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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP002186-CK

04-26-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CITY OF MILWAUKEE,

Plaintiff-Respondent,

Milwaukee Municipal
Case Number: 17016560

v.

DAVID B. MUNZINGER,

Defendants-Appellants.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM JUDGMENT DISMISSING MUNICIPAL COURT APPEAL
ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY. THE
HONORABLE HANNAH C. DUGAN, CIRCUIT JUDGE PRESIDING,
CIRCUIT COURT CASE NO. 2018TR014997

GRANT F. LANGLEY
City Attorney

JAY A. UNORA
Assistant City Attorney
State Bar No. 01029785
Attorneys for Plaintiff-Respondent

ADDRESS:

200 East Wells Street, Rm. 800
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550
junora@milwaukee.gov

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES.....	ii
OTHER AUTHORITIES	ii
STATEMENT OF ISSUES.....	iii
STATEMENT ON ORAL ARGUMENT.....	iii
STATEMENT OF PUBLICATION	iv
STANDARD OF REVIEW.....	iv
STATEMENT OF THE CASE	iv-v
ARGUMENT	vii-ix
1. The Defendant – Appellant failed to properly serve notice of appeal on the City	
2. Does the communication sent by the Defendant provide enough information to the other party to amount to a proper notice of appeal?	
CONCLUSION	ix-x
FORM AND LENGTH CERTIFICATION.....	xi
ELECTRONIC BRIEF CERTIFICATION.....	xii
CERTIFICATION OF APPENDIX.....	xiii-xiv
APPENDIX TABLE OF CONTENTS	

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Wahlberg v. St. Francis Home, Inc.</i> , 2005 WI 64 ¶6, 281 Wis.2d 312, 331, 565 N.W.2d 94 (1997).	4
<i>John Doe v. Archdiocese of Milwaukee</i> , 2005 WI 123 ¶19, 284 Wis.2d 307, 700 N.W.2d 180.	4
<i>Hagen v. City of Milwaukee Employee’s Retirement System Annuity and Pension Board</i> , 2003 WI 56, 262 Wis. 2d 113, 663 N.W.2d 268.....	6
<i>Gagnow v. Haase</i> , 149 Wis.2d 542, 439 N.W.2d 593 (Ct App 1989).....	6
<i>Burgess v. Dane County</i> , 148 Wis. 427, 134 N.W. 841 (1912)	6
<i>Moses v. Board of Veterans Affairs</i> , 80 Wis. 2d 411, 259 N.W.2d 102 (1977).....	6
<i>State v. Petty</i> , 201 Wis.2d 337, 548 N.W.2d 817 (1996).	7
<i>Pelton v. Town of Blooming Grove</i> , 3 Wis. 310 (1854).	7
<i>Clark v. Bowers</i> , 2 Wis. 123 (1853)	7
<i>Ryan v. DOR</i> , 68 Wis.2d 467, 472, 228 N.W.2d 357 (1975).....	7
<i>Johnsonville Sausage, Inc. v. DOR</i> , 113 Wis.2d 7, 9, 334 N.W.2d 269 (Ct. App. 1983).	7

Wisconsin Statutes

Wis. Stat. § 809.22
Wis. Stat. § 801.14(1).....
Wis. Stat. § 801.11(4) (3)

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1
Case No. 2018AP002186-CR**

CITY OF MILWAUKEE,

Plaintiff-Respondent,

v.

DAVID B. MUNZINGER,

Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

1. Did the Defendant properly serve a notice of appeal on the other party?

Trial Court ruling: No.

2. If the Defendant did properly serve the other party, does the communication sent by the Defendant provide enough information to the other party to amount to a proper notice of appeal?

Trial Court ruling: No.

STATEMENT ON ORAL ARGUMENT

The plaintiff-respondent City of Milwaukee, asserts that oral argument is not necessary and that the issues can be fully presented by briefs of the respective parties. This case falls within the standard contained in Wis. Stat. §809.22.

STATEMENT ON PUBLICATION

With respect to publication, the City of Milwaukee believes that this case does not merit publication. The issues in this case are not clearly articulated and defined so as to aid in the resolution of future cases with similar circumstances. The issues in this case are not clearly articulated and defined so as to aid in the resolution of future cases with similar circumstances.

STANDARD OF REVIEW

The case before the court is in the context of a motion to dismiss.

A motion to dismiss tests the legal sufficiency of the appellant's notice of appeal. When reviewing such a motion, we accept the alleged facts and the reasonable inferences as true, but we draw all legal conclusions independently. *Wahlberg v. St. Francis Home, Inc.* 2005 Wis. Stat. § 64 ¶6, 281 Wis.2d 312, 331, 565 N.W.2d 94 (1997). We review the circuit court's decision, and that of the court of appeals, de novo, but we benefit from those decisions. *John Doe v. Archdiocese of Milwaukee*, 2005 Wis. Stat. § 123 ¶19, 284 Wis.2d 307, 700 N.W.2d 180.

STATEMENT OF THE CASE

On April 24, 2018 Mr. David B. Munzinger (Munzinger) was found guilty of operating while intoxicated (OWI) after a bench trial in Milwaukee Municipal Court. On May 4, 2018 Attorney Ohiku (Mr. Munzinger's attorney of record) and Assistant City Attorney Unora (ACA Unora) (the attorney who prosecuted the OWI case for the City of Milwaukee) were both in Milwaukee Municipal Court

Branch 1 by happen-stance. Attorney Ohiku was in court to file an appeal of Mr. Munzinger's case. Attorney Unora was in court to file paperwork on another matter for the City. The Municipal court record reflects that there was no appearance for the City when Mr. Munzinger's case was called May 4, 2018 at 9:55 a.m. (Municipal Court Record (Exhibit 1, pages 2-4). The court noted on May 4, 2018 that the appeal was not perfected on May 4, 2018 as the appeal bond needed to be posted. The Municipal Court record shows the appeal filed on May 14, 2018 at 11:53 a.m. (Exhibit 1, page 4). The record for this date similarly reflects no appearance for the City. Later that day, Attorney Ohiku forwarded a three sentence letter to ACA Unora via email (Exhibit 2). At no time had ACA Unora related that he would accept service on behalf of the City.

Milwaukee County Circuit Court created case 2018TR014997 based on the appeal paperwork filed by Munzinger. On the first court date, July 11, 2018, the City filed a motion to dismiss. The court ordered a briefing schedule and a hearing on the Motion. At the October 3, 2018 hearing Judge Hannah Dugan ruled that Munzinger did not properly serve the notice of appeal on the City and what was sent by email was not a proper notice of appeal. Munzinger now appeals this decision.

ARGUMENT

1. **The Defendant –Appellant failed to properly serve notice of appeal on the City.**

The written Notice of Appeal required in Wis. Stat. § 801.14(1) is to go to the other party. The other party in Munzinger’s case is the City of Milwaukee.

Service on the City is under Wis. Stat. § 801.11(4) (3) *If against a city, the mayor, city manager or clerk thereof:*

Personal jurisdiction over a body politic may be obtained by service of the summons and complaint on an officer, director, or managing agent, or substitute service on a “person who is apparently in charge of the office.” Service on a non-party, even when it occurs erroneously in reliance on the mistaken direction of a person in the office of the defendant, does not constitute service on the defendant. *Hagen v. City of Milwaukee Employee’s Retirement System Annuity and Pension Board*, 2003 Wis. Stat. § 56, 262 Wis. 2d 113, 663 N.W.2d 268.

The notice of appeal is comparable to the service of a summons commencing a legal action and conferring personal jurisdiction upon the court over the party served. Where, as in this statute, language chosen by the legislature is plain and clearly understood, there is no room, or need, for a court to engage in any further interpretation or construction; the court must give effect to the language as written by the legislature. *Gagnow v. Haase*, 149 Wis.2d 542, 439 N.W.2d 593 (Ct. App. 1989). In other words, in the absence of ambiguity, a court must give that language its ordinary and accepted meaning regardless of the result. *Burgess v. Dane County*, 148 Wis. Stat. § 427, 134 N.W. 841 (1912); *Moses v. Board of Veterans Affairs*, 80 Wis.2d 411, 259 N.W.2d 102 (1977).

It cannot be reasonably asserted that the language of Wis. Stat. § 800.14(1) is anything other than crystal clear and unambiguous. That language plainly states that an appellant is required to notify, in writing, both the municipal judge and the “other party” within 20 days of the judgment. There is no other reasonable meaning that could be attributed to the language of the statute. Therefore, the statute is not ambiguous. In addition to the requirement that courts give the words of statutory language their ordinary and accepted meanings, courts must also give effect to each and every word contained in a statute, so as not to render any part of the statute superfluous. *State v. Petty*, 201 Wis.2d 337, 548 N.W.2d 817 (1996). To allow this appeal with the defendant’s failure to meet the requirements of the statute, would be to render that phrase “shall appeal by giving the municipal judge and the other party written notice within 20 days” superfluous. This is an impermissible result.

It has long been the rule in Wisconsin that appellants must comply with all of the statutory requirements in order to protect their appeals. Where a statute sets forth a time limit and imposes a time limit upon an appellant, an appellant must comply with that time limit. *Pelton v. Town of Blooming Grove*, 3 Wis. Stat. § 310 (1854). Failure to comply with those time limits by the appellant requires that the appellate court dismiss the appeal. *Clark v. Bowers*, 2 Wis. Stat. § 123 (1853).

To dismiss an appeal because of an appellant’s failure to comply with statutory requirements may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful, they must be unbending. *Ryan*

v. DOR, 68 Wis.2d 467, 472, 228 N.W.2d 357 (1975). As has been seen, *supra*, an appellant's failure to comply with mandatory time limits results in the circuit court's loss of jurisdiction and competency to proceed with the matter. *Johnsonville Sausage, Inc. v. DOR*, 113 Wis.2d 7, 9, 334 N.W.2d 269 (Ct. App. 1983).

Munzinger contends that the email to ACA Unora was his "notice of appeal" to the City. At no time did ACA Unora relate that he would accept service on behalf of the City. ACA Unora is not the mayor, city manager or clerk of the City of Milwaukee. Munzinger makes no claim to have served notice of appeal on the mayor, city manager or clerk as plainly stated in Wis. Stat. § 801.11(4)(3). The City has not waived this defect. Because of this fatal flaw the circuit court has no competency to proceed in this matter and the case must be dismissed.

Nowhere in Wis. Stat. § 801.11 does it state that any other service of notice is acceptable in place of written notice. Munzinger claims that he provided actual notice to ACA Unora on May 4, 2018. This is impossible as the appeal was not perfected until May 14, 2018.

2. Does the communication sent by the Defendant provide enough information to the other party to amount to a proper notice of appeal?

The letter sent via email has only three sentences. It lacks sufficient detail to be construed by any stretch of the imagination as a Notice of Appeal. If you look closely you will see that nowhere within the four corners of the document

does it even mention the case number! (Exhibit 2) Milwaukee Municipal Court provides a fill-in-the-blank form for appeals. Munzinger used one of these forms to appeal the Municipal Court decision (Exhibit 1, page 6). Munzinger provided the court the case number, citation number, what was being appealed, which Judge he was appealing from, the date of the judgement, and what type of appeal he was requesting. None of this information is contained in the letter sent to ACA Unora.

The City has many types of appeals to circuit court. Appeals may come from decisions of the Fire and Police Fire Commission, Board of Zoning Appeals, and the Administrative Review and Appeals Board as well as municipal court. Munzinger's "notice" simply lacks enough information to put the City on notice of anything. If the court were to find the emailed letter sufficient to provide notice of appeal, the email did not go to the "other party" as directed by law.

CONCLUSION

Munzinger is compelled by clear statutory language to provide written notice to the other party of his appeal. When the city is the other party, who must be served is also clearly defined. What was provided to an assistant city attorney via email lacked enough information to put the City on notice. For these reasons the Plaintiff-Respondent, City of Milwaukee respectfully requests this court to affirm the judgment of the circuit court and dismiss this appeal.

Dated and signed at Milwaukee, Wisconsin this 12th day of April, 2019.

GRANT F. LANGLEY
City Attorney

s/ JAY A. UNORA
Assistant City Attorney
State Bar No. 01029785
Attorneys for Plaintiff-Respondent

ADDRESS:
200 East Wells Street, Rm. 800
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550
1032-2018-1261.001

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b) and (c), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 1,620 words.

s/ JAY A. UNORA
Assistant City Attorney
State Bar No. 01029785
Attorneys for Plaintiff-Respondent

ELECTRONIC BRIEF CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of § 809.19(12).

I further certify that:

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

Dated and signed at Milwaukee, Wisconsin this 12th day of April, 2019.

s/ JAY A. UNORA
Assistant City Attorney
State Bar No. 1029785
Attorneys for Plaintiff-Respondent

ADDRESS:
200 East Wells Street, Rm. 800
Milwaukee, WI 53202
Telephone: (414) 286-2676
Fax: (414) 286-2128
junora@milwaukee.gov

CERTIFICATION OF APPENDIX

I hereby certify that filed 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; and (3) 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; (4) Exhibit 1 (6 pages), Certified Milwaukee Municipal Court Record Case 17016560; and (5) Exhibit 2 (1 page), emailed letter to Assistant City Attorney Jay A. Unora, dated May 14, 2018.

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 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 and signed this 12th day of April, 2019.

s/ JAY A. UNORA
Assistant City Attorney
State Bar No. 01029785
Attorneys for Plaintiff-Respondent

ADDRESS:
200 East Wells Street, Rm. 800
Milwaukee, WI 53202
Telephone: (414) 286-2676
Fax: (414) 286-2128
junora@milwaukee.gov