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STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT II
Appeal No.: 2021AP000069
Waukesha County Case No. 2020CV494

GREENWALD FAMILY LIMITED PARTNERSHIP
and

DARWIN GREENWALD,

Plaintiffs-Appellants,

v.

VILLAGE OF MUKWONAGO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF THE
WAUKESHA COUNTY CIRCUIT,
THE HONORABLE LLOYD V. CARTER, PRESIDING

DEFENDANT-RESPONDENT'S BRIEF

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STATEMENT OF THE FACTS

The Respondent generally agrees with the Appellant's Statement of the Case but adds the following facts.

On December 18, 2019, the Village Board passed a special assessment by way of Resolution 2018-050 to obtain funds from the imposition of a special property tax against the properties included within the special assessment district to repay the Village for costs incurred in developing roadway and utility improvements in Chapman Boulevard and associated properties. (R. 2, ¶¶ 1, 7, 23.)

The Greenwald Family Limited Partnership, LLC ("GFLP") filed a lawsuit in circuit court on March 17, 2020 to challenge the special assessment. (R. 2.) Wis. Stat. § 66.0703(12) sets forth the procedure for appealing a special assessment. It states in pertinent part that "[t]he person appealing shall serve a written notice of appeal upon the clerk of the . . . village".

GFLP admits it never served a written notice of appeal upon the Village of Mukwonago clerk. *Appellant Brief*, pg. 3. Instead, on April 8, 2020, GLFP, through its counsel, sent by U.S. Mail and email a Notice of Appeal directed to the Village's general counsel (Mark Blum), as well as the Village's litigation defense counsel (Remzy Bitar) in an unrelated lawsuit (*Greenwald Family Limited Partnership v. Village of Greenwald*, Waukesha County Circuit Court Case No. 19-CV-1158). (R. 10, ¶ 3.) The Village Clerk was not copied on the email or the U.S. Mailing. *Id.*

STANDARD OF REVIEW

A motion to dismiss based upon a failure to appeal within a statutorily mandated period functions as a motion for summary judgment. Whether the circuit court properly granted a motion for summary judgment is a question of law that courts review de novo, applying the same standards used by the circuit and set forth in Wis. Stat. §802.08. *Emjay Inv. Co v. Village of Germantown*,

333 Wis. 2d 252, 797 N.W. 2d 844, 2011 WI 31. Summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law.” Wis. Stat. § 802.08(2).

ARGUMENT

Wis. Stat. § 66.0703(12) sets out the procedure for appealing a special assessment. Wisconsin law clearly states that failure to comply strictly with Wis. Stat. § 66.0703(12)(a) results in a lack of subject matter jurisdiction and requires that the lawsuit be dismissed. *Bialk v. City of Oak Creek*, 98 Wis. 2d 469, 297 N.W. 2d 43 (Ct. App. 1980). Here, GFLP did not comply with the statute and the district court correctly dismissed their case. As stated above, Wis. Stat. 66.0703(12)(a) states:

A person having an interest in a parcel of land affected by a determination of the governing body, under sub. 8(c), (10), or (11) may, within 90 days after the date of the notice or of the publication of the final resolution under sub. (8)(d), appeal the determination to the circuit court of the county in which the property is located. **The person appealing shall serve a written notice of appeal upon the clerk of the city, town or village and execute a bond to the city, town, or village** in the sum of \$150 with 2 sureties or a bonding company to be approved by the city, town or village clerk, conditioned for the faithful prosecution of the appeal and the payment of all costs that may be adjudged against that person. (emphasis added)

The Wisconsin Supreme Court has addressed the express terms of Wis. Stat. § 66.0703(12)(a) on several occasions. In *Atkins v. Glendale*, 67 Wis. 2d 42, 54, 226 N.W. 2d 396 (1975), the Court held that “failure to strictly comply with [66.0703(12)(a)] . . . requires dismissal of the appeal.” The Court in *Aiello v. Village of Pleasant Prairie*, 2016 Wis. 2d 68, 72 (1996), made clear that Wis. Stat. § 66.0703(12)(a) “requires the notice of appeal to be served within a 90-day period.” Also, in *Bailk v. City of Oak Creek*, 98 Wis. 2d 469, 474 (Ct. App. 1980), the Court

of Appeals stated that “failure to strictly comply with the express terms of [66.0703(12)(a) . . . requires dismissal of the plaintiff’s action for lack of subject matter jurisdiction.”

In *Bialk*, the City of Oak Creek issued a final resolution creating a special assessment for the installation of the sanitary sewers and laterals. *Id.* The Plaintiff refused to pay the assessment and commenced an action to declare the special assessment null and void. *Id.* at 471. In *Bialk*, the Court of Appeals held that “plaintiff’s failure to strictly comply with the express terms of [the predecessor statute] sec. 66.60(12)(a) and (f), Stats., requires dismissal of plaintiff’s action for lack of subject matter jurisdiction.” *Id.* at 474. In doing so, it observed: “Our supreme court, in interpreting the appeal provisions stated in sec. 66.60 (12), Stats., has held that failure to strictly comply with these provisions requires dismissal of the appeal.” *Id.* at 472 (citing *Atkins v. Gelndale*, 67 Wis. 2d 43, 54, 226, N.W. 2d 190, 196 (1975)).

Also, in *Emjay Inv. Co. v. Village of Germantown*, the Village levied special assessments on Emjay. 333 Wis. 2d 252, 255, 797 N.W. 2d 844, 846 (2011). Emjay did not dispute that it failed to comply with the 90-day period of appeal as set forth in Wis. Stat. § 66.0703(12)(a), but instead argued that the appeal could proceed irrespective of the 90-day period of appeal set forth in the statute. *Id.* at 265-66. The Court disagreed and held that “an aggrieved property owner must strictly comply with the 90-day period of appeal in Wis. Stat. §66.0703(12)(a),” and that the “failure to do so is a forfeiture of the right to appeal.” *Id.* at 266.

The court in *Mayak v. Cloverleaf Lakes Sanitary Dist., No. 1*, 238 Wis. 2d 261, 269, 617 N.W. 2d 235, 2000 WI App 182, held that a summons and complaint meet the requirement of a written notice of appeal under subsection (12)(a). However, the statute still requires that the notice of appeal be served on the village clerk. This requirement is clear in *Mayak*, as the plaintiff had served the summons and complaint on the clerk. Also, in *Outagamie County v. Town of Greenville*,

233 Wis. 2d 566, 574, 608 N.W. 2d 414, 2000 WI App 65, the court stated that the proper procedure for filing a notice of appeal is to first file the notice of appeal with the circuit court and then serve the notice on the appropriate party, here the clerk.

Here, GFLP admitted it never served any document with the Village Clerk. *Appellants Brief*, pg. 3 They instead argue that service upon the Village's legal counsel is sufficient. However, GFLP is incorrect for four reasons. First, the plain language of the statute requires service upon the Village Clerk, no one else. Second, the aforementioned law requires strict compliance with Wis. Stat. § 66.0703, not some lesser form of compliance. Third, the specific statute governing assessments controls how GFLP should have proceeded in this matter, not some other set of statutes, as discussed further below. Finally, through Wis. Stat. § 66.0703, the Legislature created a statewide public policy for adjudicating special assessments through a simple, ordinary, and uniform way to commence proceedings for review, and uniformity, consistency, and compliance are all important aspects for the administration of justice. GFLP's theory works an end-around by creating a new procedure, one that should be addressed by the Legislature, not the courts.

The plain language of Wis. Stat. § 66.0703 requires that a person appealing a special assessment "shall serve a written notice of appeal upon the clerk of the . . . village." Wisconsin law requires strict compliance with Wis. Stat. § 66.0703. *Bialk v. City of Oak Creek*, 98 Wis. 2d 469, 474, 297 N.W. 2d 43, 46 (Ct. App. 1980). Plain and simple, GFLP failed to comply with the statutory requirements. Accordingly, this Court should affirm the decision of the circuit court.

GFLP asserts that Wis. Stat. § 801.14 governs here and further asserts that there is no conflict between Wis. Stat. § 66.0703 and Wis. Stat. § 801.14. This argument was barely made before the Circuit Court; it was not developed by way of briefing but was rather hastily raised during an oral argument at the hearing on the dispositive motion. This Court of Appeals would be

well within its discretion to affirm without considering it. As a general rule, the Court of Appeals does not consider arguments raised for the first time on appeal. *See Townsend v. Massey*, 2011 WI App 160, ¶¶ 23-27, 338 Wis. 2d 114, 808 N.W.2d 155. There are several rationales for this general rule. It prevents disruption of the judicial process by allowing the circuit court the opportunity to address any objections in the first instance. *Id.*, ¶26. Also, by requiring a party to raise all arguments in the circuit court, it gives the opposing party notice and an opportunity to address the objection. *Id.* Moreover, the rule functions to prevent appellate courts from “blindsiding” circuit courts with reversals based on legal theories which did not originate in their forum. *Id.*, ¶25.

Even considering GFLP’s argument, it lacks merit because the Circuit Court properly applied Wis. Stat. § 66.0703 as the statute that controls the disposition of this lawsuit. Section 66.0703 and § 801.14 conflict on their face. Wis. Stat. § 66.0703 states that a person appealing a special assessment shall serve a written notice of appeal upon the village clerk. But, GFLP argue that Wis. Stat. § 801.14 allows for service on the Village’s legal counsel. Here, the statutes clearly conflict. Wis. Stat. § 66.0703 governs because it is the more specific statute that governs the appeal of a special assessment. It is the long-standing rule of statutory interpretation that if two or more statutes are in conflict, the more specific statute controls over the general statute. *State ex rel. Hensley v. Endicott*, 2001, WI 105, ¶¶ 19-21, 245 Wis. 2d 607, 629 N.W. 2d 686. This rule of statutory interpretation applies with full force here. Wis. Stat. § 66.0703 is the more specific statute because it exclusively governs the appeal of a special assessment determination, whereas Wis. Stat. § 801.04 governs general civil procedure over all sorts of disputes. Thus, the Circuit Court correctly held that Wis. Stat. § 66.0703 is the applicable statute and that GFLP failed to comply with the statute.

Additionally, within the same section of statutes that GFLP cites, Wis. Stat. § 801.11, requires that a summons be served upon the president or clerk of a village, and only secondarily authorizes the service of additional pleadings to be served upon the Village attorney. Thus, even under GFLP's theory, it still failed to accomplish service in the legislatively preferred manner.

GFLP also argues that the two statutes, Wis. Stats. §§ 66.0703 and 801.14 are "easily harmonized by allowing service under the procedure mandated by Wis. Stats. § 801.14(2)," but doing this would not harmonize the statutes. Rather, it would completely ignore the plain language of Wis. Stat. § 66.0703. Further, statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶¶ 44-47. 271 Wis. 2d 633, 681 N.W. 2d 110. Holding that Wis. Stat. § 801.04 allows for service on the Village's legal counsel would render the explicitly clear language in Wis. Stat. § 66.0703 meaningless surplusage.

GFLP protests that there is no explanation or reason why serving the Village legal counsel is not sufficient. However, there are many public policy reasons as noted by the court in *Emjay Inv. Co. v. Village of Germantown*. 333 Wis. 2d at 255, 797 N.W. 2d 844, (2011). The court stated the "policy consideration behind this rule is to maintain a simple, ordinary and uniform way of conducting legal business in our courts. Uniformity, consistency and compliance with procedural rules are important aspects of the administration of justice. If the statutory prescriptions are to be meaningful, they must be unbending." *Id.* (quoting *Gamroth v. Village of Jackson*, 215 Wis. 2d 251. 259, 271 N.W. 2d 917 (Ct. App. 1997) (internal quotations omitted)). Additionally, as explained by Judge Lloyd V. Carter in his oral ruling in this case, the statute puts certain requirements on the clerk after the notice of appeal is served on them, thus further enhancing why

service upon the clerk is required and service upon the Village's legal counsel is insufficient. *See Plaintiffs Appendix* pg. 18-19.

Although GFLP is correct that the court in *Outagamie County v. Town of Greenville*, held that ambiguous procedural language of the special assessment statute should be construed to allow challenges on the merits, there is absolutely nothing ambiguous with the sentence "[t]he person appealing shall serve a written notice of appeal upon the clerk of the . . . village." The statute, plain and simple, required GFLP to serve its written notice of appeal upon the Village Clerk. Here, it failed to do so. Accordingly, its lawsuit was properly dismissed by the Circuit Court.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the lower court.

Dated this 13th day of May, 2021.

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CERTIFICATION PURSUANT TO WIS. STAT. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) as modified by the Court's Order for a brief and appendix produced with a proportional serif font. The length of this brief consists of 2,219 words.

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**CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO WIS. STAT. §
809.19(12)(f)**

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12)(f) and (13)(f).

I further certify that the electronic brief and appendix are identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

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