WISCONSIN COURT OF APPEALS
DISTRICT IV

CITY OF VERONA,
Plaintiff-Respondent,

v. Appeal No. 2017AP001813

EDWARD A. SIEVERDING,
Defendant-Appellant.

Appeal from oral ruling and judgment dated July 28, 2017
by The Honorable Nicholas J. McNamara, Presiding
Dane County Circuit Court Case No. 2017CV000916

BRIEF OF PLAINTIFF-RESPONDENT, CITY OF VERONA

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STATEMENT OF ISSUES PRESENTED FOR REVIEW ON APPEAL

1. Can a defendant wishing to appeal a conviction in municipal court comply with the jurisdictional requirements of Wis. Stat. § 800.14 to appeal to circuit court without giving the "other party" *any* written notice of the appeal?

   The Circuit Court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION ON APPEAL

There is no need for oral argument because the matter is adequately addressed in the briefs.

Publication of the decision is not recommended, because the Court will apply existing law. *See* Rule 809.23(1)(b), Wis. Rules of App. Procedure.

STATEMENT OF THE CASE

The defendant-appellant appeals from a judgment finding he failed to comply with the jurisdictional notice requirements of Wis. Stat. § 800.14. More specifically, the Verona Municipal Court convicted Sieverding of four citations including Operating a Motor Vehicle While Intoxicated (OWI) and Operating a Motor Vehicle with a Prohibited Alcohol Content (PAC). (R. 1). Sieverding gave

the municipal court timely notice of appeal.[1] However, Sieverding never gave the City any written notice of the appeal. Instead, the City received the notice of appeal when the municipal court clerk email carbon-copied the City on the transmittal of the appeal from the municipal court to circuit court. The question before the Court is whether the municipal court clerk email carbon-copying the City on its transmittal of the appeal complies with Wis. Stat. § 800.14's requirement that Sieverding give the "other party written notice of appeal 20 days after the judgment or decision." The circuit court found that Sieverding failed to give the requisite jurisdictional notice and dismissed the appeal accordingly.

[1] Sieverding's Notice of Appeal actually only references three of his four convictions and omits the PAC conviction; however, the deficiency created by the notice is not before this Court because the circuit court granted the City's Amended Motion to Dismiss all four citations for failure to give the City written notice of appeal. (*See generally* R. 2; 6, 8; 16, 9:22-25).

Factual Background

At approximately 2:57 a.m., on July, 28, 2015, Officer Kile of the Verona Police Department was patrolling East Verona Avenue. (R. 1). Officer Kile observed the defendant's vehicle, which he ultimately stopped. (*Id.*). After stopping the vehicle, identifying the driver, and conducting an investigation, Officer Kile arrested Sieverding for the suspicion of operating while impaired. (*Id.*). Sieverding then took both a breath and blood test, both of which were above the legal limit. (*Id.*). Sieverding was arrested and charged for his offenses.

Procedural History

On the night in question, Sieverding received the following four citations: (1) Operating after Suspension;

(2) Operating without Insurance; (3) Operating while under the Influence ("OWI"); and (4) Operating with a Prohibited Blood Alcohol Content ("BAC").

The Verona Municipal Court originally held a trial on these four citations on January 26, 2017 at which the City rested its case. However, at the close of evidence, the court granted Sieverding a continuance because Sieverding claimed he was unprepared to present an anticipated expert witness who would explain the potential for ambient contamination of the defendant's blood test results and the potential effects of Sieverding's alleged ketogenic diet on his breath test results. After the parties reconvened two months later for the defendant's expert testimony, the court ultimately found the defendant guilty of all four citations on March 23, 2017.

Sieverding timely gave notice of appeal to the municipal court clerk. However, the City never received any notice of appeal from the defendant. On April 11, 2017 – the

day before the deadline – the City did receive an email carbon copy from the municipal court clerk transmitting the case to the circuit court clerk that included an attachment "Notice of Right to Appeal." (R. 6, p. 6-9).

The City moved to dismiss the appeal for failure to give the "other party written notice of appeal within 20 days after the judgment or decision." (R. 6). Sieverding argued that he did not know he needed to give the City notice of his appeal. (R. 13:12-14:8). However, despite the legal irrelevance of Sieverding's knowledge, the City provided three separate emails to Sieverding where the municipal court clerk explained the need to copy the City. (R. 6, 10-12; 16, 9:1-21). In any case, after Judge McNamara conducted a hearing, the circuit court made the following factual finding:

> The defendant, Mr. Sieverding, or the appellant here, did not give written notice to the other party within 20 days. I believe he had been informed that he needed to send it to Mr.

> Engelke, but whether he had been informed or not, it doesn't change the fact that he did not serve the other party.

(R. 16, 24:6-13).

The circuit court then dismissed the appeal for failure to comply with Wis. Stat. § 800.14. (R. 16, 24:4-9). Sieverding appealed. (R. 15).

Standard of Review

This Court upholds the "trial court's findings of fact unless they are clearly erroneous." *See e.g., State v. Goss*, 2011 WI 104, ¶ 9, 338 Wis. 2d 72, 806 N.W.2d 918. Whether those facts satisfy a statutory standard is a question of law reviewed de novo. *Id.*

ARGUMENT

I. INTRODUCTION

The question before the Court is whether the City's receipt of a notice of appeal attached to a carbon copy to the circuit court clerk from the municipal clerk – not the defendant – is sufficient to satisfy the jurisdictional prerequisites of Wis. Stat. § 800.14. The City argued and the circuit court answered no.

The statute provides in pertinent part:

> ... The appellant shall appeal by giving the municipal judge and other party written notice of appeal within 20 days after the judgment or decision.

Because the municipal court ruled on March 23, 2017, Sieverding had until April 12, 2017 to give written notice of appeal to the City. The City never received any notice of appeal from Sieverding.

Contrary to any suggestion by Sieverding that the municipal court clerk could be and was his "intermediary" or "proxy" (Appellant's Brief, 5, 9), the circuit court made the following factual finding:

> The defendant, Mr. Sieverding, or the appellant here, did not give written notice to the other party within 20 days. I believe he had been informed that he needed to send it to Mr. Engelke, but whether he had been informed or not, it doesn't change the fact that he did not serve the other party.

(R. 16, 24:6-13; *see also* 22:1-21).

Because Sieverding did not serve the City, and there is no excuse or exception from Wis. Stat. § 800.14's requirement to "give the other party written notice" the circuit court's decision should be affirmed.

II. IT IS UNDISPUTED THAT WIS. STAT. § 800.14 REQUIRES, AND SIEVERDING FAILED TO GIVE, WRITTEN NOTICE OF HIS APPEAL TO THE CITY

This case requires the Court to construe a statute – Wis. Stat. § 800.14. When construing a statute, the statutory

interpretation begins with the language of the statute. *State v. Goss*, 2011 WI 104, ¶ 10, 338 Wis. 2d 72, 806 N.W.2d 918. "Statutory language is given its common, ordinary, and accepted meaning." *Id.* If the meaning of the statute is plain, the inquiry stops and ends there. *Id.*

Here, the language of Wis. Stat. § 800.14 is clear:

> ... The appellant shall appeal by giving the municipal judge and other party written notice of appeal within 20 days after the judgment or decision.

Sieverding never gave the City notice of his appeal. In fact, the defendant admitted as much:

> The statute is clear and we're not arguing with that. There was no direct notice by Mr. Sieverding in that stage of the game we would assume.

(R. 16, 14:9-12).

After admitting that "frankly there is no evidence that he did" give the City notice, Sieverding explained that he was

confused and that he believed it was the municipal court clerk's practice and responsibility to give the City notice. (R. 16, 23:11-24:3; *see also* 23:11-22). The trial court found that not only was Sieverding informed of the need to copy the City, but that Sieverding could not rely on the municipal court clerk and did not give the City the requisite notice as a factual matter. (R. 16, 24:6-13; *see also* 22:1-21).

An aggrieved party must comply with Wis. Stat. § 800.14 in order to convey jurisdiction to the circuit court when appealing a municipal court judgment. *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 503 N.W.2d 382 (1993) (reversing circuit court for lack of jurisdiction where the aggrieved party failed to appeal pursuant to section 800.14). Accordingly, the analysis is quite simple. Because Sieverding failed to give the requisite notice under Wis. Stat. § 800.14, the circuit court judgment should be affirmed.

III. WIS. STAT. § 800.14 PROVIDES NO EXCEPTION TO EXCUSE SIEVERDING'S FAILURE TO GIVE THE CITY WRITTEN NOTICE OF HIS APPEAL

In response to his undisputed failure to give notice to the City, Sieverding presents two strawmen arguments. First, that there was no prejudice caused to the City. (Appellant's Brief, 5). Second, that there was no limit on the method of delivery required by Wis. Stat. § 800.14 in reliance upon *Village of Thiensville v. Fisk,* No. 2015AP576, ¶ 3, unpublished slip op. (Wis. Ct. App. Aug. 26, 2015).[2] (Appellant's Brief, 5-9).

In regard to Sieverding's first argument, whatever actual notice and/or lack of prejudice the City had is not an exception to Wis. Stat. § 800.14's requirement that he give the City written notice of his appeal. For a comparison, actual notice and lack of prejudice is an exception to the

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[2] This case is cited pursuant to Wis. Stat. § 809.23(3), and is not precedent nor binding on this Court, and a true and correct copy of the opinion is provided in the Respondent's appendix.

notice requirements to bring a tort claim against a municipality like the City. *See* Wis. Stat. § 893.80(1d)(a). In *Fisk*, the court explained that since the legislature was aware of the formal service requirement of Wis. Stat. § 801.14, and did not include them in Wis. Stat. § 800.14, it could be inferred that the legislature purposefully decided not to include them. *Fisk*, No. 2015AP576 at ¶ 3 (citing *Coakley Relocation Sys., Inc. v. city of Milwaukee*, 2008 WI 68, ¶ 24 n. 10, 310 Wis. 2d 456, 750 N.W.2d 900). Furthermore, the courts do not read language into the statute that the legislature omitted. *See e.g., Sorenson v. Batchelder*, 2016 WI 34, ¶ 39, 368 Wis. 2d 140, 885 N.w.2d 362. Because lack of prejudice and actual notice are not an exception in the statute, Sieverding's arguments regarding prejudice are unavailing in excusing his failure to comply with Wis. Stat. § 800.14.

Secondly, Sieverding argues that there is no limit on the method of delivery of his notice of appeal based on *Fisk*.

While it is true that the *Fisk* court found that an email could satisfy the written notice of appeal requirement of Wis. Stat. § 800.14 – that notice must still come from the defendant. *Fisk*, No. 2015AP576 at ¶ 3. Sieverding stretches *Fisk* to argue there is no limit on the "methods of delivery" when *Fisk*'s holding only rejects the proposition that formal service pursuant to Wis. Stat. § 801.14 was required. *Id.* Regardless of how far Sieverding stretches the holding of *Fisk*, it does not change the operative facts that Sieverding failed to give the City <u>any</u> written notice of his appeal. (R. 16, 24:6-13; *see also* 22:1-21). Once again, this strawman argument fails to excuse Sieverding's failure to comply with Wis. Stat. § 800.14.

Finally, Sieverding argues that the City waived its right to object to the sufficiency of the appeal or to the jurisdiction of the circuit court pursuant to Wis. Stat. § 807.07. (Appellant's Brief, 9-10). As an initial matter, issues and arguments not presented to the circuit court will not be considered for the first time on appeal. *See e.g. State v. Colstad*, 2003 WI App 25, ¶ 28, 260 Wis. 2d 406, 659 N.W.2d 394. In any case, if a party has properly raised their objection to jurisdiction, the party may later take part in pretrial discovery or otherwise contest the merits of a civil forfeiture action without waving objection to jurisdiction. *See City of Milwaukee v. Mallett*, No. 2010AP400 at *4, ¶ 14, 329 Wis. 2d 712, 790 N.W.2d 544 (rejecting defendant's argument based upon Wis. Stat § 807.07 and affirming dismissal of defendant's appeal to circuit court for failure to give written notice of appeal pursuant to Wis. Stat. § 800.14). Like *Mallett*, the City "made its objection known at the first

scheduled hearing." *Id.* In fact, the City filed its notice and motion to dismiss *before* the first scheduled hearing on June 27, 2017. (R. 2). As in *Mallett*, the City did not otherwise "participate" in the proceedings as would be applied in Wis. Stat. § 807.07. The fact that the City amended its motion cannot change the result. *See* Wis. Stat. § 802.09; *see also Mallett*, No. 2010AP400 at *1, ¶ 1 ("Because the City's appearance at the scheduled pretrial conference at which it filed its motion to dismiss does not constitute participation in the proceedings, and even if it did, the filing of the motion to dismiss preserved the issue, the City did not waive its jurisdictional objection. As a result, the circuit court order is affirmed and the case is dismissed.").

CONCLUSION

For the foregoing reasons, the City respectfully requests the circuit court's factual findings and judgment be affirmed.

Dated: January 10, 2018.

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CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the Statement of the Case, Argument, and Conclusion of the brief is 2,242 words.

I have submitted an electronic copy of this brief that complies with the requirements of Wis. Stats. § 809.19(12). The text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Filed with this brief as a separate document is a supplemental appendix that complies with Wis. Stats. § 809.19(3)(b) and that contains a table of contents and portions of the record essential to an understanding of the issues raised. I have submitted an electronic version of the supplemental appendix that complies with the requirements of Wis. Stats. § 809.19(13). The text of the electronic copy of the supplemental appendix is identical to the text of the paper copy of the supplemental appendix.

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: January 10, 2018.

Kyle W. Engelke

CERTIFICATION FOR E-FILED BRIEF

CERTIFICATION OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)

I hereby certify that I have on this date submitted an electronic copy of this Brief, excluding the Supplemental Appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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, and is in text-searchable PDF Format.

A copy of this Certification has been served with the paper copies of this Brief filed with the Court, and served on all opposing parties.

Dated: January 10, 2018.

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