

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 11, 2005**

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. 04-0549**  
**STATE OF WISCONSIN**

**Cir. Ct. No. 03CV007454**

**IN COURT OF APPEALS  
DISTRICT I**

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**SUSAN SCHINDELHOLZ,**

**PLAINTIFF-APPELLANT,**

**SECURA INSURANCE,**

**INVOLUNTARY-PLAINTIFF,**

**v.**

**JOSEPH VINCENTI AND  
FARMERS INSURANCE GROUP,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Susan Schindelholz appeals from the trial court judgment dismissing her claims with prejudice because she failed to file her summons and complaint with the requisite filing fee before the statute of

limitations ran. Schindelholz contends that the trial court erred in dismissing her claim for failure to comply with WIS. STAT. § 801.02 (2001-02),<sup>1</sup> because: (1) the plain language of § 801.02 “is in conflict and ambiguous”; (2) the holding in *Douglas v. Dewey*, 147 Wis. 2d 328, 433 N.W.2d 243 (1989), is analogous to her case; (3) the requirements for filing a notice of appeal and for filing a civil action are substantially similar; and (4) the holding in *Douglas* should have been followed by the trial court, resulting in a finding that the summons and complaint were timely filed. Because *Giese v. LIRC*, 153 Wis. 2d 212, 450 N.W.2d 489 (1989), restricted *Douglas* to appellate procedure only, and WIS. STAT. § 59.40(3) gives the circuit court clerk the discretion to refuse to accept a filing until the requisite fee is paid, we affirm.

### I. BACKGROUND.

¶2 Schindelholz’s claims arose from a car accident that occurred on August 5, 2000. On July 29, 2003, her attorney mailed the summons and complaint, along with a check for \$214.00 to cover the filing fee, to the circuit court clerk. However, an increase in filing fees to \$256.50 became effective on July 26, 2003, and the \$214.00 check accordingly fell short of the increased fee. The clerk refused to accept the summons and complaint for filing, and returned it to Schindelholz’s attorney by mail, indicating that the filing fee was insufficient. Upon receiving the returned documents on August 6, 2003, the day after the statute of limitations ran, Schindelholz’s attorney’s paralegal re-filed the summons and complaint with the additional \$42.50 to cover the increase in the filing fee.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 The defendants filed a motion to dismiss asserting that Schindelholz’s complaint failed to comply with the applicable three-year statute of limitations. After a hearing, the trial court determined that the complaint and claims were barred because Schindelholz did not file her action with the requisite filing fees by August 5, 2003, when the statute of limitations ran. Schindelholz now appeals.

## II. ANALYSIS.

¶4 The issue before us requires the application of a statute to a set of undisputed facts, and thus is subject to our *de novo* review. “Whether a statutory limitations period requires dismissal of an action where the underlying facts are not in dispute is ... a question of law.” *Hamilton v. Hamilton*, 2003 WI 50, ¶14, 261 Wis. 2d 458, 661 N.W.2d 832. Indeed, “[a] motion to dismiss based on a statute of limitations is treated as a motion for summary judgment[, and w]hen reviewing a summary judgment, we perform the same function as the trial court, making our review *de novo*.” *Bartels v. Rural Mut. Ins. Co.*, 2004 WI App 166, ¶7, \_\_\_ Wis. 2d \_\_\_, 687 N.W.2d 84 (citations omitted and emphasis added).

¶5 Schindelholz contends that, as she complied with WIS. STAT. § 801.02(1),<sup>2</sup> the only issue that remains is “whether it is necessary for the proper filling [sic] [fee] to accompany the Summons and Complaint. Based on the statute

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<sup>2</sup> WISCONSIN STAT. § 801.02(1) provides:

A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days of filing.

and Wisconsin case law, it appears that this is not a requirement to properly commence an action in Wisconsin.” She insists that § 801.02(3) requires the original summons and complaint be filed together, but fails to mention the filing fee. This, she argues, conflicts with § 801.02(6), which provides that “[f]ees payable upon commencement of a civil action shall be paid to the clerk at the time of filing.” See § 801.02(6). As a result, she contends that we must turn to Wisconsin case law to resolve the issue.

¶6 Schindelholz argues that the circumstances in *Douglas*, a case in which the supreme court concluded that “a notice of appeal is filed on the day the clerk of the trial court receives the notice of appeal, whether or not the notice of appeal is accompanied by the \$150 filing fee[,]” *id.*, 147 Wis. 2d at 331, are analogous to circumstances here, in that she filed her complaint prior to the expiration of the statute of limitations, but likewise did not send the requisite filing fee until after the statute of limitations ran. She insists that the requirements for filing a notice of appeal and for filing a civil action are substantially similar, and as such, the *Douglas* analysis provides useful guidance for this court. She contends that the trial court should have followed the reasoning of *Douglas*, as it specifically rejected the argument “that sections 809.10(1) and 809.11 together mean that the clerk of the circuit court must receive **both**, the notice of appeal **and** the filing fee before a notice of appeal is considered ‘filed[,]’” which she contends is “precisely the ruling of the trial court.” However, in light of the fact that *Douglas* concerned matters of appellate procedure, not the commencement of a civil suit, and *Giese* specifically concluded that the holding in *Douglas* is limited to appellate procedure, we conclude that Schindelholz’s complaint is barred by the statute of limitations.

¶7 In *Douglas*, the supreme court held that WIS. STAT. § 809.11 “does not make the timely submission of the \$150 docketing fee a jurisdictional requirement.” *Douglas*, 147 Wis. 2d at 336.<sup>3</sup> It reasoned that § 809.11(1) does not state that the failure to submit the fee to the clerk of the circuit court affects the appellant’s timely filing of the notice of appeal, and that “the statutory language requiring the docketing fee to be filed ‘with the notice of appeal’ implies that the docketing fee is separate and distinct from the notice of appeal.” *Douglas*, 147 Wis. 2d at 336 (parenthetical and emphasis omitted). Further, the court noted that § 809.11(2) directs the clerk of the circuit court, within three days of the filing of the notice of appeal, to transmit to the court of appeals “only those materials in his or her possession at the time.” *Douglas*, 147 Wis. 2d at 337. As such, the court concluded:

On careful reading of secs. 809.10 and 809.11, Stats., ... sec. 809.10 provides that an appeal to the court of appeals is initiated by filing a notice of appeal with the clerk of the circuit court. The filing of the notice of appeal, not the docketing fee, is the means by which the court of appeals is vested with jurisdiction over the appeal.

*Douglas*, 147 Wis. 2d at 337.

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<sup>3</sup> WISCONSIN STAT. § 809.11 provides, in relevant part:

**Rule (Items to be filed and forwarded).** (1) FEE. The appellant shall pay the filing fee with the notice of appeal.

(2) FORWARDING TO COURT OF APPEALS. The clerk of the trial court shall forward to the court of appeals, within 3 days of the filing of the notice of appeal, a copy of the notice of appeal, the filing fee, and a copy of the trial court record of the case maintained pursuant to s. 59.40 (2) (b) or (c).

(3) FILING IN COURT OF APPEALS. The clerk of the court of appeals shall file the appeal upon receipt of the items referred to in sub. (2).

¶8 The supreme court rejected the argument that because WIS. STAT. § 809.25(2)(c) gives the clerk discretion to refuse to file the notice of appeal until the appellant pays the docketing fee, the circuit court clerk’s receipt of the notice of appeal is not “tantamount to filing,” concluding that § 809.25(2)(c) refers to the clerk of *the court of appeals*, not the clerk of the circuit court with whom the original notice is filed. As such, the clerk of the circuit court does not have discretion to refuse to file a notice of appeal when the docketing fee does not accompany the notice of appeal. *Douglas*, 147 Wis. 2d at 338. Furthermore, the supreme court concluded that WIS. STAT. § 59.42(1) (1985-86) likewise does not authorize the clerk of the circuit court to refuse to accept a notice of appeal without the fee,<sup>4</sup> and bolstered that conclusion with the fact that the clerk of the circuit court “merely acts as a conduit, transmitting the [fee] to the clerk of the court of appeals.” *Douglas*, 147 Wis. 2d at 340. As such, in support of the legislature’s intent to have a uniform appeal procedure, the supreme court concluded that the court of appeals obtains jurisdiction over an appeal by the filing of a timely notice of appeal with the clerk of the circuit court, and the circuit court clerk has no discretion to deny the filing if it is unaccompanied by the proper fee. *Id.* at 340-41.

¶9 The situation is quite different for the filing of a civil suit or petition. Indeed, in *Giese*, we concluded that the clerk of the circuit court did not abuse his discretion when he refused to file a petition to review an adverse decision of the

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<sup>4</sup> WISCONSIN STAT. § 59.42(1) (1985-86) has since been renumbered as WIS. STAT. § 59.40(3), and provides: “The clerk of the circuit court shall collect the fees that are prescribed in ss. 814.60 to 814.63. The clerk may refuse to accept any paper for filing or recording until the fee prescribed in subch. II of ch. 814 or any applicable statute is paid.” Neither statute, WIS. STAT. §§ 814.60 or 814.63, refers to fees for filing appeals. “Sec. 814.64 does.” *Douglas v. Dewey*, 147 Wis. 2d 328, 339, 433 N.W.2d 243 (1989) (emphasis added).

LIRC on the day it was received because it was unaccompanied by the proper filing fee. *Id.*, 153 Wis. 2d at 213-14. In that case, we held that, pursuant to WIS. STAT. § 59.42(1) (1987-88)—which is now WIS. STAT. § 59.40(3)—the circuit court clerk had discretion to refuse to accept the petition for filing without the prescribed fee. *Giese*, 153 Wis. 2d at 214-15. We differentiated the holding in *Douglas*, determining that *Douglas* did not control because it involved appellate procedure and held that WIS. STAT. § 809.25(2)(c) “conferred discretion to refuse a notice of appeal without a docketing fee on the clerk of the *court of appeals*, not on the circuit court clerk.” *Giese*, 153 Wis. 2d at 215-16 (emphasis added). We also concluded that § 59.42(1) (now § 59.40(3)) does not require the same uniformity that the legislature intended for appellate procedure across the state, but instead “requires each circuit court clerk to exercise his or her discretion within the respective circuit[, and a]lthough this may result in some inconsistencies among various counties, the plain language of the statute compels this result.” *Giese*, 153 Wis. 2d at 216 (footnote omitted).

¶10 Accordingly, as WIS. STAT. § 59.40(3) is clearly applicable here, and Schindelholz has not established that the circuit court clerk erroneously exercised its discretion in refusing to accept the complaint for filing without the proper fee, we must conclude that since the requisite fee was not paid until the day after the statute of limitations ran, the complaint was not filed in time. The complaint was thus properly dismissed because the trial court no longer had jurisdiction over the matter. For these reasons, we affirm.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

