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STATE OF  
WISCONSIN

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APPEALS

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MICHAEL J. VIETH,

Petitioner-Appellant,

v.

Appeal No. 2018 AP 1525

DANIEL J. GABLER,

Circuit Court

Case No. 2018 CV 39

Respondent-Respondent.

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**BRIEF OF PETITIONER-APPELLANT MICHAEL J. VIETH**

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On appeal from Monroe County Circuit Court,  
The Honorable Mark L. Goodman, Presiding.

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## II. ISSUES

1. Can a litigant reserve jurisdictional objections related to service when the litigant opted in to the electronic case file before service and before the time for service expired?

The Circuit Court did not address this question.

2. Did Daniel J. Gabler accept electronic service of the signed Writ when counsel for Mr. Gabler opted in as a party to the electronic case file before the time for service expired, where the electronic party registration indicated that counsel agreed to receive all communications electronically and that traditional paper copies were no longer needed, counsel's Notice of Appearance directed that service of all papers and pleadings be made upon her, and counsel had access to the entire court record electronically?

The Circuit Court did not address this question.

3. Did counsel for Michael Vieth have a right to rely upon the trial court's order that paper service was no longer necessary and opposing counsel's Notice of Appearance requesting service upon Mr. Gabler's counsel?

The Circuit Court did not address this question.

4. Did the trial court incorrectly conclude that it was fundamental error to serve a traditional paper copy of the proposed Writ upon Daniel J. Gabler and to dismiss the action, given that Mr. Gabler opted in to the electronic record during the 90-day service period, directed service to be made upon counsel, consented to electronic service, and the fact that there is no authenticated, signed Writ other than what exists in the electronic record?

The Circuit Court concluded that it was fundamental error to serve an



unsigned proposed writ. The Circuit Court did not address Mr. Vieth's arguments regarding waiver, estoppel, and the conflict between electronic service instructions and original writ service requirements.

5. Did Daniel J. Gabler waive the requirement of personal service of traditional paper copies of the signed Writ by opting in as a party to the electronic case file before the time for service had expired and after the court had converted the case to electronic filing, and filed the signed Writ?

The Circuit Court did not answer this question.

6. Is Daniel J. Gabler estopped from asserting that he needed to be personally served with traditional paper copies of the signed Writ because he filed a Notice of Appearance directing Michael Vieth not to personally serve him with the pleadings in the case and that he consented to electronic service before the time for service had expired?

The Circuit Court did not answer this question.

### **III. STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is unnecessary in this case.

This appeal may meet the criteria for publication under WIS. STAT. § 809.23(1), since it may serve to clarify the conflicts between the electronic filing requirements and legal actions that require service of traditional paper copies. An opinion of the Court of Appeals which serves to clarify the issues addressed in this appeal could serve as guidance to practitioners regarding electronic filing issues.

#### **IV. STATEMENT OF THE CASE**

This is an appeal, pursuant to Ch. 809, WIS. STAT., from an order of the Circuit Court dated July 19, 2018, dismissing Petitioner's Writ of Certiorari for failure to serve traditional paper copies of the signed Writ upon Respondent Daniel J. Gabler. The Circuit Court concluded that "service of an unsigned proposed writ constitutes a fundamental error under the test of American Family versus Royal Insurance." (R. 32:7). The Circuit Court did not address how service of an original writ is to be effected in the age of electronic filing after the Writ has been issued and the opposing party has already opted in to the electronic file and consented to accept service electronically prior to the expiration of the time for service. Neither did the Circuit Court address Mr. Vieth's arguments as to waiver and estoppel.

#### **V. STATEMENT OF FACTS**

The question of whether litigant who is directed not to serve paper copies on a party who has requested electronic service must disobey those directives and serve paper copies in violation of the e-filing statute arises from relatively brief and straightforward action in the Circuit Court. The action was initiated by Mr. Vieth's Petition for Writ of Certiorari, Affidavit of Stephen P. Hurley, and the Proposed Order - Writ of Certiorari, all filed

February 12 and 13, 2018,<sup>1</sup> which challenged the Parole Commission Action taken by Mr. Gabler, acting as Chairperson of the Wisconsin Parole Commission, at Mr. Gabler's December 29, 2017 review of the parole commission action ordered at Mr. Vieth's parole review hearing on August 28, 2017. (R. 1:1-6; 2:1-6).<sup>2</sup>

These initiating documents were served upon Kris Chilsen, a person authorized to accept service on behalf of Mr. Gabler, on February 13, 2018. (R. 7:1-2). The Writ of Certiorari was signed and issued by the Honorable Judge Mark L. Goodman on February 13, 2018. (R. 6:1-1). Two weeks later, on February 28, 2018, before the time for service of an authenticated copy of the writ expired, Attorney Sandra L. Tarver, counsel for Mr. Gabler, entered

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<sup>1</sup> An Amended Petition for Writ of Certiorari and an Amended Affidavit of Stephen P. Hurley were filed on February 13, 2018 in order to correct a misspelling in the caption.

<sup>2</sup> On December 29, 2017, Chairperson of the Wisconsin Parole Commission Daniel J. Gabler conducted a review of the Commission's August 28, 2017 review. (R. 1:1, 4-6; see also 3:1, 4-6). At the August 28, 2017 review, the Commission found that Mr. Vieth was not a candidate for a Chapter 980 proceeding, and in light of his good behavior, it deferred consideration for parole for only six months. (R. 1:4; see also 3:4). At his December 29, 2017 review of the August decision, Mr. Gabler changed the deferral of parole consideration from six months to twelve months. *Id.* Mr. Gabler did not cite any of Mr. Vieth's contemporary progress reports; instead, he relied upon comments made at the time of sentencing (over 22 years prior), the lack of a concrete release plan (although he stated that not having a concrete release plan at this stage was understandable), and deduced that Mr. Vieth had not derived sufficient benefit from prison programming, despite the fact that Mr. Vieth has completed all programming requested of him. (R. 1:5; see also 3:5).

a Notice of Appearance directing that “service of all pleadings and other papers be made upon Assistant Attorney General Sandra L. Tarver as counsel of record . . .” and not upon her client, Mr. Gabler. (R. 8:1). By entering a Notice of Appearance, Attorney Tarver opted in to the electronic file, consented to receive service of all documents electronically, and had access to all documents that had been filed in the action. For his part, Attorney Hurley received the standard e-filing notice directing him to serve all documents in the case on Attorney Tarver electronically.

When the record was not filed within the time period directed by the Writ, Mr. Vieth filed a Proposed Order to Show Cause, Affidavit of Stephen P. Hurley In Support of Order to Show Cause, and Proposed Order Finding Respondent in Contempt on May 22, 2018. (R. 9:1-2; 10:1-2; 11:1-2). The Circuit Court issued an Order to Show Cause on May 23, 2018, which directed Mr. Gabler to show cause why he should not be held in contempt for failing to make a return of the record. (R. 12:1-2). In response, Mr. Gabler filed his Notice of Motion and Motion to Quash, Brief in Support of Motion to Quash and in Response to Order to Show Cause, Affidavit of Kris Chilsen in Support of Motion to Quash, and Exhibit A to Affidavit of Kris Chilsen on May 24, 2018. (R. 13:1-2; 14:1-9; 15:1-2; 16:1-14). In these filings, Mr. Gabler

argued that the Writ should be quashed for want of personal jurisdiction, or, in the alternative, that he should not be held in contempt for failing to provide the court with a certified return of the records and proceedings before the Parole Commission. Mr. Vieth filed a Reply Brief In Support of Motion for Order to Show Cause and in Response to Respondent's Motion to Quash on June 1, 2018, which raised many of the same arguments that are raised in this appeal, including waiver and estoppel. (R. 17:1-9). Attorney Hurley also filed a letter addressed to Judge Goodman on June 4, 2018 requesting that Judge Goodman take judicial notice of the electronic notice of party registration mentioned above, which is automatically generated by the e-filing system when a party enters an appearance and directs registered parties not to serve traditional paper copies upon the newly registered party. (R. 18:1-2). Mr. Gabler filed a Reply Brief in Support Motion to Quash on June 4, 2018. (R. 18:1-2). Mr. Gabler filed Petitioner's Sur-Reply on June 5, 2018. (R. 20:1-4). The hearing originally scheduled for June 5, 2018 was adjourned to July 19, 2018 to allow Judge Goodman an opportunity to review all recently-filed documents. (R. 21:1-1).

The Circuit Court announced its decision on the motions on July 19, 2018. Judge Goodman concluded that it was fundamental error to serve Mr.

Gabler with the proposed Writ. (R. 32:6-7; 24:1). Judge Goodman did not address Mr. Vieth's waiver and estoppel arguments in his oral ruling; instead, he ended his analysis after determining that service of an unsigned proposed writ constitutes a fundamental error. (R. 32:2-7).

The Order dismissing Mr. Vieth's Writ of Certiorari was filed July 19, 2018. (R. 24:1). Mr. Vieth initiated his appeal from the Order dismissing the Petition on August 9, 2018. (R. 25:1-2; 26:1; 27:1-4; 28:1-10).

## **VI. STANDARD OF REVIEW**

The construction of a statute and its application to the facts is considered a question of law. *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992). The Court of Appeals reviews conclusions of law *de novo*. *Id.* at 545. The determination of whether a particular defect in service is technical or fundamental is a question of law that the Court of Appeals reviews *de novo*. *O'Donnell v. Kaye*, 2015 WI App 7, ¶ 9, 359 Wis. 2d 511, 859 N.W.2d 441. Whether a party has waived its jurisdictional objections arising from alleged improper service of process presents a question of law that is reviewed *de novo*. *Bergstrom v. Polk County*, 2011 WI App 20, ¶ 14, 331 Wis. 2d 678, 795 N.W.2d 482.

The appeal in the present case is not on certiorari review; it is

reviewing whether the circuit court's decision to dismiss the Writ of Certiorari for lack of service was erroneous. Therefore, the court need not inquire into the four issues available on certiorari review.

## **VII. ARGUMENT**

The issues on appeal center around the friction between electronic filing and service requirements for original writs, which came into conflict due to the unique progression of the case. This conflict was introduced when Mr. Gabler, by counsel, entered a Notice of Appearance after the Writ was signed by the circuit court, before personal service of the signed Writ, and prior to the expiration of the 90-day service window. If Mr. Gabler had taken no action, then the conflict would not have existed and personal service of traditional paper copies of the signed Writ would still have been required. However, Mr. Gabler inserted himself into the action and in doing so directed service be made upon his counsel and also consented to receive all pleadings electronically. The electronic filing notice of party registration also directed registered parties not to serve traditional paper copies of documents upon Mr. Gabler.

Mr. Gabler only raised allegations of defective service after the time for service had run. Mr. Gabler asserted that he was never personally served

with the signed Writ, even though he appeared in the action soon after the Writ was issued, directed that service of all documents be made upon his counsel, consented to electronic service of all documents, and had access to all documents contained in the electronic record, including the signed Writ. The Circuit Court, when rendering its decision, focused on whether service of an unsigned Writ constitutes fundamental error; it did not address how Mr. Gabler's entry into the action, and the consequent requirement for electronic service, changed the service requirements.

- 1. Mr. Gabler cannot enter an action, consent to electronic service, and later raise personal jurisdiction issues on the basis of lack of paper service after the time for service has expired.**

The introduction of electronic filing has changed the way attorneys practice law. Previously, when all cases were paper filing, a party could enter a notice of appearance that counsel was appearing specially solely to contest jurisdiction, and counsel would then file a motion to dismiss or other such pleading in order to litigate any jurisdictional issues. Electronic filing means that parties need to be more careful in their practice, especially when filing a notice of appearance, so as not to inadvertently subject themselves to the court's jurisdiction. This means that if a party believes that they have not been properly served, then they should either (1) not enter an appearance in



the case, or (2) enter an appearance solely to contest jurisdictional issues and immediately litigate that issue.

Mr. Vieth was notified that Mr. Gabler had opted in to the electronic case file, directed service be made upon counsel, and also consented to electronic service of documents. (R. 8:1-2). As a result of Mr. Gabler's entrance into the case, Mr. Vieth received an electronic party registration notice which directed him *not* to serve traditional paper documents on Mr. Gabler; all documents directed to Mr. Gabler must be served electronically. (R. 18:2). This placed Mr. Vieth in an unworkable situation: there is no way to electronically serve a document that is already in the electronic record prior to the party opting in to the case. Mr. Gabler then bided his time after his electronic registration and only raised objections to personal jurisdiction one day after the 90-day service window had expired. (R. 13:1-2; 14:1-9; 15:1-2; 16:1-14; 32:7). Litigants should not be allowed to exploit a procedural loophole in order to create a defect in service.

2. **Mr. Gabler inserted himself into the action and consented to electronic service prior to service of traditional paper copies of the Writ, and in doing so, consented to the circuit court's personal jurisdiction over him.**

In a certiorari action, the action is deemed to have "commenced at the

time that the prisoner files a petition seeking a writ of certiorari with the court.” WIS. STAT. § 893.735(3); *see also State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶¶ 20-21, 245 Wis. 2d 607, 629 N.W.2d 686. It is undisputed that service of the Petition for Writ of Certiorari, Affidavit of Stephen P. Hurley, Proposed Writ of Certiorari, and the Electronic E-filing Notice were filed and subsequently served upon Kris Chilsen, an authorized representative for Mr. Gabler. (R. 7:1-2; 14:2; 15:1-2). Indeed, it seems obvious that service of these documents is what triggered Mr. Gabler to enter the action by directing Attorney Tarver to file a Notice of Appearance on his behalf. While WIS. STAT. § 801.02(5) would still require service of an appropriate original writ on the defendant,<sup>3</sup> such a requirement can be waived:

If a document other than an initiating document requires personal service, it must be served by traditional methods *unless* the responding party has consented in writing to accept

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<sup>3</sup>

WIS. STAT. § 801.02(5) states, in relevant part:

An action seeking a remedy available by certiorari ... may be commenced under sub. (1), by service of an appropriate original writ on the defendant named in the writ if a copy of the writ is filed forthwith, or by filing a complaint demanding and specifying the remedy, if service of an authenticated copy of the complaint and of an order signed by the judge of the court in which the complaint is filed is made upon the defendant under this chapter within the time period specified in the order. The order may specify a time period shorter than that allowed by s. 802.06 for filing an answer or other responsive pleading.

electronic service or service by some other method.

WIS. STAT. § 801.18(6)(b) (emphasis added). WIS. STAT. § 893.735(3) treats the petition for a writ of certiorari as the initiating document, and therefore Mr. Vieth did *not* have to serve Mr. Gabler with a traditional paper copy of the signed Writ, if Mr. Gabler consented in writing to accept electronic service. Either traditional service or consent to electronic service must be accomplished within the 90-day period prescribed by WIS. STAT. § 801.02(1).

Fifteen days after the Writ was signed and filed by Judge Goodman, and long before the 90-day deadline had run, Mr. Gabler's counsel, opted in to the electronic file and consented to accept electronic service of all documents. (R. 8:1-2). At this time, a notification was sent to all parties registered to the electronic file which informed that Mr. Gabler was no longer to be served with traditional paper copies of documents and that he consented to electronic service. (R. 18:2). Mr. Gabler's consent to accept electronic service of all documents was well within the 90-day window prescribed by WIS. STAT. § 801.02(1).<sup>4</sup> Mr. Gabler's consent gave the circuit court personal jurisdiction over him, and made the court's dismissal of the

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<sup>4</sup> Further, it should be noted that once Mr. Gabler opted in to the electronic file, he had access to all documents filed in the action, including the signed Writ.

Writ of Certiorari in error.

3. **Michael Vieth was justified in relying upon the trial court's e-filing notice that service of traditional paper copies was no longer necessary and that counsel for Mr. Gabler would accept service via e-filing.**

The electronic filing statute generates a notice of activity and further states that "Users shall access filed documents through the electronic filing system." WIS. STAT. § 801.18(6)(a). It also directs that "If a document other than an initiating document requires personal service, it shall be served by traditional methods unless the responding party has consented in writing to accept electronic service or service by some other method." *Id.* § 801.18(6)(b). As explained above, the signed Writ was not the initiating document, and Mr. Gabler consented in writing to electronic service. WIS. STAT. §§ 893.735(3) & 801.18(6)(b) (R. 8:1-2; 18:2). WIS. STAT. § 801.18(6)(c) states:

Paper parties shall be served by traditional methods. The electronic case record shall indicate which parties are to be served electronically and which are to be served by traditional methods.

The circuit court did notify Mr. Vieth that Mr. Gabler no longer needed to be served with traditional paper copies. (R. 18:2). Mr. Vieth has a right to rely on notifications from the court and upon Mr. Gabler's Notice of Appearance in the case.

It would be inconsistent to penalize a party for relying upon the court's direction that service of traditional paper copies upon Mr. Gabler was no longer needed. Mr. Vieth was justified in relying upon the written instruction that Mr. Gabler's counsel was authorized to accept service and consented to electronic service. Further, the purposes of service had been accomplished, and counsel "shall access filed documents through the electronic filing system." WIS. STAT. § 801.18(6)(a). Mr. Gabler was plainly aware that the Writ had issued, and took affirmative action by authorizing counsel to enter an appearance. Mr. Gabler had no substantial rights in play in the circuit court: the proceeding is simply the formal means to compel Mr. Gabler to produce the necessary records for review. The defect Mr. Gabler complains of here is "of a hypertechnical nature, and the entire tenor of modern law is to prevent the avoidance of adjudication on the merits by resorting to dependency on non-prejudicial and nonjurisdictional technicalities." *Schlumpf v. Yellick*, 94 Wis. 2d 504, 511, 288 N.W. 2d 834 (1980).

4. **The trial court incorrectly concluded that Mr. Gabler still needed to be served with a traditional paper copy of the signed Writ after Mr. Gabler had opted in to the electronic file, consented to electronic service, the court directed parties not to serve traditional paper copies upon Mr. Gabler, and because the only authenticated, signed Writ exists in the electronic record, to which Mr. Gabler had access.**

The Writ was electronically signed by Judge Goodman and electronically filed - a paper copy of this document did not exist. (R. 6:1). This constituted the only authenticated copy of the Writ. *See* WIS. STAT. § 801.18(10) ("Electronic placement of the court filing stamp and the case number on each copy of an initiating document constitutes authentication under the statutes and court rules ..."). As of February 13, 2018, the day the Writ was signed by the court, Michael Vieth had 90 days to serve Mr. Gabler. WIS. STAT. § 801.02(1). Mr. Gabler opted in to the electronic file 15 days on February 28, 2018, prior to service. (R. 8:1-2). At this time, Mr. Vieth was informed that

Sandra Lynn Tarver has registered as an electronic notice party and has agreed to file any documents and receive all communications from this court for this case electronically. You will no longer need to provide traditional paper documents to this party.

(R. 18:2). Although an authenticated copy may be printed from the case management system by the clerk of court or from the electronic filing system

by the user (*see* WIS. STAT. § 801.18(10)), Mr. Vieth was instructed not to provide traditional paper copies to Mr. Gabler after Mr. Gabler registered to the electronic case file and consented to electronic service. (R. 18:2). If counsel had not opted in, then Mr. Vieth would still have been under the obligation to serve Mr. Gabler with a traditional paper copy of the signed Writ. However, since counsel for Gabler opted into the electronic record, which contained the signed Writ, and agreed to receive service of all pleadings electronically, Mr. Gabler was aware of and accepted service of the electronic version of the authenticated document. “Users *shall* access filed documents through the electronic filing system.” WIS. STAT. § 801.18(6)(a) (emphasis added). Mr. Gabler’s attempt to place Mr. Vieth in a Catch-22 - directing, during the service period, that service must be made on Mr. Gabler’s counsel electronically, then later maintaining that “commencement” of this action required personal service of traditional paper copies - smacks of bad faith.

5. **Mr. Gabler waived jurisdictional objections when he filed the Notice of Appearance, which constituted a general appearance in the action and gave the court personal jurisdiction over Mr. Gabler’s person.**

Mr. Gabler’s Notice of Appearance was a general appearance, which

waived any personal jurisdiction defects and provided the circuit court with personal jurisdiction over Mr. Gabler. *Gale v. Consolidated Bus & Equipment Co.*, 251 Wis. 642, 648, 30 N.W.2d 84 (1947) ("It is, of course, elementary that a general appearance waives any defects in respect to jurisdiction over the person of defendant."). Even if Mr. Gabler's Notice of Appearance in this action is interpreted to be a special appearance, there was a waiver and the circuit court had personal jurisdiction over Mr. Gabler.

In *Milwaukee County v. Schmidt, Garden & Erikson*, 35 Wis. 2d 33, 150 N.W.2d 354 (1967), the Wisconsin Supreme Court determined that the defendants waived their right to object to the jurisdiction of the court when the defendants demanded a copy of the complaint. *Id.* at 36. The plaintiffs failed to serve a verified copy of the complaint when plaintiffs served the summons upon the defendants. *Id.* The Court noted that "had the defendants done nothing, the service of the summons alone would have been totally ineffective." *Id.* If the defendants had clearly, repeatedly, and unequivocally asserted their intention not to waive any rights, then that fact would be clear and there would have been no waiver. *Id.* at 37. The defendants' demand for the complaint and use of a formal caption indicating venue and title clearly indicated that the defendants deemed themselves



active participants in the case. *Id.*

A special appearance reserving objections to jurisdiction may be converted into a general appearance in several instances, including but not limited to the following: where there is a stipulation by a defendant as to the time and place of trial (*see Gale*, 251 Wis. At 649 (citing *Keeler v. Keeler*, 24 Wis. 522, 525 (1869)), *cited supra*) and where a party requests partial or entire relief which can only be granted by a court having jurisdiction. *See Farmington Mut. Fire Ins. Co. v. Gerhardt*, 216 Wis. 457, 257 N.W. 595, 597 (1934) (“[A] special appearance, as well as jurisdiction because of lack of effective service, was waived by ‘any motion asking for partial or entire relief which is consistent only with the fact of jurisdiction and which implies it in its consideration.’”); *see Driscoll v. Tillman*, 165 Wis. 245, 161 N.W. 795, 797 (1917) (“[I]f the moving party asks for any relief tha can be granted only by a court having jurisdiction, then the appearance will be held to be general, though denominated as special.”).

Mr. Gabler took several actions which, if the appearance is determined to be special, converted the special appearance into a general appearance and thereby waived jurisdictional defects. Mr. Gabler agreed to the hearing date of June 5, 2018 at 3 pm before Judge Goodman to hear the Order to Show

Cause. (R. 13:1). Mr. Gabler likewise filed a Notice of Motion and Motion of his own, seeking relief from the Circuit Court. (R. 13:1-2; 14:1-9; 15:1-2; 16:1-14). Mr. Gabler's motion sought dismissal of the Writ of Certiorari, or, in the alternative, to find no cause for holding Mr. Gabler in contempt. (R. 14:8). Requesting relief from a finding of contempt is consistent only with the court having jurisdiction over Mr. Gabler, and as such, constituted a waiver of any purported special appearance.

6. **Daniel J. Gabler is estopped from asserting that he needed to be personally served with the signed Writ because he filed a Notice of Appearance directing Michael Vieth not to personally serve him with the pleadings in the case before the time for service had expired.**

There are four elements of equitable estoppel: "(1) action or non-action; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or non-action; (4) which is to the relying party's detriment." *See Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶ 42, 374 Wis. 2d 513, 893 N.W.2d 212 (quoting *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2006 WI 67, ¶ 33, 291 Wis. 2d 259, 715 N.W.2d 620 (internal citations omitted)).

Mr. Gabler's filing of the Notice of Appearance was an affirmative action in which he insisted that service be effected upon his counsel, not

upon Mr. Gabler personally. This affirmative action induced reasonable reliance by Mr. Vieth that he should not serve Mr. Gabler personally, and that Mr. Gabler accepted electronic service of the signed Writ by opting in to the electronic record. Mr. Vieth relied upon the action by Mr. Gabler, and took it to indicate that Mr. Gabler did not want nor need personal service of traditional paper copies of the signed Writ. Mr. Vieth relied upon Mr. Gabler's Notice of Appearance and attendant directives to his detriment, since Mr. Gabler asserted after the expiration of the service window that traditional paper copies of the signed Writ should have been served upon Mr. Gabler personally. Mr. Gabler is estopped from asserting that he needed to be personally served with traditional paper copies, since he made a written request that counsel should be served and consented to electronic service.

Mr. Gabler, through counsel, elected to insert himself into the Circuit Court action and designate counsel as his agent for service. (R. 8:1-2). Mr. Gabler had no need to appear, particularly if Mr. Gabler genuinely believed that this action had not yet been "commenced."<sup>5</sup> Mr. Gabler admitted that

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<sup>5</sup> As noted above, the action was commenced when Mr. Vieth filed the Petition for Writ of Certiorari. *See* WIS. STAT. § 893.735(3).

he was aware that the Writ was issued, and took affirmative action recognizing its issuance by authorizing counsel to appear and accept service on his behalf. (R. 14:2). Since Mr. Gabler took such an affirmative action, Mr. Gabler is now estopped from asserting that service of traditional paper copies of the signed Writ should have been effected upon him personally, since he directed that service be made upon his designated agent and he consented to receive service electronically.


#### **VIII. CONCLUSION**

There is a clear conflict between the electronic filing and service rules and the rules governing service of original writs. Mr. Vieth did not assert, as the trial court concluded, that service of traditional paper copies of the proposed writ upon Mr. Gabler was sufficient service. Instead, Mr. Vieth asserted that Mr. Gabler's entrance into the action constituted a waiver of any objections to the court's jurisdiction. If Mr. Gabler truly believed that the action had not yet commenced, he would not have jumped into the case by entering a notice of appearance. Mr. Gabler voluntarily subjected himself to the court's jurisdiction and as such, the circuit court erred in dismissing the action for lack of service.

Dated this 2<sup>nd</sup> day of November, 2018.

Respectfully submitted,

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**IX. FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,161 words.

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**X. CERTIFICATION OF ELECTRONIC COPY**

Pursuant to WIS. STAT. § 809.19(12)(f), the undersigned hereby certifies that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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## **XI. CERTIFICATION OF APPENDIX**

I hereby certify that filed with this brief, as a part of this brief, is an appendix that complies with WIS. STAT. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) limited 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 must contain the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that no unpublished decisions are cited in this brief.

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles.



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