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January 20, 2023

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You are hereby notified that the Court has entered the following order:

No. 2020AP1961 Wascher v. Carved Stone Creations L.C.#2018CV1112

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiffs-appellants-cross-respondents-petitioners, Thomas Wascher and Pamela Wascher, and considered by this court;

IT IS ORDERED that the petition for review is denied, with $50 costs.

REBECCA GRASSL BRADLEY, J. (*dissenting*).

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, Through the Looking-Glass and What Alice Found There 124 (London, Macmillan & Co. 1899).

The phrase "[e]xcept as provided in pars. (b) and (c)" has been interpreted in at least three relevant cases:

- Kalahari Dev., LLC v. Iconica, Inc., 2012 WI App 34, 340 Wis. 2d 454, 811 N.W.2d 825.
- Wascher v. ABC Ins., 2022 WI App 10, 401 Wis. 2d 94, 972 N.W.2d 162.
- State ex rel. Kormanik v. Brash, 2022 WI 67, 404 Wis. 2d 568, 980 N.W.2d 948 (per curiam).

Kalahari and this case, Wascher, interpreted the phrase in Wis. Stat. § 893.89(3) (2015–16), while Kormanik interpreted it in Wis. Stat. § 801.50(3) (2019–20). The phrase could plausibly have two different meanings in two different statutes, depending on context. Brey v. State Farm Mut. Auto. Ins., 2022 WI 7, ¶11, 400 Wis. 2d 417, 970 N.W.2d 1 ("A statute's context and structure are critical to a proper plain-meaning analysis." (citing Milwaukee Dist. Council 48 v. Milwaukee County, 2019 WI 24, ¶11, 385 Wis. 2d 748, 924 N.W.2d 153)). Kalahari and Wascher, however, facially conflict with Kormanik. Each of these decisions is published, and therefore binds lower courts. I would grant the petition for review to examine and resolve this conflict. See Wis. Stat. § (Rule) 809.62(1r)(d) (2019–20) (noting a compelling reason to grant a petition is if "[t]he court of appeals' decision is in conflict with controlling opinions of . . . the supreme court"). I respectfully dissent.

Kalahari and Wascher interpreted the relevant phrase in Wis. Stat. § 893.89(3) (2015–16). That statute states:

> (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.
>
> . . . .

(Emphasis added.)

In Kalahari, a resort owner argued that "because its damage occurred after year 7, and because the timing of that damage falls within the three-year window described in [par.] '(b),' [its] situation is an exception contemplated by the introductory language [in par. (a)]." 340 Wis. 2d 454, ¶18. The court of appeals rejected this seemingly straightforward application of the statute because, in the view of that court, the result did not make "sense." See id. It called the resort owner's interpretation "absurd" and "unreasonable" and held, "[a]s applied to the facts before us, . . . (3)(b) is not, in any logical sense, an exception to . . . (3)(a)." Id., ¶¶18–19. The court explained its justification for the result it reached as follows:

> Subsection (3)(a) makes clear that § 893.89's ten-year time limit is not intended to override shorter applicable statutes of limitations, such as the shorter six-year statute of limitations on contract actions plainly applicable here. Since Kalahari's action was time-barred after six years, it makes no sense to say that the subsection (3)(b) exception, extending the ten-year time limit, applies because the damage occurred after year 7.
>
> More generally, treating subsection (3)(b) as an exception to subsection (3)(a) leads to the absurd result that many lawsuits based on damage that occurs earlier in time would be barred, whereas otherwise identical lawsuits based on damage that occurs later in time would not be barred.

Id., ¶¶19–20. The court acknowledged its holding "might render the '[e]xcept as provided in pars. (b) and (c)' language in . . . (3)(a) meaningless." Id., ¶22.

In this case, the court of appeals followed Kalahari. Wascher, 401 Wis. 2d 94, ¶33 ("Although the Waschers suggest that Kalahari was wrongly decided, we are bound by our own published precedent." (citation omitted)). The court explicitly quoted from Kalahari, noting, "it makes no sense to say that the subsection (3)(b) exception, extending the ten-year time limit, applies because damage occurred after year 7." Id. (quoting Kalahari, 340 Wis. 2d 454, ¶19).

Just this term, this court decided Kormanik, a case involving the same phrase—"[e]xcept as provided in pars. (b) and (c)"—albeit in a different statute. Wisconsin Stat. § 801.50(3) (2019–20) states:

> (a) Except as provided in pars. (b) and (c), all actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law.
>
> (b) All actions relating to the validity or invalidly of a rule or guidance document shall be venued as provided in s. 227.40 (1).
>
> . . . .

(Emphasis added.) This court rejected an argument by the Democratic National Committee (DNC) that an action related to a guidance document's validity was governed by par. (a), not par. (b). Kormanik, 404 Wis. 2d 568, ¶22. As this court explained:

> The legislature chose to begin [par.] (a) with the phrase "Except as provided in pars. (b) and (c),["] . . . . [A]greeing with [the DNC's] argument would require us to ignore the plain meaning of that phrase. We will not do so; a statute cannot incorporate that which it specifically excepts.

Id. This court emphasized the language of § 801.50(3) is "plain." Id., ¶23; see also id., ¶30 (Dallet, J., concurring) (noting agreement with the per curiam opinion because the statutory application was "straightforward").

Kalahari and Wascher cannot be reconciled with Kormanik. The phrase interpreted in all three cases is the same: "Except as provided in pars. (b) and (c)[.]" Additionally, the structure of Wis. Stat. § 893.89(3) (2015–16) seems to be materially indistinguishable from the structure of Wis. Stat. § 801.50(3) (2019–20). Both statutes have three paragraphs, (a), (b), and (c). Both statutes begin in par. (a) with the same introductory phrase, which notes that par. (a) is applicable unless either par. (b) or (c) provides otherwise. Context does not appear to demand different results in these cases.

Kalahari and Wascher remain binding precedent; this court is the only court with the constitutional authority to overturn them. See Cook v. Cook, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). These court of appeals cases, however, exist in tension with this court's decision in Kormanik. Going forward, a lower court interpreting a statute beginning with a phrase like "[e]xcept as provided in pars. (b) and (c)" will have to decide which precedent to apply. Kalahari and Wascher invite results-oriented legal analysis, which this court has repeatedly rejected in favor of applying the law as written. "Although the absurd or unreasonable results canon applies only rarely in rather narrow circumstances, many courts cannot resist the temptation to invoke it to justify a preferred outcome." Container Life Cycle Mgmt., LLC v. Wis. Dep't of Nat. Res., 2022 WI 45, ¶79, 402 Wis. 2d 337, 975 N.W.2d 621 (Rebecca Grassl Bradley, J., dissenting). As we recently recognized in Kormanik, however, "[t]he legislature 'expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.'" Kormanik, 404 Wis. 2d 568, ¶23 (quoting 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951)).

A Westlaw search of the phrase "except as provided" within the Wisconsin statutes renders over 3,000 results. The court should grant this petition for review to address the proper meaning of that phrase and to reject the unsound notion that courts "can make words mean so many different things" in order to reach more palatable results. Carroll, Through the Looking-Glass and What Alice Found There, at 124. The people of Wisconsin decided the legislature "is to be master" over the creation of laws, not the judiciary. See Wis. Const. Art. IV, § 1. I respectfully dissent.

I am authorized to state that Justice PATIENCE DRAKE ROGGENSACK joins this dissent.

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