a petroleum reporting service, plus taxes, transportation, and other charges not already included. The APT formula then adds a markup of 9.18% to cover the cost of doing business. WIS. STAT. § 100.30(2)(am)1m.b and c.

¶7 To place this burden of computing the cost of fuel on an employee defies common sense, as it is the owner who is in the business of selling at retail,

[4] WISCONSIN STAT. § 100.30(2)(a)1m.c provides:

> With respect to the sale of motor vehicle fuel, "cost to retailer" means the following:
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> ….
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> In the case of the retail sale of motor vehicle fuel by a person other than a refiner or a wholesaler of motor vehicle fuel at a retail station, the invoice cost of the motor vehicle fuel to the retailer within 10 days prior to the date of sale, or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the motor vehicle fuel, plus a markup of 6% of that amount to cover a proportionate part of the cost of doing business; or the average posted terminal price at the terminal located closest to the retailer plus a markup of 9.18% of the average posted terminal price to cover a proportionate part of the cost of doing business; whichever is greater.

not the employee. Therefore, we agree with the circuit court's decision dismissing the claim against Michael, an employee of Badger.

¶8 The next issue is whether the circuit court properly exercised its discretion when refusing to relate the amended complaint back to the time of the filing of the original complaint naming only Michael as the defendant. The amended complaint was filed after the 180-day statute of limitations had run and over ten months after the alleged violations. When refusing to allow the amended complaint to relate back to the time of filing the original complaint, the circuit court concluded that initially the plaintiffs had not taken enough care to determine who was the operator of the business. It also reasoned that service of the original complaint on Michael was insufficient to give notice of the action to Sarah, who did not have notice of the original complaint until after the 180 days had passed.[5]

¶9 The applicable statute, WIS. STAT. § 802.09(3), provides:

> RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

[5] The alleged violations took place on July 4 and 5, 2002, and the amended complaint was filed on May 6, 2003.

¶10 If the claim asserted in the amendment arises out of the same transaction, occurrence, or event set forth in the original pleading, relation back is presumptively appropriate; however, the circuit court has the discretion to deny leave to amend when it would result in prejudice to the other party. ***Korkow v. General Cas. Co.***, 117 Wis. 2d 187, 196-97, 344 N.W.2d 108 (1984). We affirm discretionary decisions if the circuit court applied the correct law to the relevant facts of record in a reasoned manner. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463.

¶11 WISCONSIN STAT. § 802.09(3) spells out four conditions that must be met for an amended pleading to relate back and ameliorate the effect of the statute of limitations: (1) the basic claim must have arisen out of conduct set forth in the original pleadings; (2) the party to be brought in must have received notice so that it will not be prejudiced in maintaining its defense; (3) the party knew or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) most significantly, the second and third requirements must have been fulfilled within the prescribed limitations period.

¶12 There is no question that the claims the plaintiffs are asserting against Sarah are factually and legally the same claims they asserted against Michael in the initial complaint. But, adequate notice in the original complaint of the transaction, events or occurrence out of which the amended claims arise is essential if a party's statutory right to the protections of the statutes of limitations are to be guaranteed. ***Korkow***, 117 Wis. 2d at 199 ("If a party is given fair notice within the statutory time limit of the facts out of which the claim arises ... it is not deprived of any protections the statute of limitations was designed to afford."). Our courts recognize this emphasis on notice and in determining if an amended complaint relates back, we regard as "critical" whether the opposing party was put

on notice regarding the claim raised therein. ***Biggart v. Barstad***, 182 Wis. 2d 421, 430, 513 N.W.2d 681 (Ct. Appeals 1994). In ***Grothe***, 239 Wis. 2d 406, ¶11, we held that the statute requires receipt of notice of the institution of the action within the statute of limitations period.

¶13 According to the plaintiffs, the statute permits an amendment adding a plaintiff to relate back when there is a mistake concerning the proper party. Moreover, they reason that when they served Michael with the original complaint, notice of the action was imputed to Sarah because knowledge of an agent is also knowledge to the principal, citing ***Ivers & Pound Piano Co. v. Peckham***, 29 Wis. 2d 364, 369, 139 N.W.2d 57 (1966). Thus, they conclude Sarah had notice of the action and was not prejudiced.

¶14 We agree with the circuit court that filing the complaint against Michael as the violator of the statute was insufficient to give notice to Sarah of a lawsuit against her. Sarah argues that the general rule of agency does not apply to situations under the relation back statute, WIS. STAT. § 802.09(3). Under ***Hegarty v. Beauchaine***, 2001 WI App 300, 249 Wis. 2d 142, ¶24, ¶27, 638 N.W.2d 355, this court refused to relate back an amendment for statute of limitations purposes where the proper party was reasonably identifiable. The party seeking to avoid the statute of limitations has a "duty to inquire" to prevent the abuse of § 802.09(3) and, correspondingly, protection defendants are otherwise afforded under statutes of limitations. Sarah gives numerous examples of manners in which the plaintiffs could have easily and readily ascertained that she was the business's owner. Because, she argues, the plaintiffs did nothing to make this determination before filing suit, they did not meet their obligation under the relation back statute and may therefore not use it to defeat the statute of limitations.

¶15 The plaintiffs offer no argument countering Sarah's legal contention. Arguments that are not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Moreover, the plaintiffs do not attempt to explain why they did not properly identify the owner. We therefore conclude that the plaintiffs cannot avoid their specific obligation to attempt to ascertain the proper defendant by relying on a general proposition of agency law.

¶16 It is also noted that the plaintiffs did not file their amended complaint until approximately ten months after the alleged violations, even though Michael in his answer to the complaint gave notice to the plaintiffs that he was not a proper party. Obviously, the legislature, by establishing a 180-day statute of limitations, saw a need to establish a shorter time to commence these actions because of the challenges a defendant would face in establishing competitive pricing on the alleged dates of violations and all the related costs to the fuel sold on those dates. As Sarah argues, by the plaintiffs failing to comply with the statute, they have prejudiced her given the amount of time for her to properly mount a defense.

¶17 We are satisfied the circuit court applied the correct law to the relevant facts and properly exercised its discretion by not allowing the amended complaint adding Sarah to relate back to the filing of the original complaint.

By the Court.—Orders affirmed.

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