COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1351 **Cir. Ct. No. 2009CV372**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CARL SCHOH,

PLAINTIFF-APPELLANT,

V.

NEW GLARUS BREWING COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Reversed and cause remanded for further proceedings.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. This appeal concerns whether the circuit court properly revived New Glarus Brewing Company's right to demand a jury trial

after New Glarus's counsel, under WIS. STAT. § 805.01,[1] waived New Glarus's right to a jury trial at the scheduling conference. Schoh argues that the circuit court erroneously extended the deadline for demanding a jury trial, in the absence of excusable neglect, after the deadline had expired, as required by WIS. STAT. § 801.15(2)(a). New Glarus concedes waiver at the scheduling conference, but argues that the court was empowered by WIS. STAT. § 802.10(3)(e) to issue an order giving New Glarus additional time and, if we disagree with that argument, that reversal is not required either because New Glarus demonstrated excusable neglect or because the error was harmless. We agree with Schoh that a finding of excusable neglect was required, that the circuit court erred in finding excusable neglect, and that the error was not harmless. Accordingly, we reverse and remand for further proceedings.

Background

¶2 On September 18, 2009, Carl Schoh sued his former employer, New Glarus Brewing Company, seeking unpaid wages, including severance pay. It is undisputed that neither party raised the topic of the mode of trial with the circuit court prior to the scheduling conference on January 26, 2010. At that conference, the circuit court asked whether either party was demanding a jury trial, and counsel for both parties confirmed that no such demand was being made.[2]

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The transcript of the scheduling conference is not in the record. During a subsequent hearing, New Glarus's counsel asserted that his specific response to the circuit court's inquiry about a jury trial was "we have not requested a jury at this time." There is no assertion that New Glarus's counsel suggested he needed more time to make a decision.

¶3 Following the scheduling conference—either the same day or the next day—New Glarus's counsel first discussed with New Glarus whether it should request a jury trial. The day after the scheduling conference, New Glarus requested a jury and mailed in the jury fee. New Glarus's counsel subsequently moved the court to either order a jury trial or to amend the scheduling order to give New Glarus additional time, under WIS. STAT. § 802.10, to request a jury trial. New Glarus's counsel explained that he had not addressed the topic of a jury trial with his client earlier because counsel assumed that Schoh would request a jury trial.

¶4 Schoh objected to New Glarus's motion. Both parties briefed the issue, and a hearing on the motion was held on February 23, 2010. The circuit court determined that New Glarus could have a jury trial, and relied on two theories. First, the court determined that counsel's failure to request a jury trial at or before the scheduling conference was the result of "excusable neglect" under WIS. STAT. § 801.15(2)(a). Second, the court relied on its authority to issue a scheduling order under WIS. STAT. § 802.10, which includes the discretionary authority to give the parties up to 30 days to demand a jury trial.

¶5 We note that, although the circuit court did not, so far as we can tell, "enter" a scheduling order giving New Glarus additional time to demand a jury trial, we will treat the circuit court's action as having entered such an order. New Glarus plainly requested that the circuit court act under its authority to extend the

time to demand a jury trial under its scheduling order authority, and Schoh does not argue that this technical defect, if it is one, matters.[3]

¶6 The case proceeded to a jury trial. The jury found in favor of New Glarus. Following entry of judgment for New Glarus, Schoh appealed.

Discussion

¶7 This case involves the interplay of three statutes: the statute specifying the time limit for demanding a jury trial, WIS. STAT. § 805.01; the statute specifying that, when a party requests extra time after a time period has expired, the party must show excusable neglect, WIS. STAT. § 801.15(2)(a); and the statute authorizing a court, in a scheduling order, to give a party up to 30 days to demand a jury trial, WIS. STAT. § 802.10(3)(e). To the extent we are interpreting the statutes, the following principles apply:

> [S]tatutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.

State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). Further, "statutory language is interpreted 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 reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

[3] WISCONSIN STAT. § 807.11(2) provides: "An order is entered when it is filed in the office of the clerk of court." Schoh does not argue that we should reverse the circuit court because the order was not entered.

¶8 As explained below, the plain language of the statutes, the goal of avoiding statutory interpretations that produce unreasonable results, and case law dealing with this topic lead to the conclusion that the circuit court erred when it extended New Glarus's time to demand a jury trial in the absence of excusable neglect. We further conclude that this error was not harmless.

A. Excusable Neglect

¶9 If the failure of New Glarus's counsel to demand a jury trial at or before the scheduling conference was the result of excusable neglect, there would be no need to resolve the parties' statutory interpretation dispute. Thus, we first address whether the circuit court correctly determined that the failure was excusable neglect.

¶10 In ***Casper v. American International South Insurance Co.***, 2011 WI 81, 336 Wis. 2d 267, 800 N.W.2d 880, the supreme court summarized the applicable law:

> A circuit court's finding of excusable neglect "will not be disturbed by an appellate court unless an [erroneous exercise] of discretion is clearly shown." The decision of the circuit court need not be one that this court would have rendered, but it must be based on a reasonable inquiry and examination of the facts. Furthermore, the reasons for the circuit court's decision must be set forth as required under the statute.
>
> We have defined excusable neglect as "that neglect which might have been the act of a reasonably prudent person under the same circumstances," but which is not "synonymous with neglect, carelessness or inattentiveness." A circuit court must determine whether reasonable grounds exist for failing to meet the statutory time period to grant a party's motion under § 801.15(2)(a).
>
> A determination of excusable neglect does not rest solely on the existence of reasonable grounds for the party's delay. A court also must consider the interests of

> justice implicated by the grant or denial of the motion, and what effects such a ruling would have on the proceedings. The denial of a motion for enlargement of time often results in a default judgment for the plaintiffs, a result disfavored by the law, which "prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." On the other hand, the court also must be cognizant of the policies of prompt adjudication that can be advanced when a party that has failed to timely respond is held accountable for such delay. It is these considerations, together with the particular facts of the case, that must inform the circuit court's decision whether to grant a motion to enlarge time.
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> ....
>
> ... "A trial court's discretion in the enlargement of statutory time limits cannot be predicated upon judicial grace but must rest upon cause and excusable neglect."

Id., ¶¶36-38, 41 (citations omitted). Thus, our review is deferential. The question is whether, taking into account the interests of justice and the effect of holding New Glarus to its waiver, the circuit court could have reasonably concluded that New Glarus's counsel engaged in "reasonably prudent" conduct when counsel informed the court at the scheduling conference that New Glarus was not demanding a jury trial.

¶11 The circuit court's excusable neglect reasoning is as follows:

> I think that [New Glarus's counsel] was here and you [Schoh's counsel] caught him, and he says, a surprise. I'm not going to find that he's trying to mislead the Court as to that. If he was surprised and had not talked to his client about that, that that is excusable because his client has the right to have an input into whether or not they have a jury trial.
>
> For that reason I'll find that to be excusable neglect. And also the rapidity of his request for a jury trial, that he immediately went and talked to his client about it. Now perhaps I'm wrong, but that's why we make decisions.

Thus, according to the circuit court, New Glarus's counsel's neglect was excusable because he was surprised by Schoh's jury waiver at the scheduling conference and, after the conference, counsel promptly talked with his client and requested additional time to demand a jury trial. We will further assume that the circuit court accepted as true counsel's assertion that he was surprised because "plaintiffs almost always request a jury."

¶12 Consistent with the circuit court's ruling, New Glarus argues on appeal that its counsel's failure to demand a jury trial prior to or during the scheduling conference was "excusable neglect" because counsel reasonably "assumed that [Schoh], like almost all other [employee] plaintiffs in employment law cases, would request a jury." According to New Glarus, "[u]pon learning otherwise [at the scheduling conference], [its] counsel ... immediately contacted [New Glarus] and, the next day, requested a jury."

¶13 If the only question here was whether the failure of New Glarus's counsel to consult with New Glarus prior to the scheduling conference about demanding a jury trial was excusable neglect, we would likely affirm the circuit court under the deferential standard of review. This failure appears to be comparable to the erroneous assumption made by counsel in ***Meier v. Champ's Sport Bar & Grill, Inc.***, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94. In ***Meier***, the defendants' counsel filed an answer three days late because he assumed that one of his clients, the owner of a restaurant, was served with the complaint on the same day as the restaurant. ***Id.***, ¶¶10, 41-43. The circuit court in that case concluded that excusable neglect was present because simultaneous service in such situations "'probably happens in ... the significant majority of cases,'" the plaintiff was not prejudiced, and the severe consequence of not granting additional

time was that default judgment would be entered against the defendants. ***Id.***, ¶43. The supreme court affirmed the circuit court. ***Id.***, ¶44.

¶14 However, as Schoh points out, New Glarus has offered no explanation as to why, after learning at the scheduling conference that Schoh was not demanding a jury, New Glarus's counsel did not at that time request a continuance of the conference or request additional time in a scheduling order.[4] Instead, counsel simply informed the court that New Glarus was not demanding a jury trial. As counsel later candidly admitted to the circuit court: "I could have asked for the 30 days and I probably should have and I acknowledge that, but I didn't so we're here now." As to this failing, the circuit court provides no explanation, and we find nothing in the record to support the view that it was excusable neglect.

¶15 Elsewhere in its appellate brief and before the circuit court, New Glarus speaks of the importance of the right to a jury trial. We agree that this is an important right. Indeed, it is the importance of that right that leads us to conclude that it was not reasonably prudent for counsel, upon learning that Schoh was not demanding a jury trial, to waive the right to a jury trial without consulting with his client.

B. Post-Waiver Extension Of Time Under WIS. STAT. § 801.15(2)(a)

¶16 New Glarus concedes that it waived its right to a jury trial. This concession is appropriate. At the scheduling conference, the circuit court inquired

[4] Both parties assume that these are viable options under the statutes. We will assume, without deciding, that this is true.

whether either party was requesting a jury trial, and New Glarus's counsel said no. Thus, under the plain language of WIS. STAT. § 805.01(2) and (3), New Glarus waived its right to a jury trial because it failed to "demand" a jury trial "at or before the scheduling conference or pretrial conference, whichever is held first." Given this undisputed waiver, the question becomes whether there is only one or, instead, two statutory paths that would have permitted the circuit court to extend a deadline that had already passed.

¶17 Schoh argues there is a single path. According to Schoh, to obtain an extension of the time to demand a jury trial, New Glarus needed to show that its waiver was the result of "excusable neglect" under WIS. STAT. § 801.15(2)(a).

¶18 New Glarus argues there are two paths: the one Schoh describes, and a path under WIS. STAT. § 802.10. According to New Glarus, a waiving party may avoid showing excusable neglect by asking the circuit court to exercise its discretion to issue a scheduling order, under § 802.10(3)(e), giving the waiving party up to 30 days to demand a jury trial. More specifically, New Glarus argues that WIS. STAT. § 805.01 deals only with the *right* to a jury trial. New Glarus concedes it forfeited its right to a jury trial, but contends that the circuit court retained its authority under § 802.10(3)(e) to grant additional time for New Glarus to demand a jury trial because that statute independently confers authority to issue a scheduling order at any time and such an order may give parties up to 30 days to demand a jury trial. As explained below, we agree with Schoh that New Glarus's interpretation would result in an improper end run around the limitation imposed on circuit courts by WIS. STAT. § 801.15(2)(a).

¶19 Viewed in tandem, WIS. STAT. § 805.01 and WIS. STAT. § 801.15(2)(a) provide an unambiguous procedure. Section 805.01 does not

simply specify the time for making a jury trial demand; it expressly states that the failure to comply with its requirements results in waiver of the right to a jury trial. WIS. STAT. § 805.01(3). And, when a party misses a statutorily specified deadline, § 801.15(2)(a) directs that an enlargement of time "*shall not* be granted unless the court finds that the failure to act was the result of excusable neglect" (emphasis added). *See* ***Parker v. Wisconsin Patients Comp. Fund***, 2009 WI App 42, ¶¶10-20, 317 Wis. 2d 460, 767 N.W.2d 272 (explaining that § 801.15(2)(a) has generally been applied to statutorily set deadlines but does not apply to court-ordered deadlines in a scheduling order).

¶20 New Glarus agrees that WIS. STAT. § 801.15(2)(a) applies to the time specified in WIS. STAT. § 805.01 for demanding a jury trial. This concession is fatal. If the legislative intent is that § 801.15(2)(a) applies to a missed deadline for demanding a jury trial, then such applicability would be effectively eviscerated by New Glarus's proposal. That is, if New Glarus is correct that, regardless of the "shall not" language of § 801.15(2)(a), courts possess the authority to revive a party's right to demand a jury trial after the time for making such a request has expired simply by issuing a new or amended scheduling order, then a court would never be required to find excusable neglect. This is an unreasonable reading of the statutory scheme.

¶21 New Glarus's reliance on ***State ex rel. Prentice v. County Court of Milwaukee County***, 70 Wis. 2d 230, 234 N.W.2d 283 (1975), does not alter our view. Quoting from ***Prentice***, New Glarus's appellate brief contains the following: "[C]ontrary to Schoh's position, ***Prentice*** goes on to state that the waiver of the right to a jury trial does not mean that under no circumstances can the case be heard by a jury. Specifically, the court stated that 'once the defendant fails to meet the reasonable requirements of [a statute governing jury demands in

small claims actions], she loses her right and the matter of a jury trial becomes discretionary with the trial court'" (quoting ***Prentice***, 70 Wis. 2d at 240). New Glarus's quote from ***Prentice*** is selective. The next sentence explains the "discretion" the ***Prentice*** court is referring to: "Under [a predecessor statute to WIS. STAT. § 801.15(2)(a)], the trial court could have extended the twenty-day period if the failure to act was the result of excusable neglect." ***Id.*** at 240. And, in the next two sentences, the court states: "There is nothing in this record to show 'excusable neglect,'" and in this instant case "it cannot be said that failure to extend the time period ... was an abuse of discretion." ***Id.*** Accordingly, while we agree with New Glarus that ***Prentice*** does not *expressly* state that excusable neglect is the only discretionary path, it is nonetheless plain that the only discretionary path the ***Prentice*** court had in mind was excusable neglect. When a court explains that a decision remains discretionary, specifies the authority for such discretion, and then explains that nothing in the record shows a misuse of discretion under the identified authority, the court's meaning is clear.

¶22 In sum, because New Glarus did not demand a jury trial within the time set by WIS. STAT. § 805.01, the circuit court could extend the time for demanding a jury trial only if New Glarus's counsel's failure constituted excusable neglect. As we have explained, the failure was not the result of excusable neglect. What remains is New Glarus's harmless error argument.[5]

[5] Neither party suggests that New Glarus's waiver of a jury trial will not be binding on it when this case returns for retrial. We do not resolve the issue, but we do note that the holding in ***Tesky v. Tesky***, 110 Wis. 2d 205, 327 N.W.2d 706 (1983), that a waiver of the right to a jury trial did not apply to a retrial following an appeal, does not apply here. The analysis in ***Tesky*** appears to have hinged, in part, on the fact that a subsequent change in the law meant that a factual issue would be different on retrial. *See* ***id.*** at 206, 212. No comparable situation appears to be present here.

C. Harmless Error

¶23 New Glarus argues that, if the circuit court erred in granting New Glarus's request for additional time to demand a jury trial, the error was harmless. We disagree.

¶24 New Glarus first argues that the error was harmless under WIS. STAT. § 805.18(1), which provides that courts "shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." According to New Glarus, the "issue before the court did not concern any substantive rights [because] [c]itizens in Wisconsin do not have a substantive, fundamental right to a trial by judge." According to New Glarus, the "statutes at issue in this case merely prescribe the methods by which the substantive right to a jury trial is enforced and, accordingly, is procedural in nature." We are not persuaded.

¶25 The question here is whether Schoh's substantial rights were affected when the circuit court wrongly granted a time extension, thereby wrongly giving New Glarus a trial by jury. Assuming without deciding that there is no constitutional right to a court trial, it is nonetheless plain that it is a substantial matter whether a party's action is tried to a court or to a jury. Simply put, it makes no sense to say that one option—a jury trial—is a substantial matter, but that the difference between a jury trial and a court trial is not.

¶26 New Glarus's reliance on ***Rao v. WMA Securities, Inc.***, 2008 WI 73, 310 Wis. 2d 623, 752 N.W.2d 220, highlights the flaw in New Glarus's reasoning. New Glarus asserts that "this appeal concerns a procedural, not substantial, right" and, for support, quotes the statement in ***Rao*** explaining that a party has no right under the Wisconsin Constitution to the manner or time in

which the right to trial by jury may be waived because prescribing the manner of waiver is a mere *procedural* matter. But ***Rao*** and the cases it relies on, ***Phelps v. Physicians Insurance Co. of Wisconsin***, 2005 WI 85, ¶32, 282 Wis. 2d 69, 698 N.W.2d 643, and ***Prentice***, 70 Wis. 2d at 240, do not address the *improper* application of Wisconsin's jury trial waiver rules leading to the *improper* denial of a jury trial or a court trial. Rather, these cases simply stand for the proposition that our legislature may specify, in procedural rules, the manner in which a jury trial must be demanded and that the *proper* enforcement of such rules does not constitute a denial of the constitutional right to a jury trial. *See* ***Rao***, 310 Wis. 2d 623, ¶18. Schoh is not complaining about the procedure specified by the legislature for waiving the right to a jury trial, Schoh is complaining that the circuit court wrongly imposed a jury trial on him.

¶27 New Glarus next argues that the error was harmless because there is no reasonable possibility that the circuit court's error affected the outcome. According to New Glarus, there is no reason to think that a judge would have or should have reached a different decision. This argument seemingly assumes that, absent unusual circumstances not present here, juries and judges produce the same results. Schoh argues that the research in this area does not bear this out, but we do not rely on the research. Rather, we agree with Schoh's assertion that common sense and experience tell us that judges and juries frequently view cases differently. And, New Glarus could not credibly dispute this common sense view. After all, this appeal comes to us for the very reason that New Glarus thought it important enough that it have a jury trial rather than a court trial that its counsel took unusual steps to undo New Glarus's waiver.

¶28 Finally, we note that New Glarus may be arguing that we should not reverse and remand for a new trial because Schoh could have avoided the waste of

judicial resources by seeking interlocutory relief. New Glarus points out that the circuit court offered to stay the proceedings so that Schoh could pursue a permissive appeal. If New Glarus means to make this argument, we agree with Schoh that it is insufficiently developed and, therefore, we decline to resolve it. We do, however, make two observations. First, it is hard to imagine how an appellate court would go about fashioning a rule defining which adverse rulings a party must seek to overturn by means of an interlocutory appeal prior to trial or lose the opportunity for appellate review altogether. Why this ruling and not others? Indeed, appellate courts commonly address asserted error that could have been resolved in an interlocutory appeal and where the losing party did not seek such pretrial relief. Second, to say that reversal now, and the consequent waste of resources, is a problem of Schoh's making is an incomplete characterization. It is just as apt to say that New Glarus's counsel created this situation by persuading the circuit court to adopt a view that counsel should have realized was, at a minimum, debatable. That is, it is just as accurate to say that New Glarus could have avoided this appeal and the possibility of a retrial by agreeing to a court trial.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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