

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0083-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CHARLES SCHROEDER,

PLAINTIFF-RESPONDENT,

V.

LINDA WACKER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed in part; reversed in part and cause remanded.*

¶1 ANDERSON, J.¹ Linda Wacker challenges the circuit court's grant of a writ of attachment to Charles Schroeder and the court's denial of her motion

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

to reconsider the assessment of damages. Wacker failed to expeditiously challenge the issuance of the writ of attachment and has waived the right to appeal from the issuance of the writ. Nevertheless, the circuit court erred in its refusal to assess damages that Wacker suffered when her property was seized pursuant to the writ of attachment. Therefore, we reverse that part of the court's orders denying Wacker's motion for the assessment of damages.

¶2 Schroeder started a small claims action in August 1998 seeking to recover compensatory and punitive damages for breach of contract and intentional misrepresentation. He alleged that a horse he purchased at an auction became lame from a degenerative disease and that Wacker, as the owner, intentionally covered up the horse's condition at the time of the sale.

¶3 On September 14, 1999, Schroeder made an ex parte request for a writ of attachment pursuant to WIS. STAT. § 811.02. In support of his request, he executed an affidavit in which he stated,

4. I have personal knowledge that the defendant intends to liquidate all or substantially all of the property that she owns in this state on Saturday, September 18, 1999. Please see attached notice of sale.

5. I have good reason to believe that the defendant is about to dispose of or conceal her property or some part thereof with intent to defraud her creditors and/or is about to remove property out of this state with the intent to defraud her creditors.

Attached to the affidavit was an advertisement for a "Complete Performance Horse Dispersal Sale" to be held at Wild Wind Ranch, LLC, on September 17, 1999. Also attached was a surety bond in the amount of \$15,000. The circuit court granted the ex parte request and issued a writ of attachment on the same date. The Waukesha County Sheriff's Department levied the writ on September

16, 1999. The sheriff seized “1 Reveal 4-N-1 Hydraulic Drag belonging to Linda Wacker” and had it placed in storage.

¶4 Wacker filed a “Motion to Vacate the Writ of Attachment and for Damages as a Result of the Taking” on October 26, 1999. In the motion, she represented that after a trial on the underlying small claims action on September 28, 1999, all of Schroeder’s claims were dismissed, and the presiding court commissioner had found in her favor. She asked the court to vacate the writ because “the plaintiff’s claims [were] found to be without merit,” and he “fail[ed] to meet the basic standards for a writ of attachment as outlined in WIS. STAT. § 811.03.” She also sought damages she suffered as a result of the “unjustified detainment of her property.”

¶5 The circuit court vacated the writ of attachment but denied Wacker’s requests for damages. Wacker filed a motion for reconsideration and attached to that motion an affidavit and invoices specifying her damages in the amount of \$1772.10. The circuit court denied Wacker’s motion for reconsideration.

¶6 On appeal, Wacker raises two issues. First, she contends that the court erroneously granted the writ of attachment. Second, she asserts that she is entitled to reimbursement for losses and costs resulting from the detainment of her property.

¶7 We will not address Wacker’s contention that the court erroneously granted the writ of attachment for two reasons. First, whether the writ should have been issued is moot because on this issue Wacker has all the relief she is entitled to: the vacation of the writ and the return of the property. *See Riley v. Lawson*, 210 Wis. 2d 478, 490, 565 N.W.2d 266 (Ct. App. 1997) (“[A] case is moot when a

party has obtained the relief to which he or she is entitled. Generally, this court will not consider a moot issue.”).²

¶8 Second, in delaying until October 26, 1999, a challenge to the writ of attachment issued on September 14, 1999, Wacker has waived any right she has to complain about the issuance of the writ. Wacker had notice of the writ two days after it was issued when the sheriff seized the hydraulic drag. WISCONSIN STAT. § 811.18 gives a defendant the right to seek “at any time” the vacation or modification of the writ “for any sufficient cause.” Wacker fails to explain why she waited more than thirty days to seek the vacation of the writ. Her timely knowledge of the attachment of her hydraulic drag and her conduct in failing to take prompt action support waiver as a matter of law. *See Batchelor v. Batchelor*, 213 Wis. 2d 251, 259, 570 N.W.2d 568 (Ct. App. 1997).

¶9 The second issue in this appeal is Wacker’s contention that the circuit court erred in denying her the recovery of her losses and costs after she prevailed in the underlying small claims action. Wacker asserts that WIS. STAT. § 811.21 mandates that the court assess the damages she has sustained against Schroeder.

¶10 This issue involves the interpretation or construction of a statute and its application to a set of undisputed facts. As such, it presents a question of law

² This court has the discretion to address issues that are otherwise moot when the issues presented are of great public importance and are likely to arise again. *See Shirley J.C. v. Walworth County*, 172 Wis. 2d 371, 375, 493 N.W.2d 382 (Ct. App. 1992). We can think of several important issues raised by this appeal: (1) Does due process require notice and hearing before a party’s personal property can be seized during the pendency of a lawsuit? and (2) Is an affidavit that recites statutory grounds for issuance of a writ of attachment sufficient? However, we choose not to address these issues because we are convinced that they are not likely to arise again under existing Wisconsin law.

which this court reviews de novo. *See Probst v. Winnebago County*, 208 Wis. 2d 280, 285, 560 N.W.2d 291 (Ct. App. 1997).³

¶11 The sole purpose for determining the meaning of a statute is to ascertain and give effect to the legislature’s intent. *See Cynthia E. v. LaCrosse County Human Servs. Dep’t*, 172 Wis. 2d 218, 225, 493 N.W.2d 56 (1992). To find that intent, we look to the plain language of the statute. *See Peter B. v. State*, 184 Wis. 2d 57, 71, 516 N.W.2d 746 (Ct. App. 1994). If the statute is clear and unambiguous on its face, our inquiry ends, and we must simply apply the statute to the facts of the case. *See id.* This court would be setting a dangerous precedent if it assumed that the legislative body did not mean what it clearly said. *See Buening v. DHSS*, 205 Wis. 2d 32, 58-59, 556 N.W.2d 116 (Ct. App. 1996).

¶12 WISCONSIN STAT. § 811.21 provides:

If the defendant prevails in the action or if the action be discontinued the damages sustained by the defendant by reason of the taking and detention or sale of any property attached by reason of any injury thereto shall be assessed and the defendant shall have judgment therefor.

¶13 The statute is clear and unambiguous. The general rule is that the word “shall” is presumed mandatory when it appears in a statute. *See Scanlon v. Menasha*, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962). While under certain circumstances we may construe “shall” as directory if necessary to carry out the legislature’s intent, no room exists in this statute for such a reading. *See Messner Manor Assocs. v. WHEDA*, 204 Wis. 2d 492, 501, 555 N.W.2d 156 (Ct. App.

³ Wacker has not provided us with a transcript of the hearing on either her motion to vacate the writ and to assess damages or on her motion for reconsideration. Resolution of the applicability of WIS. STAT. § 811.21 is not dependent upon a review of the record. Therefore, this court will assume that every fact essential to sustain the trial court’s decision is supported by the record. *See D.L. v. Huebner*, 110 Wis. 2d 581, 597, 329 N.W.2d 890 (1983).

1996). WISCONSIN STAT. § 811.21 is inflexible in its commands. The language of § 811.21 is mandatory and obligatory. All that is required for Wacker to recover her damages is that she prevail in the underlying action. The circuit court erred in not assessing the damages sustained by Wacker against Schroeder.

¶14 In an attempt to avoid the mandatory language of the statute, Schroeder argues that before Wacker can recover damages she must show a lack of probable cause to support the issuance of a writ and actual malice. In support of this argument, he cites *Collins v. Shannon*, 67 Wis. 441, 30 N.W. 730 (1886). Schroeder's reliance upon *Collins* is misplaced. Although the defendant in that case had obtained the issuance of a writ of attachment in an earlier case, *Collins* was a malicious prosecution case and not an attempt to recover damages caused by the detention of property pursuant to the writ of attachment. In *Collins*, the plaintiff was seeking to recover for the defendant's "wrongfully designing and intending to harass and annoy the plaintiff in his feelings and to injure him in his said business." *Id.* at 442. The concepts of a lack of probable cause and actual malice are two of the elements of malicious prosecution.⁴

⁴ In *Elmer v. Chicago & N.W. Ry. Co.*, 257 Wis. 228, 231, 43 N.W.2d 244 (1950), the Wisconsin Supreme Court stated the six essential elements of malicious prosecution:

1. There must have been a prior institution or continuation of some regular judicial proceedings against the plaintiff in this action for malicious prosecution.
2. Such former proceedings must have been by, or at the instance of, the defendant in this action for malicious prosecution.
3. The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution.
4. *There must have been malice in instituting the former proceedings.*
5. *There must have been want of probable cause for the institution of the former proceedings.*

(continued)

¶15 To require a defendant who has prevailed in the underlying action to prove the plaintiff lacked probable cause for the issuance of a writ and acted in actual malice would also defeat the requirement that the plaintiff post a surety bond. WISCONSIN STAT. § 811.06 provides the details on the bond that must accompany the application for a writ of attachment:

Before the writ of attachment is executed, a bond on the part of the plaintiff in a sum set by the judge or the judicial officer issuing the writ of attachment *in an amount sufficient to provide adequate security to the defendant for any damages the defendant may sustain by reason of the attachment*, shall be filed with the court *to the effect that if the defendant recovers judgment the plaintiff shall pay all damages which the defendant may sustain by reason of the attachment*. (Emphasis added.)

¶16 The instantly recognizable scheme of WIS. STAT. §§ 811.06 and 811.21 is to provide compensation for the loss of use of personal property and for recovery or replacement of the personal property to a defendant who defeats the underlying claims of the plaintiff. The prejudgment attachment of personal property is a drastic action; in this case, it deprived Wacker of the use of her personal property without notice or hearing. A plaintiff who seeks to employ a writ of attachment cannot avoid the consequences if he or she fails to prevail on the underlying claim.

¶17 Schroeder also argues that Wacker failed to present any evidence of her damages because she did not testify at either of the hearings on her motions for damages. This argument ignores the evidentiary affidavit, including invoices for the transportation, storage and shipment of the drag to Texas, accompanying Wacker's motion for reconsideration. Schroeder does not challenge the affidavit

6. There must have been injury or damage resulting to the plaintiff from the former proceedings. (Emphasis added.)

and does not cite to any legal authority that an uncontested evidentiary affidavit is insufficient to prove Wacker's damages.

¶18 In conclusion, we reverse those orders of the circuit court denying Wacker's requests for the assessment of damages. The language of WIS. STAT. § 811.21 is mandatory and obligatory; because Wacker prevailed on the underlying claims, she is entitled to the damages she sustained because of the attachment. We remand this action with directions that the court enter judgment for Wacker's uncontested damages of \$1772.10.⁵

¶19 Costs are denied to both parties.

By the Court.—Orders affirmed in part; reversed in part and cause remanded.

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

⁵ We note that after judgment is entered on behalf of Wacker "she may maintain an action on the plaintiff's bond for the assessed damages sustained by reason of the writ of attachment." WIS. STAT. § 811.22.

