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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2022AP000536

GEORGE T. STELLING, minor, by his guardian ad litem, Eric J. Ryberg, MARK STELLING and REBEKAH STELLING,
Plaintiffs-Respondents-Respondents,

vs.

MIDDLESEX INSURANCE COMPANY, FRIEDE & ASSOCIATES, LLC and ZACHARY J. DOROW,
Defendants,

MT. MORRIS MUTUAL INSURANCE COMPANY, EDWARD P. SCANLAN and OLIVER J. SCANLAN,
Defendants-Appellants-Petitioners,

TREK BICYCLE CORPORATION GROUP HEALTH BENEFIT PLAN, DELTA DENTAL OF WISCONSIN and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Subrogated Defendants.

RESPONSE TO PETITION FOR REVIEW

**APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
CASE NO. 2021CV002999
Honorable Rhonda L. Lanford, Presiding,**

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STATEMENT OF THE ISSUES

1. *State ex rel. Boyd v. Aarons*, 239 Wis. 643, 2 N.W.2d 221 (1942) unequivocally established that if venue is proper as to one defendant, it is proper as to all. Middlesex did not appeal the circuit court's order denying Mt. Morris's motion to change venue. Did the appellate court properly hold that because venue was proper as to Middlesex, affirmance of the circuit court decision was required?

Not answered by circuit court.

Answered by appellate court: yes.

2. "[O]ne basis for proper venue is 'substantial business' by the defendant in the county where venue is sought." *Enpro Assessment Corp. v. Enpro Plus, Inc.*, 171 Wis. 2d 542, 549. 492 N.W.2d 325 (Ct. App. 1992). Does Mt. Morris's own submission showing that it sells nearly $1 million in policies in Dane County qualify as "substantial business"?

Answered by circuit court: yes

Answered by appellate court: yes.

3. "Statutory interpretation centers on the 'ascertainment of meaning,' not the recitation of words in isolation." *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 13, 400 Wis. 2d 417, 970 N.W.2d 1 (internal quotation omitted). Did the circuit court properly conclude that the plain meaning of Wis. Stat. § 801.50 did not limit venue to "the" one county where the defendant does substantial business?

Answered by circuit court: yes.

Answered by appellate court: yes.

4. Wisconsin Statute § 801.52 gives the circuit court discretion to change venue in "the interest of justice or for the convenience of the parties or witnesses." Did the circuit court appropriately exercise its discretion in declining to change venue where the accident happened less than 50 miles from Dane County and the plaintiff's medical treatment occurred in Dane County?

Answered by circuit court: yes.

Answered by appellate court: yes.

STATEMENT ON CRITERIA FOR REVIEW

No genuine issue warrants review here. In the first instance, the questions Mt. Morris seeks to raise are not squarely presented because venue is proper as to Middlesex. Per *Boyd*, venue is therefore proper in its entirety.

Even if the issues were squarely presented, none meet the criteria for review set forth in Wis. Stat. § 809.62(1r). Mt. Morris fails to advance any plausible reason that the interpretation of the venue selection statute is a novel issue or that future development of the law is required. The rules of statutory interpretation are well-settled, see *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, and the lower courts had no difficulty applying them to interpret the venue statutes. Mt. Morris's petition is yet another attempt to seek error correction of an adverse result premised on an errant, hyper-focused reading of an easy-to-follow statute.

As it concerns the discretionary challenge to venue, Mt. Morris improperly invites this Court to police discretionary, fact-specific determinations that the legislature clearly placed into the purview of trial courts. This does not satisfy the criteria under Wis. Stat. § 809.62(1r). The court of appeals thoroughly considered and affirmed that the trial court did not erroneously exercise discretion when it reasoned to the conclusion of not transferring venue to Sauk County, a mere 48 miles from the Dane County courthouse.

STATEMENT OF THE CASE

The court of appeals set forth a comprehensive and detailed accounting of the facts and procedural history of the case. Only a few additional facts are necessary for this Court's consideration of Mt. Morris's petition.

Middlesex did not timely file a motion to change venue under Wis. Stat. § 801.51. *Stelling v. Middlesex et al.,* 2023 WI App 10, ¶¶ 55, 59. Furthermore, Middlesex did not present any evidence to support Mt. Morris's motion to change venue from Dane County on the basis that venue was improper as to Middlesex and Friede. *Id*. ¶¶ 50, 56.

ARGUMENT

I. *Boyd* is dispositive of Mt. Morris's appeal.

The appellate court properly affirmed that Mt. Morris's challenge to venue as a matter of right under Wis. Stat. § 801.50(2) failed, as required by *Boyd*. The "longstanding rule from our supreme court" is that, when an action involves multiple defendants, if venue is proper as to just one of those defendants, then the case is properly venued. *Stelling,* 2023 WI App 10, ¶ 3. This "longstanding rule" is not novel and needs no further explanation. Because venue was proper as to Middlesex, Mt. Morris's petition fails to meet the criteria under Wis. Stat. § 809.62(1r) and it should be denied outright.

Mt. Morris's argument on *Boyd* lacks any legal basis. Tellingly, Mt. Morris cites no law in this section of its brief because no law exists to support its hollow assertions.[1] (PFR, pp. 12-13.) In an attempt to offer a voice for Middlesex, Mt. Morris confoundingly asserts that while the circuit court order denied the defendants' (plural) motion to change venue, because the oral ruling did not include fact-finding specific to Middlesex, Middlesex had no issue to appeal. Not so. The trial court's order referred to multiple defendants. This Court interprets a circuit court's order "by looking at the language of the order… " *Radoff v. Red*

[1] The court need not consider arguments unsupported by references to legal authority. *State v. Lindell*, 2000 WI App 180, ¶ 23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500, *aff'd*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.

Owl Stores, Inc., 109 Wis. 2d 490, 493, 326 N.W.2d 240 (1982). Because the order referenced both defendants, Mt. Morris's argument is incorrect.

Further, Mt. Morris simply ignores the language of the order and the appellate court's reasoning, chief among its points being that neither Mt. Morris nor Middlesex produced any evidence concerning Middlesex's business activity, anywhere. *Stelling*, 2023 WI App 10, ¶ 5. That Middlesex did not challenge the circuit court's order denying change of venue speaks volumes as to Middlesex's support for Mt. Morris's erroneous averments.

II. The court of appeals and the circuit court properly applied the facts under the venue selection criteria using well-settled principles of statutory interpretation.

The venue statute is clear and unambiguous. The parties do not dispute that. (*See*, Petitioner App. 135, 143). Because it is unambiguous, because the rules of statutory interpretation provide the necessary framework for construction, and because neither lower court had any difficulty understanding or applying Wis. Stat. § 801.50, review is not warranted. Moreover, Mt. Morris's hyper-focused reading of an isolated phrase in subsection (2)(c) runs contrary to the meaning and purpose of this particular statute, as explained in the Judicial Council Note of 1983.

The appellate court correctly recognized that the Judicial Council confirmed its plain language interpretation of the statute. *Stelling*, 2023 WI App, ¶ 36; *see also*, nn. 7 and 8. The Judicial Council had found, among other things, that "Wisconsin's present venue laws contain archaic distinctions which unduly restrict the plaintiff's choice of venue," and that "[u]nnecessary litigation is caused by the statutes' failure to specify that a defect in venue is not jurisdictional and does not affect the validity of any order or judgment." Judicial Council Prefatory Note to 1983 Wisconsin Act 228. It recommended amendments to eliminate these problems, which the legislature then enacted. *Id*. Mt. Morris's reading of the

statutory language would essentially eliminate the amendments, again unduly restricting plaintiffs' choice of venue and creating unnecessary litigation over venue issues.

Additionally, Mt. Morris's petition deviates from this Court's longstanding rules of statutory construction. Several pages of the petition are devoted to rehashing its outlier argument that Wis. Stat. § 801.50(2)(c) somehow limits the meaning of substantial business to a single county. Recognizing the rule of statutory construction that precludes inserting words or phrases into a statute to give it certain meaning, the court of appeals highlighted that "at oral argument Mt. Morris appeared to concede that its argument required inserting 'the most' before 'substantial business' in the statute." *Stelling*, 2023 WI App 10, ¶ 38. That concession undermines Mt. Morris's arguments; Mt. Morris omits its concession from its petition.

Mt. Morris's arguments are also contrary to this Court's cases rejecting a hyper-literal approach to construction of statutes. *See, e.g.*, *Brey v. State Farm Mut. Auto. Ins. Co*., 2022 WI 7, ¶ 13. Mt. Morris has proffered no reason for this Court to again address this recently reaffirmed rule.

Further reason to deny review is that Mt. Morris's proposed reading of Wis. Stat. § 801.50(2), particularly as it applies to the meaning of "substantial business," would produce absurd results resoundingly contrary to the goals of the 1983 amendment of § 801.50 and disproportionate to the needs of most, if not all, civil cases. Mt. Morris's reading of the statute – requiring that substantial business be "the" one county where the "most" business is conducted by a defendant – would require plaintiffs to identify, before filing suit, in which county a particular defendant performs the greatest share of its business. Such financial information is not readily available and generally is not voluntarily produced (Middlesex clearly eschewed this approach), so the inevitable result would be more discovery and litigation to identify *the* county in which any particular defendant does the most

business. That is precisely what the Judicial Council was trying to avoid, demonstrating that Mt. Morris's arguments create an absurd result.

The same arguments apply with respect to Wis. Stat. § 801.53. The statute is clear. The court of appeals properly interpreted it and applied it to the determination of venue. In this regard, the proof submitted by the parties with respect to the venue options set forth under Wis. Stat. § 801.50(2) is no different than that which a circuit court routinely deals with on issues of discovery, which require some evidentiary showing to enable a circuit court to make an appropriate record in support of a decision. Mt. Morris's voluntary production of "proof" that it sold 559 policies in Dane County and earned $859,145 in premiums from their sale was satisfactory evidence for both lower courts to reasonably hold, under the plain reading of the statute, that Mt. Morris conducted substantial business in Dane County.

Interpreting Wis. Stat. § 801.50(2)(c) is not a novel issue. Further, *Enpro* has for decades provided sufficient guidance to litigants, declaring subsection (2)(c) to mean that "one basis for proper venue is 'substantial business' by the defendant in the county where venue is sought." *Enpro*, 171 Wis. 2d at 549. Because proper interpretation of this statute has been explained by *Enpro*, lower courts and litigants, with the lone exception of Mt. Morris, have had no trouble understanding the outlines of proper venue. That this issue has not been raised since *Enpro* was decided demonstrates that this issue is not likely to recur. Indeed, even Middlesex chose not to dispute this interpretation. Review is simply not merited.

III. Review of discretionary challenges under Wis. Stat. § 801.52 is a fact-specific inquiry that does not satisfy any criteria for review.

Fact-intensive discretionary decisions warranting consideration of which witnesses may appear at trial and whether a venue should be moved in the interest

of justice, are not sufficient to invoke this Court's "law development" prerogative under Wis. Stat. § 809.62(1r)(c). *See also, Cook v. Cook*, 208 Wis.2d 166, 189, 560 N.W.2d 246 (1997).

As admitted in Mt. Morris's petition for review, even if a plaintiff properly selects venue under Wis. Stat. § 801.50(2), the circuit court retains discretion to change venue, on its own motion or that of a party. This Court affirms a discretionary order if there appears any reasonable basis for the trial court's decision. *See, Quick v. 1960 American Legion, Dept. of Wis. Convention Corp.*, 36 Wis. 2d 130, 135, 152 N.W.2d 919 (1967). In fact, the appellate court generally looks for reasons to sustain discretionary decisions. *Burkes v. Hales*, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991).

After reviewing the record, the court of appeals applied its error-correcting function to assess whether that discretion was erroneously exercised. Because the circuit court followed the standards governing discretionary change of venue and set forth several reasons not to transfer venue (particularly that Sauk County and Dane County are right next to each other, Mt. Morris failed to produce evidence that there would be an issue with access to proof, and that the plaintiff's surgeon would be less likely to testify in person in Sauk County versus Dane County, which is also an interest of justice factor), the appellate court correctly determined that the circuit court properly exercised its discretion. *Stelling*, 2023 WI App 10, ¶ 79. This mine-run issue does not merit review.

The court of appeals' decision also demonstrates that Mt. Morris's petition misstates the record. Mt. Morris incorrectly asserts that the only basis for the circuit court's decision to decide the discretionary challenge against it was that the plaintiff's surgeon is located at UW Hospital in Dane County. (*See*, Petition for Review, p. 12.) Mt. Morris's narrow recitation of the circuit court's discretionary decision distorts the actual record and thus improperly portrays the discretionary decision-making of the circuit courts as one that somehow favors all plaintiffs. The reality is that discretionary challenges to venue are determined on a case-by-

case basis under facts unique to each case. *See, D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 106 (2d Cir. 2006).

Wis. Stat. § 809.62(1r) requires that for review to be warranted, a decision by the Supreme Court is necessary to further clarify the law. Mt. Morris's petition claims that the law governing *forum non conveniens* requires more structure, yet it conceded during oral argument before the court of appeals that under *Littmann v. Littman*, 57 Wis. 2d 238, 246, 203 N.W.2d 901 (1973), a circuit court is not required to consider each factor. *Stelling*, 2023 WI App 10, ¶ 78. In this case, however, the circuit court did reason through several factors and still decided against Mt. Morris. Significantly, the circuit court adhered to the principle recognized in *Lau v. Chicago & N.W.R. Co.*, 14 Wis. 2d 329, 337, 111 N.W.2d 158 (1961), that the plaintiff's choice of forum should rarely be disturbed and that the right of a plaintiff to choose a forum "is an important legal right and should not lightly be tampered with" (*see*, Pet. App. 050).

Mt. Morris would simply prefer that this Court change the law to allow an insurer a right to substitute a plaintiff's choice of venue for that of its own after suit is filed, contrary to long-standing precedent, as stated above. Its position would thwart the legislature's intent to allow the plaintiff broad latitude in selecting a venue, adopting the recommendations set forth in the Judicial Council Note in 1983. Wis. Stat. § 801.52 functions to prevent a plaintiff from setting trial in a venue that would be inconvenient to parties or witnesses or not in the interest of justice. This discretionary standard has been applied by circuit courts without issue for decades because the circuit courts are best positioned to consider the relative convenience of witnesses and parties. This is a factual issue that does not present a proper basis for appeal of any legal issue under Wis. Stat. § 809.62(1r).

CONCLUSION

Mt. Morris's petition improperly seeks error correction by this Court. It fails to meet the proper law-development criteria as required under Wis. Stat. § 809.62(1r). Its petition should be denied because the issues are not squarely presented, given *Boyd* and Middlesex's failure to timely challenge venue in the trial court and failure to timely seek leave to appeal.

Even if the issues were squarely presented, they do not present any novel issue meriting review nor any legal question likely to recur. Mt. Morris's erroneous interpretation of an admittedly unambiguous statute was properly rejected. Finally, discretionary challenges are fact-intensive exercises. The petition fails in its effort to recast a factual issue into a legal question that is likely to recur. Mt. Morris's petition must be denied.

Respectfully submitted this 27th day of February, 2023.

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CERTIFICATE OF FORM, LENGTH, ELECTRONIC FILING

I hereby certify that:

This response to petition for review ("response") conforms to the rules contained in Wis. Stat. §§809.19(8)(b)(bm) and (c) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,646 words.

Dated this 27th day of February, 2023.

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