

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 29, 2009

David R. Schanker
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. 2008AP2629

Cir. Ct. No. 2008CV256

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE ARBITRATION OF:

JAMES R. MOE AND SUE BLASER,

PETITIONERS-RESPONDENTS,

V.

BLACKHAWK EXCAVATING II, INC.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Green County:
JAMES R. BEER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 VERGERONT, J. This interlocutory appeal concerns the proper venue for an application to confirm an arbitration award. The issue is whether

WIS. STAT. § 788.09 (2007-08),¹ which provides that proceedings to confirm an arbitration award take place in “the county within which such award was made,” is controlling over a conflicting contract clause. Specifically, the contract between the parties provides that venue over disputes shall be in Lafayette County, but the application to confirm was filed in the circuit court of Green County, where the award was made. The circuit court concluded the arbitration statute was controlling and that the application was properly filed in Green County. For the reasons stated below, we affirm. We decline to address the argument that a portion of the award—that made pursuant to the employment agreements—is not subject to ch. 788.

BACKGROUND²

¶2 Blackhawk Excavating II, Inc., purchased the assets of a business that had been owned and operated by James Moe. Moe financed a portion of the purchase price by taking two promissory notes and security interests from Blackhawk. In addition to the asset purchase agreement, as part of the transaction there were agreements under which Blackhawk agreed to continue Moe’s employment and the employment of Sue Blaser. The following clause addressing

¹ All references to the Wisconsin Statutes are to the 2007-2008 version unless otherwise noted.

² Besides the arbitrators’ decision and award and one page from the asset purchase agreement, the only source of the background facts in the record is from the attorneys’ oral and written argument in the circuit court; in addition, the attorneys make factual assertions in their briefs on appeal. Where necessary, we draw from the attorneys’ assertions here and in the circuit court when they agree on basic background information.

venue applies to the asset purchase agreement and to the Moe and Blaser employment agreements:³

Governing Law and Forum Selection. This Agreement shall be construed in accordance with and governed by the laws of the State of Wisconsin. Exclusive jurisdiction and *venue over any dispute arising out of this Agreement or the work to which it relates shall be had in Lafayette County, Wisconsin.* Any disputes that arise under the terms of the Agreement or the Restrictive Covenant Agreement and the Employment Agreement entered into simultaneous with the entry of the Agreement that are unresolvable between the parties shall be resolved by binding arbitration. Seller will select an arbitrator, Buyer will select an arbitrator and the two arbitrators so selected will select a third arbitrator. The parties will present the dispute to the three arbitrators and majority decision of the arbitrators shall prevail....

(Emphasis added.)⁴

¶3 Subsequently, disputes arose concerning the notes and employment agreements. The parties agreed to submit the disputes to binding arbitration and to hold the arbitration hearing in Dodgeville, Iowa County. At the close of the Dodgeville hearing before three arbitrators, it was decided that the parties would submit written arguments before the arbitrators made their decision. After those submissions, and apparently unbeknownst to both sides, the arbitrators met in Monroe, Wisconsin, Green County, conferred, and issued their decision. The

³ The only portion of any of the agreements that is in the record is the page containing the “Governing Law and Forum Selection” clause, apparently from the asset purchase agreement. However, the parties do not dispute that the Moe and Blaser employment agreements are subject to the “Governing Law and Forum Selection” clause.

⁴ We have not italicized the words “exclusive jurisdiction and” because the parties’ arguments and this opinion address only venue. We note that subject matter jurisdiction cannot be conferred by consent of the parties. WIS. STAT. § 801.04. *See also Wisconsin’s Envtl. Decade, Inc. v. PSC*, 84 Wis. 2d 504, 515, 267 N.W.2d 609 (1978).

arbitrators concluded that the two notes from Blackhawk to Moe were subject to arbitration under the above “Governing Law and Forum Selection” clause and made an award to Moe under the terms of both of the notes. The arbitrators also resolved issues concerning the employment agreements in favor of Moe and Blaser and made awards to both under those agreements.

¶4 Moe and Blaser filed an application for confirmation of the arbitrators’ award with the Green County Circuit Court. Blackhawk responded by filing an application for vacation or modification of the arbitrators’ award on several grounds. Blackhawk also filed a motion to change the venue of the confirmation proceeding from Green County to Lafayette County, based upon the contract venue clause. The court denied Blackhawk’s motion to change venue, agreeing with Moe and Blaser that WIS. STAT. § 788.09 controls. This statute provides:

Court confirmation award, time limit. At any time within one year after the award is made any party to the arbitration may apply to the court in and for the county within which such award was made for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected under s. 788.10 or 788.11....

¶5 We granted Blackhawk’s interlocutory petition for leave to appeal.

DISCUSSION

¶6 Blackhawk contends on appeal that the contract clause placing venue in Lafayette County determines venue notwithstanding the statutory venue provision in WIS. STAT. § 788.09. Moe and Blaser respond that the circuit court

correctly determined that the contract venue clause does not override WIS. STAT. § 788.09.⁵

¶7 A resolution of these issues requires that we construe provisions of WIS. STAT. ch. 788 and other venue statutes and apply them to undisputed facts. This presents questions of law, which we review de novo. *Johnson v. Berge*, 2003 WI App 51, ¶4, 260 Wis. 2d 758, 659 N.W.2d 418.

¶8 When we construe a statute, we begin with the language of the statute and give it its common meaning, unless there are technical or specially defined terms. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. *Id.*, ¶46. We also consider the purpose of the statute insofar as it is ascertainable from the text and structure of the statute itself. *Id.*, ¶48. If, employing these principles, we conclude the statutory language has a plain meaning, then we apply the statute according to that plain meaning. *Id.*, ¶47.

¶9 We begin with the language of WIS. STAT. § 788.09 that “[a]t any time within one year after the award is made any party to the arbitration may apply to the court in and for the county within which the award was made for an order confirming the award” The word “may” in the context of the entire clause

⁵ We understand from the parties’ arguments that they both construe the language of the contract’s venue clause to provide that any arbitration confirmation proceeding be filed in Lafayette County. We assume without deciding that is the proper construction.

plainly means that a party is authorized to apply for confirmation, not that a party has a choice about the time limit or the county. Case law has established that an arbitration award is “made” under § 788.09 when it is signed by the arbitrators. *Pick Indus., Inc. v. Gebhard-Berghammer, Inc.*, 264 Wis. 353, 357a-b, 60 N.W.2d 254 (1953) (holding on reconsideration that an award is made when signed by the arbitrators and thus the one year period starts at that time.) The parties agree that the arbitration award was signed by the arbitrators in Green County.

¶10 WISCONSIN STAT. § 788.09 is silent on the issue of whether venue can be changed from the county in which the award was made. However, WIS. STAT. § 801.52 authorizes the court in its discretion to “change the venue to any county in the interest of justice or for the convenience of the parties or witnesses,” except for a few types of civil actions that do not include ch. 788.⁶

⁶ WISCONSIN STAT. § 801.52 provides:

The court may at any time, upon its own motion, the motion of a party or the stipulation of the parties, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses, except that venue in a civil action to impose forfeiture for a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or for a violation of any other law arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, may be changed only as provided in s. 971.223(1) and (2) or in the same manner that is authorized for a change in the venue of a criminal trial under s. 971.22. This section does not apply to proceedings under ch. 980 [“Sexually Violent Person Commitments”].

¶11 All venue statutes are subject to WIS. STAT. § 801.52, not just the general venue statute, § 801.50, unless otherwise provided.⁷ *Hoffman v. Memorial Hosp. of Iowa Co.*, 196 Wis. 2d 505, 510-11, 538 N.W. 2d 627 (Ct. App. 1995) (establishing this principle in the context of holding that § 801.52 applies to permit a change in venue determined under § 655.009(3), relating to actions against health care providers). Because there is nothing contrary in either § 788.09 or § 801.52, § 801.52 authorizes the court to change venue that is proper under § 788.09 in the interests of justice or the convenience of the parties or the witnesses.

¶12 In this case, Blackhawk did not bring its motion to change venue on either of the two grounds enumerated in WIS. STAT. § 801.52. Instead, Blackhawk asked the court to change venue because of the venue clause in the contract. We note that § 801.52 permits the court to change venue “upon its own motion, the motion of a party or *the stipulation of the parties ... in the interest of justice or for the convenience of the parties or witnesses.*” (Emphasis added.) Blackhawk is not

⁷ WISCONSIN STAT. § 801.50(2) provides:

Except as otherwise provided by statute, venue in civil actions or special proceedings shall be as follows:

(a) In the county where the claim arose;

(b) In the county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;

(c) In the county where a defendant resides or does substantial business; or

(d) If the provisions under par. (a) to (c) do not apply, then venue shall be in any county designated by the plaintiff.

Subsections (3)-(5t) prescribe venue in a number of specific types of actions.

contending that the contract venue clause comes within § 801.52 because it is a stipulation approved by the court. Rather, Blackhawk contends that the contract venue clause—without court approval—is a valid means of changing venue.

¶13 Blackhawk has provided no authority for the proposition that parties may, without court approval under WIS. STAT. § 801.52, agree to a county of venue that is different than that prescribed by statute. The cases Blackhawk cites in support of its position pertain to contractual forum selection clauses addressing in which *state* an action may be brought. See *Beilfuss v. Huffy Corp.*, 2004 WI App 118, ¶¶2-3, 274 Wis. 2d 500, 685 N.W.2d 373; *Leasefirst v. Hartford Rexall Drugs, Inc.*, 168 Wis. 2d 83, 86, 483 N.W.2d 585 (Ct. App. 1992). These cases have no application to determining the proper *county* of venue within Wisconsin under Wisconsin law.⁸

¶14 In the absence of authority supporting its argument, Blackhawk does not persuade us that a parties' contract may alter statutory venue, given that, when if there is a stipulation, WIS. STAT. § 801.52 requires court approval based on the two specified grounds. Thus, we affirm the circuit court's denial of the motion to change venue based on the contract venue clause.⁹

⁸ The parties debate the proper reading of two cases that address the issue of whether an arbitration is governed by common law or by the predecessor to WIS. STAT. ch. 788 (WIS. STAT. ch. 298, renumbered by 1979 Wis. Laws, ch. 32, § 24): *Reith v. Wynhoff*, 28 Wis. 2d 336, 339-340, 137 N.W.2d 33 (1965), and *City of Madison v. Frank Lloyd Wright Found.*, 20 Wis. 2d 361, 383-84, 122 N.W.2d 409 (1963). We do not discuss these cases because we do not find the facts or legal issues sufficiently close to provide any guidance in this case.

⁹ We note that the parties agreed to ignore the contract venue clause when they agreed to hold the arbitration hearing in Iowa County, not Lafayette County. We do not address whether this constituted a waiver of the contract venue clause with respect to the confirmation proceeding because the evidentiary record necessary to resolve this issue is lacking.

¶15 Blackhawk also argues that, regardless of whether WIS. STAT. § 788.09 might override a contractual venue clause, that statute does not apply to the employment agreements because they are excluded from ch. 788. Blackhawk relies on § 788.01, which states that the chapter “shall not apply to contracts between employers and employees, or between employers and associations of employees, except as provided in s. 111.10” WIS. STAT. § 788.01.¹⁰ According to Blackhawk, because the employment agreements are not subject to ch. 788, the contract clause determines venue in Lafayette County as to those awards, and efficiency then dictates that the entire confirmation proceeding be venued there. Blackhawk implicitly concedes that the asset purchase agreement is governed by ch. 788.

¶16 We decline to decide whether the exclusion in WIS. STAT. § 788.01 applies to these employment agreements. In the circuit court, Blackhawk made only cursory reference to this issue in its brief, did not mention it in argument at the hearing, and did not mention it when the court made its oral ruling that WIS. STAT. ch. 788 controls. Likely for these reasons, the circuit court did not address it. A litigant must raise an issue with sufficient prominence such that the circuit court understands that it is being called upon to make a ruling, and failure to do so

¹⁰ WISCONSIN STAT. § 111.10 provides:

Arbitration. Parties to a dispute pertaining to the meaning or application of the terms of a written collective bargaining agreement may agree in writing to have the commission serve as arbitrator. Parties to a labor dispute may agree in writing to have the commission act or name arbitrators in all or any part of such dispute, and thereupon the commission shall have the power so to act. The commission shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in ch. 788.

generally forfeits the right to make the argument on appeal. See *Bishop v. City of Burlington*, 2001 WI App 154, ¶¶8-9, 246 Wis. 2d 879, 631 N.W.2d 656.¹¹

¶17 Even if we overlook forfeiture, on appeal neither the record nor Blackhawk’s arguments are sufficiently developed to permit us to resolve the issue. The employment agreements are not in the record and there is no discussion of the meaning of “employees,” which is crucial to deciding if the exclusion in WIS. STAT. § 788.01 is triggered in the first instance. In addition, Blackhawk does not address whether the exclusion in § 788.01 applies when, as here, an employment agreement is part of a larger transaction and the parties arbitrate in a single hearing disputes under the employment agreement as well as disputes under another agreement that is subject to ch. 788.

CONCLUSION

¶18 For the reasons explained above, we affirm the circuit court’s denial of the Blackhawk’s motion to change venue based on the contract and we decline to address Blackhawk’s argument that the employment agreements are not subject to ch. 788.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¹¹ *Bishop v. City of Burlington*, 2001 WI App 154, 246 Wis. 2d 879, 631 N.W.2d 656, uses the term “waiver,” but we use “forfeiture,” consistent with the recent decision, *State v. Ndina*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. In *Ndina*, the court explained that, while courts often use “waiver” and “forfeiture” interchangeably, they are distinct concepts. *Id.*, ¶29. When the right to make an objection or assert a right on appeal is lost because of failure to do so in the circuit court, the proper term is “forfeiture.” *Id.*, ¶¶30-31.

