

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 23, 2012

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. 2012AP550

Cir. Ct. No. 2012SC51

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TERRANCE LOVELL EDWARDS,

PLAINTIFF-APPELLANT,

V.

CATHY JESS, KATHRYN R. ANDERSON AND JEFF JAEGER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Juneau County:
JOHN P. ROEMER, JR., Judge. *Affirmed.*

¶1 KLOPPENBURG, J.¹ Terrance Lovell Edwards appeals a circuit court's order dismissing Edwards's small claims action against three state

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

employees, due to Edwards's failure to pay the necessary fees to transfer the case from Juneau County to Dane County. Edwards's sole issue on appeal is whether WIS. STAT. § 814.29(1m) allows Edwards to avoid prepayment of the necessary fees to change venue. For the reasons stated below, this court affirms.

BACKGROUND

¶2 Edwards is incarcerated at New Lisbon Correctional Institution. The respondents – Cathy Jess, Kathryn R. Anderson, and Jeff Jaeger – are employees of the Department of Corrections (collectively “DOC employees”). On January 12, 2012, Edwards brought a small claims action against the DOC employees alleging breach of contract.

¶3 According to Edwards's complaint, he and the DOC entered into a contract on May 18, 2011, in which the DOC agreed to loan Edwards up to \$200 for one year to fund various litigation expenses. However, later in 2011, the legislature passed 2011 Wis. Act 32, a provision of which capped the annual prisoner litigation loan amount at \$100. *See* WIS. STAT. § 301.328(1m), *as amended* by 2011 Wis. Act 32, § 3014m. According to Edwards's complaint, the DOC rescinded the agreement, required Edwards to reapply for a loan, and ultimately loaned him \$15.00 for his litigation expenses. These events allegedly caused Edwards to miss a Wisconsin Supreme Court deadline. Edwards sought damages in the amount of \$5,000.

¶4 On January 30, 2012, the DOC employees moved to change venue pursuant to WIS. STAT. § 801.51. In their motion, the DOC employees argued that Dane County was the proper venue for actions brought by prisoners against state

employees. *See* WIS. STAT. § 801.50(3)(c). The circuit court granted the motion and ordered Edwards to pay the change-of-venue fees.² The circuit court noted that if Edwards could not pay the change-of-venue fees “up front,” the case would be dismissed without prejudice and could be re-filed in Dane County. Ultimately, Edwards did not pay the transfer fees. Accordingly, the circuit court dismissed the matter without prejudice on March 12, 2012. Edwards now appeals.

DISCUSSION

¶5 Edwards argues that as an indigent prisoner, he was not required to pay the change-of-venue fees, because WIS. STAT. § 814.29(1m) allows for waiver of prepayment of certain fees. Edwards also argues that the change of venue constituted a “special proceeding” to which § 814.29(1m) applies. This case requires an analysis of the interplay between WIS. STAT. §§ 801.61 and 814.29. Statutory interpretation and application are questions of law that an appellate court reviews de novo. *Andersen v. DNR*, 2011 WI 19, ¶26, 332 Wis. 2d 41, 796 N.W.2d 1.

¶6 WISCONSIN STAT. § 801.61 outlines the proper procedure following a court’s order to change venue. Specifically, it provides that when the place of trial is changed, the court file must be transmitted to the proper county of venue, with a statement of fees. *Id.* Payment of change-of-venue fees is required prior to transmitting the file to the new venue. *Id.*

¶7 When the place of trial is changed due to improper venue under WIS. STAT. § 801.51, the plaintiff must pay the change-of-venue fees. *See* WIS. STAT.

² Edwards does not appeal the circuit court’s order granting the change of venue. Rather, his appeal concerns only whether WIS. STAT. § 814.29(1m) allows for waiver of prepayment of the change-of-venue fees.

§ 801.61. Here, Edwards was responsible for the change-of-venue fees, because he improperly filed his action in Juneau County. Because prepayment was required by statute, the case would not be transmitted to the proper venue until Edwards paid the fees.

¶8 Edwards asserts that WIS. STAT. § 814.29 entitles him to waiver of prepayment of the change-of-venue fees. Indeed, § 814.29 allows indigent individuals to avoid prepayment of certain litigation costs:

Except as provided in sub. (1m), any person may commence, prosecute or defend any action or special proceeding in any court, or any writ or error or appeal therein, without being required to give security for costs or to pay any service or fee, upon order of the court based on a finding that because of poverty the person is unable to pay the costs of the action or special proceeding, or any writ of error or appeal therein, or to give security for those costs.

WIS. STAT. § 814.29(1)(a) (emphasis added).

¶9 However, WIS. STAT. § 814.29(1m) limits the circumstances in which indigent prisoners are exempted from prepayment:

(b) *If a prisoner makes a request for leave to commence or defend an action, special proceeding, writ of error or appeal without being required to prepay the fees or costs or without being required to give security for costs, the prisoner shall submit [an affidavit of indigency and a trust account statement]....*

(c) *Except when dismissal is required under s. 801.02(7)(d), the court shall issue an order permitting the prisoner to commence or defend an action, special proceeding, writ of error or appeal without the prepayment of fees or costs or without being required to give security for costs if [certain conditions are met].*

WIS. STAT. § 814.29(1m)(b)-(c) (emphasis added).

¶10 By its plain language, WIS. STAT. § 814.29(1)(a) exempts indigent persons from prepayment when commencing, prosecuting, or defending any action or special proceeding. By equally plain language, § 814.29(1m) allows indigent prisoners to proceed without prepayment only when commencing or defending an action or special proceeding. The verb “prosecute” does not appear in the provision applicable to prisoners. *See id.*

¶11 The difference in language between WIS. STAT. § 814.29(1)(a) and § 814.29(1m) suggests that the legislature deliberately omitted the verb “prosecute” from the list of actions that indigent prisoners may undertake without prepaying the required fees. Notably, the legislature added both paragraph (1)(a) and subsection (1m) to § 814.29 simultaneously in one legislative act. *See* 1997 Wis. Act 133, §§ 34-35. This court presumes that the legislature chose its terms “carefully and precisely to express its meaning.” *County of Dodge v. Michael J.K.*, 209 Wis. 2d 499, 504, 564 N.W.2d 350 (Ct. App. 1997) (*citing State v. McKenzie*, 139 Wis. 2d 171, 177, 407 N.W.2d 274 (Ct. App. 1987)).

¶12 Thus, an indigent prisoner is not exempted from prepaying fees required to prosecute an already commenced action. To interpret the statutory language otherwise would disregard the distinction drawn by the legislature between “person” and “prisoner,” and between “commence, prosecute or defend” and “commence or defend.” *See Graziano v. Town of Long Lake*, 191 Wis. 2d 812, 822, 530 N.W.2d 55 (Ct. App. 1995) (“[W]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings.”); *see also Outagamie County v. Town of Greenville*, 2000 WI App 65, ¶9, 233 Wis. 2d 566, 608 N.W.2d 414 (“[I]f a statute contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.”) (citations omitted).

¶13 Applying these legal principles to the present matter, Edwards, as an indigent prisoner, could commence or defend an action or special proceeding without prepayment of fees or costs. However, at the time of the change-of-venue order, Edwards had already commenced the action. Moreover, as plaintiff, Edwards was not defending the action. In sum, Edwards was not performing either action set forth in WIS. STAT. § 814.29(1m) that would allow him to proceed without prepayment of fees or costs. Therefore, Edwards was required to pay the change-of-venue fees up front to transmit the case to the proper venue.

¶14 Edwards asserts that the motion and order for change of venue constituted a “special proceeding” to which WIS. STAT. § 814.29(1m)(b) applies. This court disagrees. Historically, special proceedings included only those proceedings that were not an action at law or a suit in equity under traditional common law or equity practice. *Ryder v. Society Ins.*, 211 Wis. 2d 617, 618-19, 565 N.W.2d 277 (Ct. App. 1997). Today, special proceedings are defined as “[a] proceeding that can be commenced independently of a pending action and from which a final order may be appealed immediately.” BLACK’S LAW DICTIONARY 1324 (9th ed. 2009). Special proceedings do not include matters that are incident to an existing action. *Ryder*, 211 Wis. 2d at 619. Based on these principles, the motion and order to change venue did not constitute a “special proceeding.” Rather, the motion and order were incident to the ongoing small claims action. Even if the change-of-venue motion and order constituted a special proceeding, Edwards was neither commencing nor defending the action and therefore would still be required to prepay the change-of-venue fees.

¶15 The statutes make it clear that Edwards is unable to waive prepayment of change-of-venue fees. However, Edwards is not without a remedy. Because the circuit court dismissed Edwards’s action without prejudice, Edwards may re-file his action in Dane County.

¶16 In conclusion, WIS. STAT. § 801.61 requires prepayment of change-of-venue fees. The waiver of prepayment provisions set forth in WIS. STAT. § 814.29(1m) do not apply to Edwards's change-of-venue fees. Thus, Edwards was required to pay those fees before the file would be transmitted from Juneau County to Dane County. Because he failed to pay those fees, the circuit court properly dismissed the case without prejudice. Accordingly, this court affirms the circuit court's order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

