COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1328

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

JULIA K. WLEKLINSKI,

PLAINTIFF-APPELLANT,

V.

TROSTEL, ALBERT & SONS AND
LABOR & INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Julia K. Wleklinski appeals from an order dismissing her Labor and Industry Review Commission review action. On appeal,

Wleklinski contends that the language of WIS. STAT. § 102.23(1) (1997-98)[1] does not, in her circumstances, "cut off the Circuit Court's power under § 802.09(3) to permit the amendment of pleadings to add a party." We cannot agree. We therefore affirm the order of the circuit court.

¶2 Wleklinski unsuccessfully sought worker's compensation from her employer, Albert Trostel & Sons. The administrative law judge's decision was adopted by LIRC. Throughout those proceedings, both Trostel and Trostel's insurer, Sentry Insurance, were named as parties. LIRC's decision was issued on September 2, 1999. Wleklinski claims that she only received it nine days later. In any event, on September 29, Wleklinski filed a summons and complaint seeking judicial review of LIRC's order. That summons and complaint named only Trostel and LIRC as defendants; it omitted any reference to Sentry. On October 8, Wleklinski filed an amended summons and complaint naming Sentry as a party defendant. On October 11, Wleklinski moved to extend the thirty-day time limit for such a filing set out in WIS. STAT. § 102.23(1). On October 13, LIRC moved to dismiss for failure to properly commence the action within the thirty-day time limit of § 102.23(1)(a). The circuit court granted LIRC's motion, and this appeal followed.

¶3 In essence, Wleklinski argues that her failure to join Sentry within the thirty-day time limit of WIS. STAT. § 102.23(1) was not jurisdictional, but rather could have been remedied by virtue of WIS. STAT. § 802.09, which allows pleadings to be amended. We cannot agree. The circuit court concluded that it was without jurisdiction to hear the case on the merits because it lacked subject

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

matter jurisdiction.[2] Whether a court has subject matter jurisdiction is a question that this court decides de novo. *See* ***Weisensel v. DHSS***, 179 Wis. 2d 637, 641-42, 508 N.W.2d 33 (Ct. App. 1993). We conclude that the circuit court was correct in its determination.

¶4 In ***Holley v. DILHR***, 39 Wis. 2d 260, 268, 158 N.W.2d 910 (1968), our supreme court held that a party's failure to name the State as an adverse party within the meaning of WIS. STAT. § 102.23 within thirty days of the order resulted in the circuit court's being without jurisdiction of the subject matter. Wleklinski nowhere disputes that Sentry was such a necessary adverse party, and she nowhere argues that the ***Holley*** rule should not apply with equal force to adverse parties other than the State. Our conclusion is further supported by ***Miller Brewing Co. v. LIRC***, 173 Wis. 2d 700, 495 N.W.2d 660 (1993). There, our supreme court concluded that a plaintiff's failure to name an adverse party insurer in the circuit court action requires a dismissal of the action. *See* ***id.*** at 705-06.

¶5 Wleklinski attempts to distinguish ***Miller*** by arguing that there "a party later deemed indispensable was never joined in the action. That situation is far different than this case where the alleged indispensable party was in fact served and made part of the proceeding at the earliest stage." Wleklinski's argument, however, literally begs the question, which is the "fallacy of founding a conclusion on a basis that as much needs to be proved as the conclusion itself." H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 614 (4th ed. Oxford Univ. 1950). Wleklinski's argument presupposes what it endeavors to prove; namely, that she successfully made Sentry a part of the proceeding. In spite of

[2] Courts have used the terms "subject matter jurisdiction" and "competence" in a variety of ways. *See* ***Miller Brewing Co. v. LIRC***, 173 Wis. 2d 700, 705 n.1, 495 N.W.2d 660 (1993).

Wleklinski's claim, the circuit court concluded that it was without subject matter jurisdiction to proceed because of the holdings of ***Miller*** and ***Holley***. The circuit court was correct in doing so.

¶6 Wleklinski argues that "[n]owhere in ***Miller*** ... is the court precluded from granting an extension of the 30-day period, per § 802.09(3), as was offered in the amended pleadings." Again, we cannot agree. Here, there is no question that Wleklinski's only pertinent act during that thirty-day time limit was to file a summons and complaint which failed to name Sentry as an adverse party. Contrary to Wleklinski's assertion, nothing in ***Miller*** qualifies the clear rule that it sets forth:

> Section 102.23(1)(a) requires that an action be brought and the adverse parties be made defendants within the statutory 30-day period. If an appellant does not comply with sec. 102.23(1)(a) the circuit court cannot proceed with the case; the circuit court must dismiss the action with prejudice and the appellant loses the right to judicial review of LIRC's decision.[3]

Miller, 173 Wis. 2d at 706 (footnote omitted).

¶7 Wleklinski's further argues from WIS. STAT. § 802.09 and ***Korkow v. General Casualty Co.***, 117 Wis. 2d 187, 344 N.W.2d 108 (1984),[4] for the possibility that the court could have extended the thirty-day time limit. These arguments again presuppose that the court has power to act after the thirty-day

[3] As a correlative issue, Wleklinski posits a circumstance where a petitioner might not actually receive a LIRC decision until after the thirty-day time limit has run. Such is not Wleklinski's circumstance, however, nor is that issue before us. This court will not address hypothetical arguments. *See* ***Merrill v. Jerrick***, 231 Wis. 2d 546, 557, 605 N.W.2d 645 (Ct. App. 1999), *review denied*, 234 Wis. 2d 178, 612 N.W.2d 734 (Wis. Apr. 26, 2000) (No. 99-0787).

[4] We note that ***Korkow v. General Casualty Co.***, 117 Wis. 2d 187, 344 N.W.2d 108 (1984), is not an administrative review case.

time period has run. Here, as has been demonstrated, Wleklinski failed to join an adverse party within the thirty-day time limit dictated by WIS. STAT. § 102.23. As shown above, both ***Holley*** and ***Miller*** make clear that the circuit court loses subject matter jurisdiction at that point.[5]

By the Court.—Order affirmed.

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

[5] This precept also disposes of Wleklinski's cognate argument that she was prejudiced because of a delay in the receipt of the order; again, Wleklinski did not raise that point in the circuit court within the thirty-day time limit.