

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 9, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 01-2074  
STATE OF WISCONSIN**

**Cir. Ct. No. 97-CV-235**

**IN COURT OF APPEALS  
DISTRICT III**

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**HUGH R. MOMMSEN, KAREN J. MOMMSEN, AND  
JOHN MOMMSEN,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**DUANE SCHUELLER, AS COMMISSIONER OF THE BARRON  
COUNTY HIGHWAY DEPARTMENT, BARRON COUNTY  
HIGHWAY COMMITTEE, AND BARRON COUNTY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Barron County:  
JAMES C. EATON, Judge. *Affirmed.*

Before Cane, C.J, Hoover, P.J. and Peterson, J.

¶1 PER CURIAM. Hugh R. Mommsen, Karen J. Mommsen and John Mommsen appeal an order dismissing three of their claims against Duane Schueller, the Barron County Highway Committee and Barron County

(collectively, the County). The Mommsens argue that WIS. STAT. § 808.08(3) did not mandate dismissal of their claims. We reject their arguments and affirm the order.

### BACKGROUND

¶2 The underlying case involved the Mommsens' challenge to the revocation of a driveway permit that had been issued to them by the County. The County originally approved the permit, believing that the driveway would access only one dwelling. After learning that the access would serve at least eleven residences, the County revoked the permit pursuant to a County ordinance. The Mommsens initially filed suit seeking: (1) mandamus to reissue the permit; (2) certiorari review of the County's highway committee proceedings; and (3) declaratory judgment that the County's ordinance was illegal. In an amended complaint, the Mommsens added a claim seeking damages for inverse condemnation.

¶3 The Mommsens then filed a motion for summary judgment, and the County moved to dismiss the inverse condemnation claim. The Mommsens withdrew the inverse condemnation claim from the trial court's consideration prior to oral argument on the summary judgment motion. The parties agreed that the motion to dismiss the inverse condemnation claim would be held in abeyance pending resolution of the rest of the case.

¶4 Ultimately, the trial court declared the ordinance illegal. The county appealed. This court reversed and remanded the matter to the trial court. *Mommsen v. Schueller*, 228 Wis. 2d 627, 599 N.W.2d 21 (Ct. App. 1999). On June 9, 1999, the County's attorney contacted the Mommsens' attorney by letter indicating, in relevant part: "In conclusion, I am certain that you will be

requesting, or the Court will be setting this matter for a scheduling conference in the near future.” Counsel for the Mommsens responded by letter dated June 11: “I think we ought to resolve other issues before seeking any further appellate review, although obviously I must discuss this with the Mommsens. If anything changes, I will let you know; otherwise, let’s assume that we just have to go finish the matter in the Circuit Court.” Remittitur of the matter to the circuit court occurred on July 15, 1999. The circuit court then inquired of the parties by letter dated July 20: “We have now received the remand from the Court of Appeals in the above encaptioned matter. Please advise what further court action is necessary.”

¶5 In their appellant’s brief, the Mommsens state: “Through inadvertence ... no response was made at that time.” On October 23, 2000, counsel for the Mommsens contacted the circuit court requesting resolution of the remaining issues. The county moved to dismiss the matter pursuant to WIS. STAT. §§ 805.03 and 808.08(3). The court granted the motion to dismiss and this appeal followed.

#### ANALYSIS

¶6 The Mommsens argue that WIS. STAT. § 808.08(3) does not mandate dismissal of their claims. The construction of statutes and their application to a particular set of facts are questions of law that we review independently. *State v. Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998). The aim of statutory construction is to ascertain the legislature’s intent, and our first resort is to the statutory language itself. *Id.* If the words of the statute convey the legislative intent, that ends our inquiry; we do not look beyond the statute’s plain

language to search for other meanings, but simply apply the language to the facts before us. *Id.* at 255-56.

¶7 WISCONSIN STAT. § 808.08 provides:

When the record and remittitur are received in the trial court:

- (1) If the trial judge is ordered to take specific action, the judge shall do so as soon as possible.
- (2) If a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar.
- (3) If action or proceedings *other than those mentioned in sub. (1) or (2) is ordered*, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings. If further proceedings are not so initiated, the action shall be dismissed except that an extension of the one-year period may be granted, on notice, by the trial court, if the order for extension is entered during the one-year period. (Emphasis added.)

Although this court’s earlier decision reversed the summary judgment regarding only one of the Mommsens’ four claims, we remanded the matter “for proceedings consistent with this decision.” The mandate line provided: “Judgment reversed and cause remanded with directions.”

¶8 Neither a new trial nor specific action was ordered by this court on remand. However, because action or proceedings other than those mentioned in WIS. STAT. § 808.08(1) or (2) were required, the catch-all provision of subsec.(3) applies. The Mommsens failed to move for further proceedings within the time limit imposed by subsec. (3). The Mommsens nevertheless argue that the language of subsec. (3) applies only to the issue that was appealed, and not to the issues left undetermined by the circuit court. We disagree.

¶9 With regard to “any matters left open,” a circuit court is free to make any order or direction not inconsistent with the appellate court decision when confronted with a remand for further proceedings. *Fullerton Lumber Co. v. Torborg*, 274 Wis. 478, 483, 80 N.W.2d 461 (1957); *see also Lingott v. Bihlmire*, 38 Wis. 2d 114, 129, 156 N.W.2d 439 (1968). In *Fullerton*, our supreme court held:

In cases in which the appellate court reverses the decree and remands the cause to the lower court for further proceedings, that court can carry into effect the mandate of the appellate court only so far as its direction extends; but the lower court is left free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision.

*Id.* at 483-84. Because the circuit court, consistent with this court’s decision, had the discretion to address those matters not presented or settled on appeal, the circuit court properly dismissed the Mommsens’ claims for failure to timely move for further proceedings pursuant to WIS. STAT. § 808.08(3).<sup>1</sup>

*By the Court.*—Order affirmed.

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

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<sup>1</sup> The Mommsens challenge the trial court’s dismissal without prejudice of their inverse condemnation claim. To the extent the trial court chose to dismiss that claim without prejudice, rather than with prejudice, the Mommsens are not aggrieved by that distinction.

