

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-2988

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**GOGEBIC-IRON WASTEWATER AUTHORITY, A PUBLIC
BODY CORPORATE OF THE STATE OF MICHIGAN, DOING
BUSINESS IN WISCONSIN, AND MICHIGAN MUNICIPAL
LIABILITY AND PROPERTY POOL, A MICHIGAN
INSURER, SUBROGEE OF GOGEBIC-IRON WASTEWATER
AUTHORITY, SUBROGOR,**

PLAINTIFFS-APPELLANTS,

V.

**C.D. SMITH CONSTRUCTION, INC., A WISCONSIN
CORPORATION, DELTA FIBERGLASS STRUCTURES, INC.,
A FOREIGN CORPORATION LICENSED TO DO BUSINESS
IN WISCONSIN, FOTH & VAN DYKE AND ASSOCIATES,
INC., A WISCONSIN CORPORATION, AND JOHN
SULLIVAN, INDIVIDUALLY AND AS AN AGENT
REPRESENTATIVE AND EMPLOYEE OF U.P. ENGINEERS &
ARCHITECTS, INC., A MICHIGAN CORPORATION,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Iron County:
PATRICK J. MADDEN, Judge. *Affirmed.*

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

HOOVER, J. This is a construction defect action by a Michigan public corporation, Gogebic-Iron Wastewater Authority, and its Michigan insurer, Michigan Municipal Liability and Property Pool (collectively, the Authority) for the repair or replacement of clarifier domes on a waste treatment plant in Michigan. They bring the litigation in Wisconsin to avoid a less favorable statute of repose in Michigan. They sue: (1) the Wisconsin domiciled engineer, Foth & Van Dyke and Associates, and general contractor, C.D. Smith, in Wisconsin despite forum selection contract provisions designating Michigan as the forum in which to litigate contract claims; (2) the Michigan engineer, John Sullivan, and his firm, U.P. Engineers & Architects, Inc., with few or no Wisconsin contacts, retained to review the clarifier dome's compliance with Michigan law; and (3) the Utah manufacturer of the dome, Delta Fiberglas Structures, Inc.

The Authority appeals a judgment dismissing the defendants from its suit on various grounds. The circuit court dismissed: (1) Sullivan and U.P. based on its lack of personal jurisdiction over them; (2) Foth and Smith because of their contracts' forum selection provisions; and (3) Delta, holding that it would be unfair and inequitable to permit suit against Delta when the other necessary and indispensable parties had been dismissed. The Authority contends that Sullivan and U.P. are subject to Wisconsin jurisdiction because they conduct substantial activities in Wisconsin and they caused injury in Wisconsin. It also argues that the forum selection provision authorizes the action to be brought in either Wisconsin or Michigan because the clauses require that the action is to be commenced in the owner's state and the City of Hurley is an owner. The Authority further contends that Delta never argued before the circuit court, and the court never determined, that the other parties were indispensable; and it cannot obtain relief in Michigan.

The Authority further maintains that the court erred by considering and rendering orders without permitting the Authority a hearing on its objection to the proposed order or its motion for reconsideration or clarification.

We conclude that the court lacked personal jurisdiction over the Michigan engineer and his firm because they lack adequate contacts with Wisconsin and there was no injury in Wisconsin. Therefore, their dismissal was appropriate. The court also properly dismissed the Wisconsin engineer and general contractor because their contracts with the Authority required litigation involving the contract to be brought in Michigan. Finally, the Utah manufacturer was appropriately dismissed under § 803.03, STATS., because the Authority could not sue the other necessary parties in Wisconsin and it would be unfair and inequitable to permit the action to proceed solely against Delta in Wisconsin. Finally, the court's written orders conformed to its oral decision and it was not required to hold a hearing to rehear arguments already made. Accordingly, we affirm the judgment.

FACTS

On January 18, 1996, secondary clarifier domes on a waste treatment plant collapsed. The plant is located in Iron Mountain, Michigan, and is owned by the Authority, a Michigan public corporation. The facility services several Michigan governmental units and the City of Hurley, Wisconsin, all of which are members of the Authority. Following the collapse, the Authority determined that all the domes supplied were capable of supporting only 15% of their design load.

The domes were installed in 1986. They were supplied by Delta pursuant to a purchase order from Smith. The weight and distribution of the loads the domes could support were required to conform to standards set by the State of

Michigan. Delta provided Foth with a set of calculations regarding the domes before construction. The Authority and Foth required that the calculations be reviewed by an engineer licensed in Michigan; Delta contracted with U.P and Sullivan to perform this service. They reviewed the calculations in Houghton, Michigan, their principal place of business.

Both Foth and Smith had contracts with the Authority. The other defendants did not. Smith's and Foth's contracts both contained forum selection provisions providing that the forum for disputes arising out of, or related to the contract would be the state where the owner is located.

The project was substantially finished in the late 1980s. Although Foth certified the project as substantially complete on October 24, 1986, Foth was still preparing and circulating unsigned and incomplete certificates of completion as late as 1990.

The Authority filed suit in Iron County, Wisconsin, in July 1997. In essence, the suit contends that the engineers/architects, dome supplier and general contractor are liable for providing and installing the defective domes. The Authority seeks damages for the repair of the collapsed domes as well as for the cost to repair or replace the primary domes, which did not collapse. The Authority apparently filed the litigation in Wisconsin because of its ten-year statute.¹ Michigan has a six-year statute of repose for construction defects.²

¹ Section 893.89, STATS., provides, in pertinent part:

(1) In this section, "exposure period" means the 10 years immediately following the date of substantial completion of the improvement to real property.

(continued)

(2) Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or

for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.

(3)(a) Except as provided in pars. (b) and (c), if a person sustains damages as the result of a deficiency or defect in an improvement to real property, and the statute of limitations applicable to the damages bars commencement of the cause of action before the end of the exposure period, the statute of limitations applicable to the damages applies.

(b) If, as the result of a deficiency or defect in an improvement to real property, a person sustains damages during the period beginning on the first day of the 8th year and ending on the last day of the 10th year after the substantial completion of the improvement to real property, the time for commencing the action for the damages is extended for 3 years after the date on which the damages occurred.

² Mich. Comp. Laws § 600.5839 (1997) provides in pertinent part:

Sec. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

The defendants' answers raised a variety of jurisdictional issues. The court, on its own motion, raised the issue of whether Wisconsin was the proper forum for this case. After briefing and a hearing, the circuit court determined that Wisconsin was not the proper forum. The court stated "it is just obvious from all the facts and the authorities cited that the appropriate jurisdiction for this action is in the State of Michigan, and, therefore, the Court will decline to exercise jurisdiction in this case."

The court subsequently entered written orders. The first order was signed on August 27, 1998. The order was prepared by one of the defendants and dismissed both Foth and Smith because their contracts with the Authority provided that Michigan is the proper venue for contract disputes and, in the exercise of its discretion, the "court determines that the court shall decline to exercise its jurisdiction with respect to the claims and cross-claims of all parties. The court determines that all claims and cross-claims are more properly the subject of legal proceedings which may be filed in an appropriate court in the state of Michigan."

The court rendered the order over the Authority's objection. The court subsequently scheduled a hearing regarding the Authority's objection but later decided to cancel it. The Authority moved the court to reconsider and clarify its decision. Instead, the court issued a supplemental order on September 2, 1998. The order dismissed, without prejudice: (1) Sullivan and U.P. because they did not have sufficient contacts with Wisconsin to warrant application of § 801.05(4), STATS.; and (2) Delta pursuant to § 803.03, STATS., because the other defendants are necessary and indispensable parties, and judgment rendered in their absence will be inadequate and prejudicial to Delta as all of the defendants were instrumental in designing or constructing the domes and all could be found

negligent. The court also declined to hear the Authority's motion for reconsideration or clarification.

STANDARD OF REVIEW

The Authority raises several questions with separate standards of review. Initially, it raises questions of jurisdiction, then contract interpretation and finally, the indispensability of the defendants other than Delta. Personal jurisdiction is a question of law that we review de novo. *Marsh v. Farm Bureau Mut. Ins. Co.*, 179 Wis.2d 42, 52, 505 N.W.2d 162, 165 (Ct. App. 1993). Similarly, contract interpretation is a question of law we review without deference to the circuit court. *Ondrasek v. Tenneson*, 158 Wis.2d 690, 694, 462 N.W.2d 915, 917 (Ct. App. 1990).

Whether a party is necessary and indispensable under § 803.03(1), STATS., is within the trial court's discretion. *See, e.g., Wisconsin State Journal v. University of Wisconsin-Platteville*, 160 Wis.2d 31, 44, 465 N.W.2d 266, 271 (Ct. App. 1990). Its decision will be affirmed if it examined relevant facts, applied the proper legal standard and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

ANALYSIS

We will first examine the jurisdictional issues. Among all of the defendants, only U.P. and Sullivan contest personal jurisdiction. Second, we will examine whether the forum selection provision in Smith's and Foth's contracts prevent the Authority from suing them in Wisconsin. Third, we will examine whether U.P., Sullivan, Foth and Smith are necessary and indispensable parties to

the litigation and, if so, whether proceeding in their absence is unfair to Delta. Finally, we will address the Authority's contentions that the court erred by signing the written orders without hearing its objection and declining to hear its reconsideration/clarification motion.

Personal Jurisdiction Issues

Whether Wisconsin courts have personal jurisdiction over a nonresident defendant is a two-step inquiry. *Marsh*, 179 Wis.2d at 52, 505 N.W.2d at 165. First, the nonresident's contacts with Wisconsin must be determined under Wisconsin's long-arm statute, § 801.05, STATS. *Id.* The long-arm statute is to be liberally construed in favor of exercising jurisdiction. *Lincoln v. Seawright*, 104 Wis.2d 4, 9, 310 N.W.2d 596, 599 (1981). Second, if the long-arm statute extends to the defendant, we must determine whether the exercise of jurisdiction comports with due process requirements. *Id.*

Section 801.05, STATS., the long-arm statute, provides in pertinent part:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

(1) LOCAL PRESENCE OR STATUS. In any action whether arising within or without this state, against a defendant who when the action is commenced:

....

(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

....

(4) LOCAL INJURY; FOREIGN ACT. In any action claiming injury to person or property within this state arising out of

an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

The burden is on the plaintiff to establish jurisdiction under this state's long-arm statute. *Vermont Yogurt Co. v. Blanke Baer Fruit & Flavor*, 107 Wis.2d 603, 606, 321 N.W.2d 315, 317 (Ct. App. 1982).

The Authority contends the court had personal jurisdiction over U.P. and Sullivan under both § 801.05(1) and (4), STATS. First, under subsec. (1), the Authority contends that Sullivan and U.P. “were plainly engaged in substantial and not isolated activities within Wisconsin at the time the action was commenced.”³ In this regard, the Authority points to work U.P. did for Wisconsin clients. Second, under subsec. (4), the Authority asserts that the domes’ failure constituted an injury to property in Wisconsin arising out of service activities that U.P. and Sullivan carried on within Wisconsin. This contention rests upon the Authority’s premise that injury to its property constitutes “direct injury” to the City of Hurley. We reject these arguments and agree with the trial court that it did not have personal jurisdiction over U.P. and Sullivan.

First, we reject the Authority’s position that U.P. and Sullivan are engaged in substantial and not isolated activities in Wisconsin under § 801.05(1)(d), STATS. Our focus under this subsection is solely with the defendants’ contacts with Wisconsin. *Vermont Yogurt*, 107 Wis.2d at 606, 321

³ The Authority, in its brief, mistakenly attributes subsec. (5) with the language “engaged in substantial and not isolated activities within this state.”

N.W.2d at 317. There is no evidence at all of any contact Sullivan has with Wisconsin. He is not licensed here, and has never engaged in business activities in Wisconsin. We see no basis for jurisdiction over him under subsec. (1)(d).

U.P. has some Wisconsin contacts. Although it does not solicit business here, it has several Wisconsin clients. Normally, we would expect that U.P.'s work with several Wisconsin clients would generate sufficient contacts with Wisconsin to meet the statute. Here, however, there is no evidence in the record before us that any of these projects for Wisconsin clients were in fact performed in Wisconsin or involve any contact by U.P. with Wisconsin. Based on this record, we cannot say that the Authority has met its burden to show that U.P. has anything more than isolated contacts with Wisconsin.

We further reject the Authority's contention that the dome collapse at the Michigan site caused injury to person or property within Wisconsin under § 801.05(4), STATS. No person suffered bodily or personal injury and no property was damaged in Wisconsin. Nor was there direct financial loss to any person in Wisconsin. The Authority's position is apparently that the City of Hurley is a person and, as a member of the Authority, it was injured when the Authority's domes collapsed, presumably because it may sustain financial loss to repair or replace the domes. It directs us to no case law that so holds and, under its reasoning, a corporation that has no ties to Wisconsin other than a single Wisconsin stockholder could bring action in Wisconsin against anyone who wrongs it because the Wisconsin shareholder sustains a financial injury. We decline to interpret the statute in such a manner.

We conclude that the Authority has not met its burden to establish jurisdiction under § 801.05, STATS. Therefore it is unnecessary for us to

determine whether these defendants' contacts are adequate to exercise jurisdiction using the due process analysis.

Contract Issues

We next examine whether the contracts' forum selection provisions require Foth and Smith to be sued in Michigan. The Authority's contract with Foth states:

Except as may be otherwise provided in this contract, all claims, counterclaims, disputes and other matters in question between the owner and the engineer arising out of or relating to this contract or the breach thereof will be decided by arbitration if the parties mutually agree or in a court of competent jurisdiction within the State in which the owner is located.

Smith's contract provision is virtually identical, replacing "contract" with "agreement" and "contractor" with "engineer."

In general, forum selection clauses that confer personal jurisdiction are enforceable unless found to be unconscionable. *Leasefirst v. Hartford Rexall Drugs*, 168 Wis.2d 83, 88, 483 N.W.2d 585, 587 (Ct. App. 1992). The ultimate aim of contract interpretation is to ascertain the parties' intent. *Patti v. Western Machine Co.*, 72 Wis.2d 348, 351, 241 N.W.2d 158, 160 (1976). When the contract's terms are plain and unambiguous, this court will construe the contract as it stands. *Borchardt v. Wilk*, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990).

The Authority does not challenge enforcement of the forum selection clause,⁴ but asserts it authorizes litigation in either Wisconsin or Michigan because Hurley is an “owner.” The Authority contends that its members are the real owners and because Hurley is a member/“owner,” Wisconsin is an appropriate forum in which to pursue this action. Smith and Foth contend that the forum selection clause requires that the suit be brought in Michigan because the Authority, incorporated and located in Michigan, is the owner.

We conclude that “owner” refers exclusively to the Authority and not Hurley or other members. All the construction documents of record reference the Authority as the owner and the entity signing both contracts as owner was “Gogebic—Iron Wastewater Authority.” This language is unambiguous. Although Hurley may have an ownership interest in the Authority, the latter, as a Michigan public corporation, is a legal entity, distinct from its individual owners. *See Consumer’s Co-op v. Olsen*, 142 Wis.2d 465, 475, 419 N.W.2d 211, 213 (1988) (the general rule is that a corporation is treated as a legal entity distinct from its members). Because the Authority is the owner and is located in Michigan, it must bring its action against Smith and Foth in Michigan. The circuit court’s dismissal was appropriate.

Indispensable party

In the circuit court’s supplemental order it concluded that Smith, Foth, Sullivan and U.P. were necessary and indispensable parties to the Authority’s suit. From this, it further held that:

⁴ The Authority does not contend that the forum selection provision in its contract is somehow unconscionable or the result of unequal bargaining power.

A judgment rendered in their absence will be inadequate and prejudicial to Delta Fiberglass Structures, Inc. as all defendants were instrumental in the design and construction of the fiberglass domes and all defendants could potentially be found negligent in this matter. It would therefore be inequitable to proceed with an action where all parties were not defendants.

The Authority does not challenge the court's determinations. Rather, so far as we can perceive, it attacks Delta's dismissal primarily on the basis that the issue of whether Smith, Foth, Sullivan and U.P. were necessary and indispensable parties was not addressed by any defendant or the circuit court.⁵ The Authority is wrong. Our review of the record reflects that Delta argued in its trial court brief that Delta and Sullivan and U.P. were necessary and indispensable

⁵ The Authority appears to advance two other arguments. The first involves *forum non conveniens*. The Authority's argument in this regard does not address the basis upon which the court dismissed Delta.

Delta contended before the circuit court that dismissal was warranted under the factors set forth in § 803.03(3), STATS., relating to when an action may be dismissed because of the inability to feasibly join an indispensable party. Rather than dispute Delta's position regarding the application of the § 803.03(3) factors, the Authority merely asserted that the statute of limitations would bar its claim in Michigan. Because the Authority offers no argument on the other factors, we deem it has conceded Delta's position on the others. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). The trial court's order demonstrates that it considered several statutory factors, including whether judgment in the person's absence will be adequate and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. It was also aware of the Authority's statute of repose argument. The lack of an alternative forum is not conclusive. See *American Optical Co. v. Curtiss*, 59 F.R.D. 644, 648 (N.Y. 1973). It appears under the statute that the weight to be given each factor is left to the trial court's discretion. The court implicitly decided that the other factors outweighed the Authority's statute of repose concerns.

Our review is limited to whether the circuit court erroneously exercised discretion. A Michigan court would have jurisdiction over all the defendants and be able to render complete relief in one action. In addition, on appeal the Authority has not responded to Delta's arguments that despite the Authority's protestations, the application of Michigan's statute of repose is not as clear as the Authority contends. Delta points out that the complaint alleges that the substantial completion certificates for the project were still being circulated in 1990. Furthermore, if the action is barred by the repose statute, the equities favor Michigan as the appropriate jurisdiction since it is the jurisdiction the Authority itself chose in its contracts and is where the injury occurred. We cannot say that the circuit court erred in its exercise of discretion.

parties. Delta then proceeded to analyze the various factors set forth in § 803.03, STATS., to conclude that the action was appropriately dismissed. The circuit court also specifically cited to the statute in its supplemental order, stating that Smith, Foth, Sullivan and U.P. are necessary and indispensable parties. The Authority's contention that the indispensability of various defendants was not addressed by the parties or the trial court is therefore without merit.

The court's orders

The Authority contends that the circuit court erred by failing to hear its objections to the entry of the two proposed orders. The Authority claims the proposed orders did not comport with the circuit court's oral ruling from the bench; they transgressed the limits and boundaries of the court's order. We reject this contention. An examination of the court's oral ruling indicates that it based its decision on the briefs and the argument made before it. Foth and Smith contended they should be dismissed on the basis of their contract provisions, Sullivan and U.P. contended they should be dismissed based on the court's lack of personal jurisdiction, and Delta asserted dismissal was proper under § 803.03, STATS. We fail to understand how the orders transgressed the circuit court's oral decision when it was based upon the parties' arguments and the orders reflected those arguments. The Authority does not explain how the orders transgressed the oral decision. It merely asserts they did. We generally do not develop a party's arguments for them or consider issues that are inadequately briefed. *See State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). We decline to do so here.

Finally, the Authority asserts that the circuit court erred when it declined to hear the Authority's reconsideration/clarification motions. We take

this declination, along with the court's supplemental order, to be denials of the Authority's motion. *See* § 806.07, STATS. The Authority's motion added nothing new to its previous arguments. The Authority directs us to no authority indicating the court was required to hold another hearing on these matters and we decline to develop its argument for it. *See Pettit*, 171 Wis.2d at 646, 492 N.W.2d at 642.

In conclusion, the circuit court appropriately dismissed this action and ordered the matter transferred to Michigan. The Authority failed to prove that U.P. and Sullivan were subject to Wisconsin jurisdiction under the long-arm statute. Foth's and Smith's contracts required the action to be brought in Michigan. The trial court properly exercised its discretion by concluding that it would be unfair and inequitable to Delta if the suit proceeded solely against it. Finally, the court's written orders conformed to its oral decision, and it was not required to hold a hearing to revisit arguments already made. Accordingly we affirm the orders.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

