

FILED
10-13-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

NANCY KORMANIK,

Plaintiff-Petitioner,

-vs-

WISCONSIN ELECTIONS COMMISSION,

Defendant,

and

RISE, INC. and DEMOCRATIC NATIONAL
COMMITTEE

Intervenor-Defendants,

and

COURT OF APPEALS DISTRICTS II & IV,

Respondents.

PLAINTIFF NANCY KORMANIK'S [PROPOSED] REPLY IN
SUPPORT OF PETITION FOR SUPERVISORY WRIT

On Petition from October 10, 2022 Order, Court of Appeals,
District II, Chief Judge Chief Judge William W. Brash, III,
Presiding

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.

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Chief Judge Brash agrees that the Court should resolve this important issue of appellate venue in a precedential opinion. C.J. Brash Resp. 3, 14-15. The only question is how to resolve it.

As Ms. Kormanik explained in her petition, this case challenges WEC guidance, which makes it a declaratory judgment action under section 227.40. And as the text and structure of section 801.50(3) make clear, that means this case falls under only paragraph (3)(b), not paragraph (3)(a). Just three weeks ago, the court of appeals interpreted the statute in the same manner as Ms. Kormanik: "[T]his court is satisfied that this is an action 'relating to the validity or invalidity of a rule or guidance document' under Wis. Stat. § 801.50(3)(b) and, as such, was venued in the Waukesha County circuit court as provided under Wis. Stat. § 227.40(1). This court having concluded that this is an action under Wis. Stat. § 801.50(3)(b), and not under § 801.50(3)(a), the appeal 'shall be heard in the court of appeals district which contains the court from which the judgment or order is appealed' which, in this case, is District II.'" Supp. App. 1-4 (Brash, C.J.). The result of the court of appeals' unpublished transfer orders has been perennial confusion, protracted briefing, and inconsistent rules applied to parties before the court. This Court should issue the supervisory writ to resolve the issue once and for all.

Chief Judge Brash, the DNC, and Rise, Inc. filed responses to Ms. Kormanik's petition. All three fail to analyze the text of sections 801.50(3) and 752.21. Instead, they misapply precedent and raise foreclosed equity arguments. But the statutory text resolves the issue.

- I. Respondents fail to address the unambiguous text and structure of section 801.50(3), which make clear that this case was venued under (3)(b).

Appellate venue is proper in District II, because District II “contains the court from which the judgment or order is appealed.” Wis. Stat. § 752.21(1). Section 752.21(2) provides an exception to that rule, but only for actions venued “under [section] 801.50(3)(a).” All parties agree that this case was venued under section 801.50(3)(b). So paragraph (3)(a)—and the appellate venue exception—do not apply.

No response addresses the unambiguous text and structure of section 801.50(3). Section 801.50(3)(a) applies, “[e]xcept as provided in pars. (b) and (c).” Rise does not reference the exception at all. Chief Judge Brash at least cites the exception, but then brushes the statutory language aside, saying it is “exactly the reasoning of exclusivity that this Court rejected in *DNR*.” C.J. Brash Resp. 12. That overlooks footnote 8 in *DNR*, in which the Court explicitly said “[t]he exceptions mentioned here are not relevant to this case.” *State ex rel. Dep’t of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV [DNR]*, 2018 WI 25, ¶ 16 n.8, 380 Wis. 2d 354, 909 N.W.2d 114. *DNR* does not resolve the issue presented here.

The DNC’s argument is worse than Rise’s silence. The DNC argues that paragraph (3)(b) and (3)(a) can simultaneously apply because paragraph (3)(b) “is incorporated by reference” in paragraph (3)(a). DNC Resp. 22. In support, the DNC cites *the exception*, which it says makes paragraph (b) and (c) “part and parcel of subsection (3) as a whole.” DNC Resp. 22. That rule swallows the exception and eviscerates the legislature’s careful drafting. When the exception that is (3)(b) applies, the general rule that is (3)(a) does not apply. An exception does not

"incorporate" what it excepts. But the respondents' interpretation would make the exception "dead letter." *DNR*, 2018 WI 25, ¶ 48.

The appellate-venue statute resolves any doubt. Section 752.21(2) applies only when the lower court action was venued under section 801.50(3)(a). If the legislature wanted section 752.21(2) to apply to actions venued under paragraph (3)(b), it would have said so. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 ("Statutory language is read where possible to give reasonable effect to every word," and in "interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.") The legislature could have also applied section 752.21(2) to all actions under subsection (3)—paragraphs (a), (b), and (c) included. It did not. Section 752.21(2) glaringly omits any mention of section 801.50(3)(b). And because the circuit court recognized that venue was proper under section 801.50(3)(b), then section 752.21(2), by its own terms, does not apply.

II. Respondents misread and misapply *DNR*.

Instead of analyzing the text, the responses misapply *DNR*. But, as Ms. Kormanik explained in her petition, *DNR* is "not relevant" to section 801.50(3)(b). *DNR*, 2018 WI 25, ¶ 16 n.8. *DNR* analyzed the interaction of sections 227.53(1)(a)3. and 801.50(3)(a). The plaintiffs in *DNR* argued they did not "designate" venue under section 801.50(3)(a) because section 227.53(1)(a)3. deprived them of any choice. The Court properly held that "designate" does not mean "choose," so section 801.50(3)(a) still applied. But the issue of venue choice is wholly irrelevant to this case. *DNR* did not address paragraph (3)(b). And this case does not involve section 227.53(1)(a)3.

Indeed, respondents cite *no case* interpreting sections 801.50(3)(b) and 227.40, which is the issue here. Tellingly, respondents rely on cases that did not even discuss these issues. *See Waity v. LeMahieu*, L.C. No. 2021-CV-589; *Teigen v. Wisconsin Elections Commission*, L.C. No. 2021-CV-958 (Ct. App. Dist. II/IV Jan. 24, 2022). But as Ms. Kormanik has already explained, *no one contested* appellate venue in those cases. Pet. 10. Neither this Court nor the court of appeals is bound by issues not litigated and not decided. And Ms. Kormanik should not and cannot be prejudiced by the failure of other parties in other cases to raise this issue.

III. Respondents' procedural and equitable arguments are meritless.

With no good legal arguments, respondents turn to the equitable factors that bear on interlocutory appeals. Specifically, they argue Ms. Kormanik has not demonstrated an inadequate remedy or irreparable harm. But *DNR* forecloses all those arguments. As Ms. Kormanik explained in her petition, straightforward application of *DNR's* procedure rebuts respondents' equity arguments. Pet. 5-7. The DNC and Rise also point to the court of appeals' stay of the circuit court's injunction as evidence that the equities favor their position. But the stay is merely administrative, pending resolution of the parties' motions for leave to appeal.

In a last-ditch effort to avoid Ms. Kormanik's arguments, respondents argue that she forfeited her arguments by not addressing them in her letter on venue. *See* C.J. Brash Resp. 12-13; DNC Resp. 15-17; Rise Resp. 5 (faulting Ms. Kormanik for not addressing *DNR* or *Teigen*). Not so. This "confuses legal issues with legal arguments." *State v. Weber*, 476 N.W.2d 867, 868 (Wis. 1991). Legal issues incorporate legal

arguments, which means that once an issue is presented for appeal, any "arguments may be made, pro or con, in the disposition of [that] issue." *State v. Weber*, 476 N.W.2d 867, 868 (Wis. 1991). The court of appeals requested "input from the parties as to the proper district to hear the petition and request for stay," App. 202, thus allowing Ms. Kormanik to advance any argument that bears on the proper appellate venue in this case. Ms. Kormanik submitted a straightforward letter applying the statutory text. She did not discuss *DNR* because *DNR*, by its own terms, does not apply to section 801.50(3)(b). And every party admits this is a (3)(b) case. A straightforward application of the statutory text is all that is required to resolve this issue. And Ms. Kormanik is still the only party to analyze that text in any substantial detail. Regardless, the point remains that there was no forfeiture here.¹

Likewise, respondents cite no authority requiring Ms. Kormanik to move for reconsideration before seeking a supervisory writ from this Court. In any event, Chief Judge Brash agrees that the issues Ms. Kormanik raises warrant the Court's attention.

* * *

All parties agree that Ms. Kormanik's action falls under section 801.50(3)(b). That resolves this petition. Under the plain language of the statute, a case under paragraph (3)(b) does not fall under paragraph (3)(a). Respondents' arguments obscure the plain meaning of text. The Court should grant the petition and issue the writ.

¹ Moreover, "it is within this court's discretion to disregard alleged forfeiture or waiver and consider the merits of any issue." *McKee Fam. I, LLC v. City of Fitchburg*, 2017 WI 34, ¶ 32, 374 Wis. 2d 487, 501, 893 N.W.2d 12, 19 (internal quotation marks omitted).

Dated this 13th day of October, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY,
S.C., Attorneys for Plaintiff-Petitioner.

By: *Electronically signed by Kurt A. Goehre*
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CERTIFICATION

I hereby certify that this Reply conforms to the rules contained in §§ 809.19 and 809.62 for a petition produced with a proportional serif font. The length of this brief is 1,417 words.

Dated this 13th day of October, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY,
S.C., Attorneys for Plaintiff-Petitioner.

By: Electronically signed by Kurt A. Goehre
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CERTIFICATE OF SERVICE

I certify that on this 13th day of October 2022, I caused a copy of this petition to be served upon counsel for each of the parties via the Court's electronic filing system and e-mail.

Dated this 13th day of October, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY,
S.C., Attorneys for Plaintiff-Petitioner.

By: Electronically signed by Kurt A. Goehre
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