

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

August 9, 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. 00-1088-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**SHIRLEY MADRIGRANO,**

**PLAINTIFF-RESPONDENT,**

**v.**

**WISCONSIN BELL, INC. D/B/A AMERITECH  
CORPORATION, INC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Kenosha County:  
BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 NETTESHEIM, J.<sup>1</sup> Wisconsin Bell, Inc. appeals from a small claims judgment in favor of Shirley Madrigano. Wisconsin Bell contends that the

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<sup>1</sup> 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.

trial court was without subject matter jurisdiction because Madrigano did not first litigate her grievance before the Public Service Commission (PSC) pursuant to WIS. STAT. § 196.219(4). We hold that Madrigano's failure to invoke the procedures of the statute did not affect the trial court's subject matter jurisdiction. We further uphold the trial court's ruling that Wisconsin Bell's motion was not timely filed. We affirm the judgment.

¶2 The facts are not in dispute. Madrigano's complaint alleged that Wisconsin Bell had improperly charged her for certain telephonic services or materials related to a security system which she had never ordered. Wisconsin Bell denied the allegations and affirmatively pled that Madrigano had failed to exhaust her administrative remedies.

¶3 On the day of trial, Wisconsin Bell filed a written motion and supporting brief asking the trial court to dismiss Madrigano's complaint on jurisdictional grounds. The motion itself is not part of the appellate record. However, the transcript of the hearing reveals that Wisconsin Bell argued that the court did not have jurisdiction because Madrigano had failed to comply with WIS. STAT. § 196.219(4). Wisconsin Bell stated that it had properly raised this issue in its answer by its affirmative defense that Madrigano had failed to exhaust her administrative remedies.

¶4 The trial court held that Wisconsin Bell's motion was untimely.<sup>2</sup> Following the bench trial, the court awarded judgment in favor of Madrigrano.

¶5 Wisconsin Bell appeals, renewing its argument that the trial court was without jurisdiction. Although Wisconsin Bell did not specify in the trial court whether it was challenging the court's personal jurisdiction or subject matter jurisdiction, it casts its appellate argument in terms of subject matter jurisdiction. For purposes of our discussion, we will assume that WIS. STAT. § 196.219(4) required Madrigrano to first litigate her grievance before the PSC.

¶6 "A court has subject matter jurisdiction if it has the power to hear the kind of action brought. Circuit courts in Wisconsin are courts of general jurisdiction and have original subject matter jurisdiction over civil and criminal matters not excepted in the constitution or prohibited by law." *State v. Olexa*, 136 Wis. 2d 475, 479, 402 N.W.2d 733 (Ct. App. 1987). Subject matter jurisdiction cannot be waived. *See Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 157, 605 N.W.2d 210 (Ct. App. 1999), *review denied*, 233 Wis. 2d 85, 608 N.W.2d 474 (Wis. Jan. 18, 2000) (No. 98-2846).

¶7 The underlying issue in this case is whether the parties contracted for the service and materials provided by Wisconsin Bell to Madrigrano. The law authorizes the circuit courts of this state to litigate contract disputes. Therefore,

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<sup>2</sup> We acknowledge that the trial court also ruled that Wisconsin Bell's motion was not supported by any factual allegations and that, at the close of the testimony, the court held that the evidence did not establish the factual premise for the motion. However, even if we addressed the correctness of these additional rulings, we still would have to address the correctness of the court's threshold ruling that Wisconsin Bell's motion was untimely. Because we uphold that ruling, we do not address the court's further rulings.

the trial court had subject matter jurisdiction in this matter. Moreover, the exhaustion of the administrative remedies doctrine is “a rule of policy, convenience, and discretion, *not a rule regulating the jurisdiction of the court.*” *County of Sauk v. Trager*, 118 Wis. 2d 204, 211-12, 346 N.W.2d 756 (1984) (emphasis added). Therefore, any defect occasioned by Madrigano’s failure to first litigate this matter before the PSC was subject to waiver. *See Isermann*, 231 Wis. 2d at 157.

¶8 As noted, the trial court ruled that Wisconsin Bell’s motion challenging the court’s jurisdiction was untimely. We read that ruling as a declaration that Wisconsin Bell had waived the defect. WISCONSIN STAT. § 801.01(2) says that the rules of civil procedure set out in WIS. STAT. chs. 801 to 847 apply in all actions “except where [a] different procedure is prescribed by statute or rule.” Complimenting this statute, a small claims statute, WIS. STAT. § 799.04(1), says that “[e]xcept as otherwise provided in this chapter, the general rules of practice and procedure in chs. ... 801 to 847 shall apply to actions and proceedings under this chapter.” WISCONSIN STAT. § 801.15(4) requires that “[a] written motion ... and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by statute or by order of the court.” We are unaware of any statute or rule that dispenses with this requirement in a small claims action.<sup>3</sup>

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<sup>3</sup> We acknowledge that WIS. STAT. § 799.06(1) provides that in small claims actions, “All pleadings except the initial complaint may be oral.” However, in the context of this statute which addresses how a small claims action is commenced, we deem the word “pleadings” to pertain to those documents which frame the issues between the parties. We do not deem a motion to dismiss filed moments before a trial begins as a pleading under this statute.

We also acknowledge that WIS. STAT. § 799.20(1) contemplates a motion to dismiss being presented on the return date. Even if this statute envisions an oral motion, the motion to dismiss in this case was not presented on the return date.

¶9 Surprisingly, Madrigrano does not address this aspect of the trial court's favorable ruling. In some situations, we might choose to ignore a trial court's ruling and instead address the issue as the parties bring it to us. But it would be unfair to the trial court to employ that procedure in this case. When Wisconsin Bell presented its motion just moments before the trial was scheduled to commence, the court expressed its chagrin:

I have a little problem when you have got a five-day notice on a motion required by law for you to walk in here three or four minutes before the hearing and give ... counsel a copy of your motion and give me the motion the minute I walk on the bench ready to try the case. And there are a couple things wrong with it. Number one ... you are not giving sufficient motion time. Number two, it invites me to commit error. And I'll tell you a couple of reasons why. You have given me about 12 pages of written material, single-spaced, much of it in highly technical terms. And on the day of trial you are asking me to make a decision whether you are correct or not.

¶10 We agree with the concerns expressed by the trial court. While the notice provisions of WIS. STAT. § 801.15(4) principally protect the party against whom a motion is directed, the benefits of the statute also inure to the trial court. Here, Wisconsin Bell's motion put the court in the unhappy waters between Scylla and Charybdis. On the one hand, if the court chose to take the necessary time to digest the substantial volume of material submitted and to hear the arguments on the motion, the court may well have been required to adjourn the trial. On the other hand, if the court chose to "shoot from the hip" without reviewing the materials, it risked a hasty and perhaps erroneous decision.

¶11 Although Wisconsin Bell did not expressly ask the trial court to shorten the five-day time limit as authorized by the statute, the last-minute presentation of the motion implicitly put that question before the trial court. A request to shorten the five-day limit under the statute is committed to the court's

discretion. See *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 112, 479 N.W.2d 557 (Ct. App. 1991). Given the dilemma presented by the tardy filing of the motion, we see no misuse of discretion in the court's decision to reject the motion as untimely. We conclude by echoing our statement in *Eden Stone*:

Perhaps in earlier and more leisurely times, the type of adjournment sought in this case would have been routinely granted. However, given the volume of litigation burdening the trial courts, the bar and litigants must understand that Wisconsin trial judges will monitor their calendars to avoid the damaging effects of unwarranted delay. In this, the trial court properly exercised its responsibilities in this regard.

*Id.* at 114.

¶12 We hold that the trial court did not misuse its discretion in rejecting Wisconsin Bell's motion as untimely.

*By the Court.*—Judgment affirmed.

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

