STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

Village of Thiensville,
*Plaintiff-Respondent*,

*v.* Appeal No. 15-AP-576-FT

Conor B. Fisk,
*Defendant-Appellant*.

*ON APPEAL FROM A DECISION AND ORDER ENTERED BY THE OZAUKEE COUNTY CIRCUIT COURT THE HONORABLE PAUL V. MALLOY, PRESIDING*

# PLAINTIFF-RESPONDENT'S MEMORANDUM BRIEF AND SUPPLEMENTAL APPENDIX

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## STATEMENT OF THE CASE

This is an appeal from a decision and order of the circuit court finding that Fisk failed to properly serve his notice of appeal from municipal court upon counsel for the Village, thus depriving the circuit court of jurisdiction.

After a traffic stop in the early morning hours of December 27, 2013, a Village of Thiensville police officer issued Fisk two citations, one alleging a violation of Thiensville Village Code § 74-1 adopting Wis. Stat. § 346.63(1)(a), operating a motor vehicle while under the influence of an intoxicant ("OWI"), and a second alleging a violation of the same Thiensville code section adopting Wis. Stat. § 346.63(1)(b), operating a motor vehicle with a prohibited alcohol concentration ("PAC"). (R. 2, 3.)

Fisk, by his attorney, entered not guilty pleas to the two citations. (R. 1-1.) The matter proceeded to a trial before the Mid-Moraine Municipal Court on November 5, 2014. (R. 9-1, 10-1.) The municipal court found Fisk not guilty of the OWI charge, but guilty of the PAC charge, and imposed a sentence. (*Id.*)

On November 25, 2014—the 20th and final day for Fisk to appeal the municipal court PAC conviction to the circuit court—Fisk's attorney personally delivered a Notice of Appeal to the municipal court clerk's office along with the statutory filing fee. (R. 11-1, 11-3, R-App. 1-2.) At 9:02 p.m. on November 25, Fisk's attorney e-mailed a scanned copy of the Notice of Appeal to the Village's attorney. (R.

14-2, R-App. 3.) This was the only notice of appeal Fisk provided to the Village. (R. 14-1.)

The Village moved the circuit court to dismiss Fisk's appeal, on the grounds that this notice was insufficient to "give written notice" of the appeal to the Village, as required by Wis. Stat. § 800.14(1). (R. 13.) After briefing and argument by the parties, the circuit court granted the Village's motion. (R. 38, R. 19.) Fisk appeals from the circuit court's decision and order.

## ARGUMENT

### I. Because electronic mail is not a recognized means of giving notice to an opposing party, Fisk failed to "give written notice" of his appeal to the Village

The defendant failed to give notice of appeal to the Village within 20 days of the municipal court decision. Therefore, the circuit court properly determined it lacked jurisdiction, and this Court should affirm the circuit court's dismissal of the appeal.

In order for a circuit court to obtain jurisdiction over an appeal from a municipal court judgment, the appellant "must follow the method prescribed in the governing statute." *City of Mequon v. Bruseth*, 47 Wis. 2d 791, 794, 177 N.W.2d 852 (1970). Wis. Stat. 800.14(1) sets forth the sole manner in which an appellant shall appeal a municipal court judgment: by "giving the municipal judge and other party written notice of appeal within 20 days after the

judgment or decision." Thus, Wisconsin appellate courts have repeatedly held that an appellant's failure to strictly comply with this statutory procedure, including failure to deliver the notice of appeal to the municipality within 20 days of the municipal court judgment, deprives the circuit court of jurisdiction over the appeal. *See, e.g., City of Milwaukee v. Hall*, 2012AP875 (unpublished, R-App. 4-8); *Town of Oconomowoc v. Hibbard*, 2009AP2890 (unpublished, R-App. 9-14), *City of West Allis v. Michaels*, 2013AP710 (unpublished, R-App. 15-20.)

Wisconsin's civil procedure rules provide 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). The statute goes on to define "delivery":

> 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.

*Id.* Furthermore, Wis. Stat. § 801.14(4) provides that

> [t]he filing of any paper required to be served constitutes a certification by the party or attorney

> effecting the filing that a copy of such paper has been timely served on all parties required to be served, except as the person effecting the filing my otherwise stipulate in writing.

*Id.* (emphasis added.)

Here, it is uncontroverted that Fisk did not hand-deliver, fax, or mail his notice of appeal to the Village's attorney within 20 days after the municipal court judgment. Rather, Fisk's attorney waited until after 9:00 p.m. on the 20th day to e-mail a scanned copy of the appeal papers to the Village's attorney. Because Fisk's notice was not "delivered" in a manner authorized by statute, Fisk failed to "give" notice as demanded by Wis. Stat. § 800.14(1). Furthermore, it is evident that Fisk did not comply with the certification requirement of Wis. Stat. § 801.14(4); the appeal papers emailed to the Village's attorney had been file-stamped by the municipal court clerk's office[1], evidencing that Fisk filed first with the municipal court and *then* provided a copy to the Village.

Fisk's primary argument is that the Wisconsin civil procedure code does not apply to appeals from municipal court to circuit court; therefore, Fisk argues he is not constrained to the definition of

[1] The Court may also wish to take judicial notice of the fact that the Mid-Moraine Municipal Court administrative/clerk's office has set office hours of 8:00 a.m. to 4:30 p.m. Monday through Friday; the Mid-Moraine Municipal Court, unlike many municipal courts, does not hold regularly scheduled evening court proceedings.

"delivery" in Wis. Stat. § 801.14(2). Fisk's argument misses the mark.

Our courts have held that the provisions of Chapter 801 apply to appeals to the circuit court from other lower bodies, so long as a more specific procedure is not in place. For instance, in *Gangler v. Wisconsin Electric Power Co.*, the parties disputed whether the date counting provisions of Wis. Stat. § 801.15(1) or Wis. Stat. § 990.001(4) applied to an appeal to the circuit court from a county condemnation commission award. *Gangler v. Wisconsin Electric Power Co.*, 110 Wis. 2d 649, 329 N.W.2d 186 (1983). Because the appeal of the condemnation award initiated the action in the circuit court, and because the statutes governing condemnation proceedings did not evidence a contrary policy, the state Supreme Court held that the date counting rules in Wis. Stat. § 801.14(2) applied. *Id.* at 655-56. A more recent case underscored the holding of *Gangler* by noting that Chapter 801 did not apply to an appeal from an administrative ruling to the state division of hearings and appeals, distinguishing *Gangler* by noting that *Gangler* applied to appeals to circuit court. *Baker v. Dep't. of Health Servs.*, 2012 WI App 71 ¶ 10, 342 Wis. 2d 174 ¶ 10, 816 N.W.2d 337 ¶ 10.

Because this case is an appeal to the circuit court, and because Wis. Stat. § 800.14 does not evidence a contrary or stand-alone policy or definition of how written notice is to be given, this Court should hold, consistent with *Gangler*, that the definition of "delivery" in

Wis. Stat. § 801.14(2) applies to the service of a notice of appeal from municipal court to circuit court.

Fisk further argues that noncompliance with a time limit does not necessarily mean that the circuit court loses competency to proceed, and invites this court to find that the word "shall" in Wis. Stat. § 800.14(1) is directory as opposed to mandatory. This argument fails because the question here is not one of competency, but of subject matter jurisdiction. While circuit courts have original jurisdiction over all civil and criminal matters, circuit courts have appellate jurisdiction only "as the legislature may prescribe by law." WIS. CONST. art. VII, § 8. Therefore, while noncompliance with a mandatory statute does not always translate into a loss of competency, a circuit court obtains appellate jurisdiction "only…under the rules of appealability established by the legislature." *See Walford v. Bartsch*, 65 Wis. 2d 254, 258, 222 N.W.2d 633 (1974), *citing Bruseth*, *supra*. "In order for there to be a right of appeal, some statute must grant it and a party seeking to appeal must follow the method prescribed in the governing statute." *Bruseth*, *supra*, at 794. Therefore, the proper inquiry here is whether Fisk has strictly complied with the method prescribed for an appeal from municipal court to circuit court. This Court should affirm the circuit court's decision that Fisk did not do so.

Finally, Fisk argues that because the legislature has allowed for service of certain papers by fax, the legislative intent has been

fulfilled here because e-mail is better than fax. (A. Br. at 9.) However, the Village is not aware of any provision in the Wisconsin Statutes that allows for personal delivery of court filings and pleadings by e-mail, other than for those who voluntarily opt-in to the circuit court e-filing system in a particular action. Wis. Stat. § 801.17(6). Even in the circuit court e-filing system, documents are not directly e-mailed from party A to party B; rather, party A uploads a document to the e-filing system, which then automatically generates an e-mail notice to all registered electronic participants notifying them of the new filing. Wis. Stat. § 801.17(6)(b). Notably, even in the e-filing system, documents uploaded after the close of business are deemed filed as of the next business day, and when a party has "the right or duty to do some act within a prescribed period after the service of a document on the party," the party gets an extra day to comply if a document is served using e-filing between 5:00 p.m. and 12:00 midnight. Wis. Stat. § 801.17(4)(d)-(e). The same is true for documents sent by fax. Wis. Stats. §§ 801.16(2)(f), 801.15(5)(b). Therefore, there is a clear legislative intent that papers delivered after the close of business are, for all intents and purposes, deemed to have been delivered as of the next business day.

Because Fisk failed to serve notice of his appeal on the Village in a manner authorized by statute, the defendant has failed to comply with the statutory prerequisites of an appeal from municipal court to

circuit court. Because strict compliance with Wis. Stat. § 800.14(1) is necessary to confer jurisdiction upon the circuit court, the circuit court properly determined that it lacked jurisdiction over the appeal, and this Court should affirm the circuit court's dismissal of the appeal.

### *The Village Has Been Demonstrably Harmed; Fisk's Methods Prevented The Village from Cross-Appealing*

Fisk's error is not harmless because the municipal court found the defendant guilty on the PAC citation, but not guilty on the OWI citation. In order for the circuit court jury to decide both citations *de novo*, the Village would have had to cross-appeal the not guilty finding on the OWI citation within the same 20 days after the municipal court judgment. Fisk's method of notifying the Village of his appeal made it impossible for the Village to bring the OWI citation to the circuit court jury along with the PAC citation.

This Court has held that when a municipal court finds a defendant guilty on one half of an OWI/PAC case but not guilty on the other half, the defendant's appeal from the guilty finding does not automatically bring the entire matter into circuit court; rather, the municipality must file its own separate appeal from the not guilty finding. *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 503 N.W.2d 382 (Ct. App. 1993). The *Bastian* court dismissed the municipality's argument that such a finding would encourage what it

characterized as "sharp practices amongst defense attorneys." *Id.* at 197. The *Bastian* court suggested[2] that a municipality should take a "protective appeal" and "can always move to dismiss its appeal" if the defendant does not appeal in-kind. *Id.*

The Village does not dispute the central holding of *Bastian*, which is that the municipality must appeal in order for the municipality to bring the dismissed portion of an OWI/PAC case into circuit court. Rather, the Village contends that the dicta in *Bastian* concerning a municipality's potential remedies for such "sharp practices" was misplaced.

The *Bastian* court's discussion missed the mark on this issue for two important reasons. One, it interpreted the statute in such a way to reach an absurd result: that a municipality should pay a nonrefundable $144.50 filing fee simply as an insurance policy to protect the future availability of appellate remedies. Two, it touched on but does not directly address the fact that such an appeal is moot unless and until the defendant appeals from the conviction of the companion drunk-driving citation. "An issue is moot when its resolution will have no practical effect on the underlying controversy." *State ex rel. Olson v. Litscher*, 2000 WI App 61 ¶ 3,

[2] The *Bastian* court discussed the notion of a "protective appeal" solely for the purpose of dismissing the Town's concerns; the discussion was not essential to *Bastian*'s holding. Thus, the Village contends this discussion was dicta. *See, e.g., State v. Sartin*, 200 Wis. 2d 47, 60 n.7, 546 N.W.2d 449 (1996) (language expressed in a court's opinion that extends beyond the facts in the case, is broader than necessary, and not essential to the determination of the facts at issue is dicta); *State v. Harvey*, 2006 WI App 26 ¶ 19, 289 Wis. 2d 222, 710 N.W.2d 482 (citing *Sartin* with approval.)

233 Wis. 2d 685, 608 N.W.2d 425. Because OWI and PAC citations are joined for purposes of sentencing pursuant to Wis. Stat. § 346.63(1)(c), a municipality can obtain no further penalty or relief when a defendant has already been convicted and sentenced on one half of an OWI/PAC case. In other words, a municipality's appeal of a not guilty finding on half of an OWI/PAC case is properly considered moot *unless* a defendant revives the proceedings by filing his or her own appeal. Therefore, this Court should not find that the Village is in error for failing to take a "protective appeal."

This is not a case where the defendant's failure to provide proper notice of appeal to the Village elevates form over substance. Fisk's decision to wait until after 9:00 p.m. on the last day of the appellate period to notify the Village of his appeal made it impossible for the Village to cross-appeal the municipal court's dismissal of the OWI citation. The legislature has expressed a policy of encouraging "vigorous prosecution" of drunk driving offenses; such policy is hampered when untimely notice prevents a municipality from presenting a full OWI/PAC prosecution in the circuit court. Fisk's method of notifying the Village of his appeal was prejudicial to the Village.

## CONCLUSION

Fisk's notice of appeal, sent via e-mail to the Village well after business hours on the final day to appeal, violated both the letter

and the spirit of the statutes governing appeals from municipal court to circuit court. Because a failure to give proper notice in an appeal from municipal court deprives the circuit court of jurisdiction over the appeal, this Court should affirm the circuit court's decision and order dismissing Fisk's appeal.

Respectfully submitted July 16, 2015.

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## FORM AND LENGTH CERTIFICATION
### Wis. Stat. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b)-(c) for a brief produced with a proportional serif font, as modified by the Court's April 7, 2015 order pertaining to expedited appeals. The length of this brief is 2,457 words.

## ELECTRONIC BRIEF CERTIFICATION
### Wis. Stat. § 809.19(12)(f)

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated July 16, 2015.

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