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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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Summary of reply.

The Court is facing a procedural issue in this matter – whether GFLP's manner of serving the clerk with a notice of appeal document complied with the special assessment statute and the rules of civil procedure – it absolutely did so. As described in its brief, GFLP took the appropriate and indeed stricter approach to making service on the clerk by following the requirement in Wis. Stats. § 801.14(2) that service on a represented party "shall be made on the attorney" for the party. The Court should clarify that § 801.14(2) applies to challenges under Wis. Stats. § 66.0703(12), as it does in every other similar situation that counsel could find.

The Court should also allow this matter to proceed on its merits, which shows that GFLP is seeking to challenge an outrageously faulty special assessment being imposed against them by the Village. The assessment imposes property taxes over 10 times the amount it imposes against other affected properties. *See Doc No. 2 Complaint at ¶ 14-15.* It also imposes the assessment against property that currently lies in the *Town* of Mukwonago not the Village, another error. *Id.* And GFLP receives no benefit from the infrastructure for which the Village is seeking reimbursement. *Id. at ¶ 9-12*

GFLP properly followed the requirements in Wis. Stats. § 66.0703(12) and § 801.14(2) because the attorney for the Village had affirmatively admitted and accepted service of the summons and complaint. The Court should confirm that § 801.14(2) sets forth the property process under the circumstances in this matter. Doing so will do nothing to undermine the consistency and uniformity of the special assessment challenge

statute. Nor will it in any way affect the ability of the Village and its clerk to respond to the merits of GFLP's current challenge under that provision.

II. The Special Assessment appeal provisions are not clear and obvious as to the manner of affecting service to initiate the appeal.

The Village argues that, "Wis. Stats. § 66.0703 … creates a statewide policy for adjudicating special assessments through a simple, ordinary and uniform way to commence proceedings for review. *Brief at p. 5*. The Village then accuses GFLP of creating and "end around" by creating a new procedure. *Id.*

This is erroneous. GFLP followed the procedures carefully given that the attorney for the Village had admitted service of the underlying summons. The Village now seeks to punish GFLP for being more careful and indeed "stricter." In fact it is the Village's suggested outcome that creates an exception and inconsistency by carving out an appeal under § 66.0703(12) as apparently the only civil court action or special proceeding that is exempt from the service rules in Wis. Stats. § 801.14(2).

Initiating a circuit court challenge to a special assessment – that is, the precise actions one must take to do so - is not at all clear based on a simple and plain review of only the language in Wis. Stats. § 66.0703(12). GFLP determined that a summons and complaint was required to obtain jurisdiction in the circuit court. That document was thus properly and timely filed first. *See Doc No. 2 Summons and Complaint*. It was then served on the Village. That service was affected by the Village's attorney admitting and accepting service. *See App at pp 8-10.*

GFLP then prepared its notice of appeal and "served" that on the clerk. However,

how to "serve" the notice of appeal is ***not*** specifically addressed in Wis. Stats. § 66.0703(12). "Serve" is not defined in Wis. Stats. § 66.0703, or ch. 66 generally, or anywhere in the statutes that undersigned could locate. Thus, GFLP did what it should have done by referring to the rules that govern civil actions in the circuit court. A review of those statutes shows that because the notice of appeal is a separate document that comes after the summons, GFLP was required to follow the express requirement in Wis. Stats. § 801.14(2), and *serve* the clerk by *service* on the Village's attorney.

The Village does concede, as the caselaw explains that GFLP followed the property sequence, filing the summons and complaint in circuit court and then serving the notice of appeal on the clerk. *See Village brief at p.4-5, citing Outagamie County v. Town of Greenville*, 233 Wis.2d 566, 574-75 and n.3 (Ct.App.2000).

Still, after trying several ways to knock this matter out on procedural grounds, the Village's argument comes down to the following: Even though Wis. Stats. § 801.14(2) requires that the attorney for a represented party be served with all documents subsequent to the summons and complaint- as was admittedly done here – somehow that provision does not require what it's plain language clearly does, in fact, require.

II. There is no conflict between the statutes.

The Village argues that, "Section 66.0703 and § 801.14 conflict on their face" and that "Wis. Stat. § 66.0703 is the more specific statute because it exclusively governs the appeal of a special assessment, whereas Wis. Stat. § 801.04 governs general civil procedure over all sorts of disputes." *Brief at p. 6.*

But the fact that §801.14(2) governs "all sorts of disputes" does not in any way

mean it conflicts with Wis. Stats. § 66.0703(12). The Village's struggle to highlight the actual conflict here is due to the fact that there is no conflict. As described in GFLP's brief, the duty of the court in applying statutes is to harmonize them it possible, not to find a conflict where none exists. *See City of Milwaukee v. Kilgore,* 193 Wis.2d 168, 184 (1995) (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.") That is easily done here.

The Village responds that applying § 801.14(2) would render the "explicitly" clear language in Wis. Stats. § 66.0703(12) meaningless surplusage. *Brief at p. 7*. It does not identify that language but can only be referring to the word "serve." This argument has two obvious faults. First, "serve" which is not defined, is ambiguous because it does not always and only mean in-person delivery. Secondly, even if "serve" does contemplate in-person delivery under other statutes, that would not negate or conflict with the requirement in Wis. Stats. § 801.14(2) that service on a represented party of anything except the initiating summons *must* be made by service on its attorney.

III. The Circuit Court Addressed the Issue.

The Village argues that GFLP did not raise the issue below. That is inaccurate. In response to the Village's argument in its motion to dismiss, GFLP made the express and complete argument that service on the Village's attorney under § 801.14(2) was required and adequate *See Circuit Court Record at Doc. No. 29, at ¶s 4, 6, and 7.* Moreover, the Circuit Court's ruling, indeed the only dispositive ruling it made, was based on its interpretation and application of Wis. Stats. § 801.14(2). *See App 24-26.*

IV. The Supreme Court's decisions require allowing this matter to proceed on the merits.

As GFLP noted in its brief, "[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; where a procedural statute does not provide specific direction for compliance, the ambiguity is to be resolved in favor of the landowner." *See Outagamie County v. Town of Greenville*, 233 Wis.2d 566, 573 (Ct.App.2000)

The Village's responds that "there is absolutely nothing ambiguous with the sentence, 'the person appealing shall serve written notice of appeal upon the clerk of the … village. *See Village's brief at p. 8.* This argument is again based on the premise that "serve" means only and always in-person delivery to the clerk. It does not. What it requires is that "service" be made on the clerk. And to determine how to do that one must refer to Wis. Stats. § 801.14(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. …

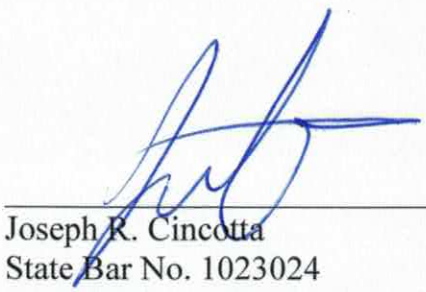
The Village's implied argument seems to be that Wis. Stats. § 801.14(2) does not apply to section 66.0703(12). But there is nothing in section 66.0703 to suggest that result. More significantly, the express language of Wis. Stats. § 801.14(2) shows otherwise. It is all inclusive, making § 801.14 applicable, "Whenever under these *statutes*, service of pleadings or other papers is required …."

CONCLUSION

The Village continues to confuse the issue by equating "serve" with "personally present." But the undefined word "serve" standing alone in Wis. Stats. § 66.0703(12) does not explicitly or expressly require and only allow for "Service" through in-person delivery of the notice of appeal to the clerk. It does not say how to serve the notice of appeal, which can only be determined by review of § 801.14(2). GFLP did that and properly served the clerk through service on the clerk's attorney.

Based on the above GFLP requests that the Court reverse the circuit court and remand this matter for further proceedings on the merits of GFLP's claim.

Dated this 27th day of May, 2021



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

I certify that this Reply 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 1538 words.

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