

FILED
04-23-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

GREENWALD FAMILY LIMITED PARTNERSHIP
And
DARWIN GREENWALD,

Plaintiffs-Appellants,

v.

Appeal No. 2021AP69-FT
Circuit Court No. 20-CV-494

VILLAGE OF MUKWONAGO,

Defendant-Respondent.

**APPEAL FROM A FINAL ORDER
ENTERED ON DECEMBER 4, 2020
IN CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE LLOYD V. CARTER, PRESIDING**

BRIEF OF APPELLANT

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ISSUE PRESENTED FOR REVIEW

1. Did the service of the Notice of Appeal required by Wis. Stats. § 66.0703(12) by mail on the Attorney for the Village, who had previously admitted service of the underlying summons and complaint in the challenge, satisfy the requirement to serve written notice of appeal on the Village clerk.

The Circuit Court determined that the clerk had to be personally presented with the Notice of Appeal document, even though the rule of Wis. Stats. § 801.14 requires that filings shall be served on a party's counsel of record once service has been admitted.

STATEMENT OF THE CASE

Plaintiff-Appellants Greenwald Family Limited Partnership and Darwin N. Greenwald (hereinafter "GFLP") sought to challenge a special assessment adopted by the Village affecting two of their properties. The Village finalized the resolution adopting the special assessment on December 18, 2019. *See Appendix at p. 4 noting date of resolution.* The Village through the Village Clerk provided the statutory notice of the adopted and publication of the resolution on January 16, 2020. *See App at p. 4.*

GFLP filed its action in circuit court challenging the special assessment on March 17, 2020. *See Record at Doc No. 1.* GFLP then sought an admission of service of the summons and complaint from the Attorney for the Village. *See App at p. 8 – email to Attorney Blum.* The Village attorney agreed to admit service in an email to counsel. *See App at p. 8.* He then provided a signed admission of service noting that service was admitted on March 23, 2020. *See App 9-10.*

Thereafter, GFLP delivered to the Village Attorney the second document in the case, which is the Notice of Appeal. This was delivered to counsel for the Village along with the required Bond Amount of \$150.00. *See App 11-14*. This was delivered by email and also regular U.S. Mail. *See App at 11-12*. There is no dispute about these facts. And there is no dispute that the summons and complaint was filed within the 90 days of January 16, 2020. And further that the Notice of Appeal was filed within 90 days of January 16, 2020. GFLP did not deliver the Notice of Appeal to the clerk at the Village but instead directed and delivered those documents to the attorney for the Village. *See App 11-14*.

The Village filed a motion to dismiss claiming that GFLP had to personally serve and present the notice of appeal to the clerk. After briefing the Court held a hearing on November 17, 2020. The Court agreed with the Village and ordered the case dismissed. *See App at pp.15-29*. Further facts will be noted as appropriate below.

ARGUMENT

I. Standard of Review.

The Circuit Court made a legal determination based on undisputed facts. The determination was the interpretation Wis. Stats. § 66.0307(12). Specifically, what is required under the language, “The person appealing shall serve a written notice of appeal upon the clerk of the city, town or village ...” This Court’s review is *de novo*. *See Mayek v. Cloverleaf Lakes Sanitary Dist. No. 1*, 238 Wis.2d 261, 266-67 (Ct.App.2000).

II. Service on the Village Attorney is Service on the Village Clerk.

Appellant’s served the Village clerk by mailing the written notice of appeal to the

Village Attorney. *App at 12*. As noted, at the time of the delivery of the Notice of Appeal, the Village Attorney had previously accepted service of the underlying summons and complaint that initiated the action. *App 9-10*. The Village Attorney accepted service and admitted service for the Village on March 23, 2020. *App 10*.

Subsequent to that, undersigned on behalf of the Appellants served the Notice of Appeal on the Village Attorney by mail and email on April 9, 2020. *App 11-14*.

There is no dispute about these facts. As described in the statute, the Notice of Appeal is a separate document from the initiating pleading – the summons and complaint.¹ The Summons and Complaint was properly and timely filed. It was then properly served on the Village by delivering the authenticated Summons and Complaint to the Attorney for the Village and asking whether he would admit service on the Village. The Village Attorney admitted service as was appropriate.

Then, as contemplated by the statute, Appellant through undersigned Counsel prepared and delivered a Notice of Appeal and appropriate bond amount to the attorney for the record for the Village. *App 11-14*.

The language of § 66.0703(12) requires service of a written notice of appeal upon the clerk...” Service is not defined in Wis. Stats. § 66.0703. However, Wis. Stats. § 801.14 controls service of papers after the filing of the summons and complaint.

(1) Every order required by its terms to be served, and every written notice,

¹ The process for initiating a challenge under Wis. Stats. § 66.0703(12) is not explicitly described in the statute but case law makes clear that it begins with serving a summons and complaint in circuit court. This was recognized by this Court in *Mayek*, which ruled that filing and service of a summons and complaint in circuit court to commence the action was the equivalent of filing of a notice of appeal. *Mayek*, 238 Wis.2d 261, 269-70. In an earlier case, the Court determined that the circuit court filing should come first. *Outagamie County v. Town of Greenville*, 233 Wis.2d 566, 575 n. 3 (Ct.App. 2000).

appearance, demand, offer of judgment, undertaking, and similar paper shall be served upon each of the parties.

(2) 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, ...

See Wis. Stats. § 801.14(1) and (2). (emphasis added).

There was no order of the Court in this matter requiring service upon the party in person. Pursuant to Wis. Stats. § 801.14(2) Appellant and its undersigned counsel were thus required to serve the Village's attorney. There was no other manner available to Appellants to serve the Village Clerk than by serving the Village's and thus the Village Clerk's Attorney.

III. There is No Conflict between Wis. Stats. §801.14 and §66.0703.

The Village and the Circuit Court's ruling is set forth by its discussion and reasoning regarding the statutory language requiring that a plaintiff, "serve a written notice of appeal." The Circuit Court determined that this language was somehow in conflict with the requirement in Wis. Stats. § 801.14(2) that undersigned shall serve papers on the Attorney for a represented party, here the Village. The Circuit Court determined that the requirement in Wis. Stats. § 66.0703 was more "specific" and should apply over the more general statute, Wis. Stats, § 801.14. This was then applied by the Circuit Court to rule that undersigned's actions to "serve" the Village Clerk pursuant to Wis. Stats. § 801.14 were ineffective and did not satisfy the requirement in § 66.0703(12) requiring service of a written notice of appeal on the Village Clerk. *See App at 24-26,*

Circuit Court discussion of specific language.

This was erroneous as described above. This is the only issue presented in this case. The Circuit Court was in error because there was no actual conflict. The two statutes are easily harmonized by allowing service under the procedure mandated by Wis. Stats. §801.14(2), which requires serving the party's attorney of record. There is no explanation or reason why serving the Village clerk's attorney is not sufficient in a case like this. Serving the attorney with the jurisdictional document, the summons and complaint, was perfectly appropriate. The Village admitted service. This was accomplished by the Attorney for the Village admitting service on behalf of the Village. If the attorney was authorized by the Village to accept service of the summons and complaint, why then would serving a subsequent notice of appeal not also be considered served if delivered to the same attorney of record that already admitted service of the underlying summons and complaint? This confused process makes no sense. It is unnecessary and not at all required by any reasonable or for that matter strict interpretation or construction of the plain language of Wis. Stats § 66.0703(12).

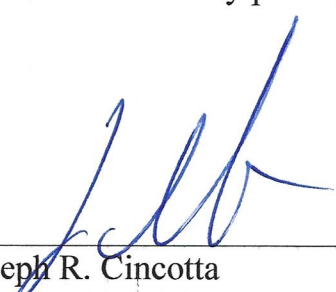
When construing statutes that apply to the same subject matter, Courts should harmonize them rather than eliminate the applicability of one of the statutes. In *City of Milwaukee v. Kilgore*, the Supreme Court confirmed that, "In construing statutes that are seemingly in conflict, it is our duty to attempt to harmonize them, if it is possible, in a way which will give each full force and effect." *City of Milwaukee v. Kilgore*, 193 Wis.2d 168, 184 (1995). Here, service on the attorney for the Village pursuant to the requirement in Wis. Stats. § 801.14(2) fully accomplishes the purpose of service on the

Village and its clerk. Just as the attorney for a represented party properly accepts service for that party under § 801.1492), allowing the attorney to accept service of the written notice of appeal under §66.0703(12) in no way alters or effects the goal of service on the Village clerk under that provision. As this Court has ruled, ambiguous procedural language of the special assessment statute should be construed to allow challenges on the merits. *See Outagamie County v. Town of Greenville*, 233 Wis.2d 566, 573 (Ct.App.2000) (“[p]rocedural statutes are to be liberally construed so as to permit a determination upon the merits of the controversy if such construction is possible.”)

CONCLUSION

For the above reasons, Appellant respectfully requests that the Court reverse the decision of the Circuit Court and remand this matter so it may proceed to the merits of the Special Assessment challenge.

Dated this 13th day of April, 2021



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CERTIFICATIONS PURSUANT TO WIS. STATS.
§ 809.19(2) and (8).

I certify that this Brief conforms to the rules contained in s. 809.19(8) (b) and (c) as modified by the Court's order for a Brief produced with a proportional serif font. The length of this brief is 1642 words.



Joseph R. Cincotta

I hereby also certify that filed with the brief in this matter as a part of the brief is an appendix that complies with s. 809.19(2)(a) for an Appellant's Brief and that contains: (1) a table of contents; portions of the record essential to an understanding of the issues raised and reasoning of the lower court.

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.



Joseph R. Cincotta

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12) and that said electronic brief is identical in content and format to the printed form of the brief filed as of this date.



Joseph R. Cincotta

I further certify that an appendix has been filed with this brief and as a separate electronic document in accordance with s. 809.19(12) and (13) and that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.



Joseph R. Cincotta