STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

VILLAGE OF THIENSVILLE,

Plaintiff-Respondent,

v. Appeal No. 2015AP576-FT

CONOR B. FISK,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE
OZAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE PAUL V. MALLOY, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Did the trial court err as a matter of law in ruling that it had no jurisdiction to hear the appeal filed from the municipal court judgment of conviction?

ANSWERED BY THE TRIAL COURT: No. The Court ruled it had no jurisdiction to hear the appeal as a result of a lack of jurisdiction.

STATEMENT OF THE CASE AND RELEVANT FACTS

A court trial was held in the Village of Thiensville Municipal Court on November 5, 2014 on citations alleging 1st Offense Operating While Intoxicated (OWI) and 1st Offense Operating with a Prohibited Breath Alcohol Concentration (BAC). After trial, the Court entered an Order on the same date dismissing the OWI citation (R. 9) and finding guilt on the BAC citation (R. 10). On November 25, 2014, the defendant-appellant, Conor B. Fisk ("Fisk") filed a timely Notice of Appeal (R. 11) with the municipal court clerk on the BAC citation. At 9:02 p.m. on November 25, 2014, Fisk's counsel e-mailed the Village's attorney file stamped copies of the appeal documents. (R. 14, Exh. A)

On December 3, 2014, the municipal court file was transmitted and filed with the Circuit Court of Ozaukee County. On December 23, 2014, the Village filed a Motion to Dismiss Defendant's Appeal and Brief in Support of its Motion (R. 13) with an accompanying Affidavit of Counsel (R. 14) alleging that the appeal was defective for failure to provide proper written notice of appeal to the Village. Fisk filed a Response Brief on January 2, 2015. (R. 15) The Village filed its Reply Brief on

January 5, 2015. (R. 16)

The trial court held a hearing on January 7, 2015 wherein both sides presented oral argument on the jurisdictional issue. (R. 37) The trial court issued an oral decision granting the Village's motion and dismissing the appeal for lack of jurisdiction on January 26, 2015. (R. 38) The Court issued a final written order on February 13, 2015. (R. 19) Notice of Entry of Final Order was filed on February 23, 2015.

A timely Notice of Appeal was filed on March 17, 2015. The matter is now before this Court for briefing.

LEGAL ARGUMENT

I. THE TRIAL COURT HAD PROPER JURISDICTION TO HEAR THE APPEAL FROM THE MUNICIPAL COURT CONVICTION

A. Standard of Review

Whether Fisk complied with Wis. Stat. § 800.14 when seeking to appeal presents a question of law which the appellate court reviews *de novo*. See ***Wellin v. American Family Mut. Ins. Co.***, 2006 WI 81, ¶ 16, 292 Wis. 2d 73, 717 N.W.2d 690 (the interpretation and application of statutes and case law to facts of a particular case present questions of law which appellate courts decide *de novo*.) Accordingly, this Court conducts a *de novo* review of the trial court's decision on an issue of this nature.

B. Argument

1. Fisk Complied With the Requirements of § 800.14(1), Wis. Stats.

The Village claimed, and the trial court found, that Fisk did not comply with § 800.14 (1), Wis. Stats., because he did not give proper written notice of appeal when appealing from the municipal court to the circuit court. In claiming that improper notice was provided, the Village invoked the service statute provided in the rules of civil procedure in § 801.14(2), Wis. Stats. This statute is simply not applicable to an appeal from the municipal court to the circuit court. When a specific method of review is prescribed by statute, that method is exclusive. ***Sewerage Comm'n of Milwaukee v. DNR***, 102 Wis. 2d 613, 630, 307 N.W2d 189 (1981).

The Village's claim that Fisk did not provide proper written notice to its attorney is founded upon a literal misinterpretation of the applicable municipal court statute. § 800.14(1), Wis. Stats., states as follows:

> Appeals from judgments, decisions on motions brought under s. 800.115, or determinations regarding whether the defendant is unable to pay the judgment because of poverty, as that term is used in s. 814.29 (1) (d), may be taken by either party to the circuit court of the county where the offense occurred. The appellant shall appeal by giving the municipal judge and other party *written notice of appeal* within 20 days after the judgment or decision. No appeals may be taken from default judgments. (Emphasis Added)

The above statute is contained within Section 800 of the Wisconsin Statutes ("Statutes"). This is a special section of the code that was created by the legislature and pertains specifically to municipal court procedure in our state. The section does

not invoke, nor make reference to, Section 801 of the Statutes. As can be seen, that statute delineates that an appellant need only provide the other party with "*written notice*" of the appeal within 20 days after the judgment or decision. The statute makes no reference to the terminology "service of pleadings and other papers" upon opposing counsel as set forth in § 801.14(2), Wis. Stats. Here, it is undisputed that Fisk provided written notice to the Village attorney via e-mail transmission within 20 days after the judgment in municipal court.

The Village's main claim at the trial court level was that Fisk failed to comply with the service statute contained in § 801.14(2), Wis. Stats. The Village claimed that "[S]tate law provides that when service of papers or other pleadings is required to be made upon a party represented by an attorney, such service shall be made upon the attorney, either by 'delivering' a copy of the paper to the attorney, or mailing a copy to the attorney's last-known address, Wis. Stat. § 801.14(2)." (R. 13, pp. 2-3.) That may well be the case with service related to actions governed by Chapter 801. However, that chapter of the Statutes is inapplicable to proceedings related to the issue before this court. §§ 801.01(1) and (2), Wis. Stats., pertain specifically to the scope of procedures set forth in that chapter of the Statutes. Those two statutory sections state:

> (1) Kinds. Proceedings in the courts are divided into actions and special proceedings. "Action", as used in chs. 801 to 847, includes "special

proceeding" unless a specific provision of procedure in special proceedings exists.

(2) Scope. Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin where different procedure is prescribed by statute or rule. Chapters 801 to 847 shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding.

Given the above statutory sections, it is clear that the scope of the codified laws contained in section 801 apply to govern procedures within that section except where a different procedure is prescribed by statute or rule. It is clear that § 800.14(1), Wis. Stats., provides a different procedure than that set forth in § 801.14(2), Wis. Stats, for providing notification to opposing counsel. The more specific statute provides only that "*written notice*" be given to opposing counsel.

In this scenario, the Village acknowledges in its pleadings and Affidavit of Counsel that it received the written e-mail transmission on November 25, 2014. For the Village to suggest in this day and age that such notification was not in writing makes a mockery of the statute. Accordingly, it is undisputed that such written notice under the applicable statute was given to opposing counsel within a timely manner and in compliance with the law as set forth in Chapter 800.

2. Fisk Complied with the Requirements of § 801.14(2), Wis. Stats.

Even if this Court finds that Fisk should have complied with the service provisions set forth in Chapter 801, he is still in compliance with the legislative intent of the applicable statute at issue. § 801.14(2), Wis. Stats., sets forth as follows:

> Whenever under these statutes, service of pleadings and other papers is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party in person is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing it to the last-known address, or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this section means: handing it to the attorney or to the party; transmitting a copy of the paper by facsimile machine to his or her office; or leaving it at his or her office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Service by facsimile is complete upon transmission. The first sentence of this subsection shall not apply to service of a summons or of any process of court or of any paper to bring a party into contempt of court.

The clear intent of this statute pertains to notification to opposing counsel. The legislature set forth that it wants a party to a lawsuit to provide notification of any filings to opposing counsel so that the documents are actually received by that attorney. Further, this Court should be aware of the fact that the legislative history of this specific statutory subsection dictates that it has not been amended in any fashion since 1991. In 1991, there is a notation in the statute as follows:

> "Judicial Council Note, 1991: Sub. (2) is amended to clarify that facsimile transmission can be used to serve pleadings and other papers. Such service is deemed complete upon transmission. The change is not intended to expand the permissible means of serving a summons or writ conferring court jurisdiction under s. 799.12 and

ch. 801, stats. [Re Order eff. 7-1-91]."

The rules of statutory construction are applicable in this case. Our Supreme Court has held that "[T]he word "shall" is ordinarily presumed to be mandatory when it appears in a statute, but may be construed as directory if necessary to carry out the legislature's clear intent. ***Karow v. Milwaukee Cnty. Civil Serv. Comm'n***, 82 Wis.2d 565, 570–71, 263 N.W.2d 214 (1978). A statutory time limit is one type of statutory requirement that may result in a loss of the circuit court's competency, if a party fails to satisfy it. ***Id***., ¶ 13. However, noncompliance with a mandatory statute does not always translate into a loss of competency. ***State v. Bollig***, 222 Wis.2d 558, 566, 587 N.W.2d 908 (Ct.App.1998) (citing ***State v. Kywanda F.***, 200 Wis.2d 26, 33, 546 N.W.2d 440 (1996)). Sometimes the "legislative purpose of the statutory scheme [can] be fulfilled, without strictly following the statutory directive." ***Id***. at 567–68, 587 N.W.2d 908.

The Wisconsin Supreme Court in ***Karow*** ultimately set forth several factors for use in evaluating whether a statute's use of the term "shall" is mandatory or directory. The factors to be considered are: the inclusion or omission of a "prohibition or a penalty" in the statute, "the consequences resulting from one construction or the other," "the nature of the statute," "the evil to be remedied," and "the general object sought to be accomplished" by the legislature. ***Karow*** at 572, 263 N.W.2d 214.

1. The first factor to be considered is the inclusion or omission of a

penalty. § 801.14(2) does not provide a penalty within the four corners of the paragraph.

2. The second factor pertains to the consequences resulting from one construction or the other. A mandatory construction would allow for only for two types of service – regular U.S. mail and fax transmission. This severely limits the statute and lags it behind technology in the 21st century. A directory construction allows for the use of common sense in understanding that the technology of email is much faster and more efficient than either of the delineated methods set forth in the statute.

3. The nature of the statute was set forth above. It is simply a "notice" statute. Compliance with this statute is complete once a party has taken appropriate steps to give opposing counsel notification of a filing. Clearly, taking a directory approach to interpretation of this statute provides that notification by faster and more efficient means brings one within the notice requirements of the statute.

4. The evil to be remedied is to make certain that some form of notice is provided to opposing counsel so that the attorney can appropriately respond to the filing. The legislature wanted to make it clear that attorneys must provide notice to one another when filing documents so that nobody is left in the dark with respect to keeping up with the substance of any lawsuit. Here, the evil to

be remedied was complied with as the Village attorney acknowledges receipt of the email transmission.

5. The general object of the sought to be accomplished by the legislature is to provide notice to opposing counsel in the most efficient means possible. This is the reason why fax transmission was added in 1991. Simply stated, the addition of email transmission is simply lagging behind with our legislature. There should be no dispute with the parties to this action that email transmission is the most effective means of written communication in this day and age.

Given the analysis set forth above, the term "shall" as used in this statute should be construed by this Appellate Court as directory in order to carry out the legislature's clear intent of notification to opposing counsel. Notification was delivered to counsel here by written e-mail transmission. Accordingly, Fisk has effectively complied with the statute.

CONCLUSION

Based upon the arguments contained in this brief, Fisk moves the Court to reverse and remand this matter back to the trial court for entry of an Order that the circuit court had jurisdiction to hear the appeal taken directly from the municipal court.

Dated this 24th day of June, 2015

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BRIEF CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), as modified by this Court's order dated April 7, 2015, for a brief and appendix produced with a proportional serif font. The length of the brief is 2,385 words. This brief was prepared using Microsoft Word word processing software. The length of the brief was obtained by use of the Word Count function of the software.

Dated this 24th day of June, 2015

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Attorney Christopher J. Cherella

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of sec. 809.19(12), Wis. Stats. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of June, 2015

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Attorney Christopher J. Cherella

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of June, 2015

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Attorney Christopher J. Cherella

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DEFENDANT-APPELLANT'S APPENDIX

A. Notice of Compilation of Record

B. Notice of Appeal

C. Portions of the Record Essential to an Understanding of the Issue Raised (i.e. R. 37 - Oral Argument Hearing on January 7, 2015)

D. Transcript of Trial Court's Oral Ruling dated January 26, 2015

E. Trial Court's Written Order dated February 13, 2015

F. Notice of Entry of Final Order dated February 19, 2015 and filed on February 23, 2015