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STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2021AP00069-FT
Waukesha County Case No. 2020CV494

GREENWALD FAMILY LIMITED PARTNERSHIP
and

DARWIN GREENWALD,

Plaintiffs-Appellants-Petitioners,

v.

VILLAGE OF MUKWONAGO,

Defendant-Respondent.

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

RESPONSE TO PLAINTIFFS'-APPELLANTS' PETITION FOR REVIEW

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STATEMENT OF THE FACTS AND PROCEDURAL POSTURE

As the Petition states, the facts in this case are undisputed. This case is a special assessment proceeding under Wis. Stat. § 66.0703(12). Darwin Greenwald and Greenwald Family Limited Partnership (hereafter, collectively "GFLP") filed suit in Waukesha County on March 17, 2020 to appeal a special assessment levied by the Village of Mukwonago (hereafter, the "Village"). Under the clear terms of the statute governing special assessments and challenges thereto (Wis. Stat. § 66.0703(12)(a)), an appeal of a special assessment begins with the service of a special assessment properly served upon the municipality and doing so within 90 days.

However, GFLP never provided a timely written notice of appeal upon the Village Clerk as required. (See Petitioners' Brief, pg. 11-12). Instead, on April 8, 2020, GFLP, 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), both of whom were involved with GFLP in an unrelated lawsuit. The Village Clerk was not copied on the email or the U.S. Mailing and, more importantly as already noted, she was not served with the Notice of Appeal. Nor did the Village Clerk receive service of the Notice of Appeal within 90 days.

The Village moved to dismiss GFLP's Complaint in the Circuit Court on grounds that Wis. Stat. § 66.0703(12)(a) required GFLP to serve its notice of appeal on the Village Clerk and that GFLP's failure to do so within ninety days was fatal to its action. The Circuit Court agreed with the Village and dismissed GFLP's Complaint with prejudice. GFLP appealed the Circuit Court's Order to the Court of Appeals. The Court of Appeals affirmed the Circuit Court's Order in an unpublished, per curium opinion.

THE STANDARDS FOR GRANTING REVIEW ARE NOT BY GFLP'S PETITION

Review is a matter of judicial discretion, not of right, and will only be granted when special and important reasons are presented. See Wis Stat. § 809.62(1r). While not controlling, said statute provides criteria that will be considered in reviewing a petition, as follows:

> (a) A real and significant question of federal or state constitutional law is presented.
> (b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.
> (c) A decision by the supreme court will help develop, clarify or harmonize the law, and
> 1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
> 2. The question presented is a novel one, the resolution of which will have statewide impact; or
> 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.
> (d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.
> (e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination. *Id.*

The Court should deny GFLP's Petition for Review because GFLP does not meet any of the criteria for review set forth in Wis Stat. § 809.62(1r). GFLP argues that review is appropriate to clarify the proper procedure under Wis. Stat. § 66.0703(12) and because the Court of Appeal's decision is contrary to long settled doctrines of this Court and federal decisional law. However, both of these assertions are without support as discussed more

fully below. The proper procedure under Wis. Stat. § 66.0703(12) is clear in that "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 case at hand, GFLP did not personally serve, email, or mail the Village Clerk the notice of appeal. In fact, GFLP did not provide the notice of appeal in any manner to the Village Clerk. As cited below, both this Court and the Court of Appeals have ruled that strict compliance with Wis. Stat. § 66.0703(12) is required.

In concocting a so-called need-for-clarification to support its Petition, GFLP also argues that Wis. Stat. § 801.14, which governs service and filing of pleadings in civil litigation, is the controlling statute in that service of the notice of appeal to the Village's counsel is sufficient. GFLP's use of Wis. Stat. § 801.14 is simply a red-herring to create confusion where none exists. Through Wis. Stat.§ 66.0703, the Legislature created a statewide mechanism for adjudicating special assessments in a simple, ordinary, and uniform way that, as material here, contains straightforward rules as to service and timelines. Wis. Stat. § 66.0703 states that a person appealing a special assessment shall serve a written notice of appeal upon the Village Clerk. This statutory section is clearly the more specific statute governing special assessments in this State, not the generic statute governing service of legal papers in a litigated matter as outlined in Wis. Stat. § 801.14. Under GFLP's argument, not only would Section 66.0703(12) be rendered meaningless and complete surplusage but the upshot of how GFLP views Wis. Stat. § 801.14 as taking priority would create a practical outcome that the statutory scheme under Chapter 801 for commencement of a civil action would be rendered meaningless where, as here, a litigant could simply dump their complaints on any attorney they believe to be a person's or entity's

legal representative without following the statutory steps for acquiring personal jurisdiction. For the above stated reasons, this case is not one that is worthy to be heard by this Court, especially when considering the criteria set forth in Wis Stat. § 809.62(1r). Rather, this is a case of straightforward statutory interpretation and precedent.

In its Petition, GFLP argues that review is appropriate to clarify the proper procedure under Wis. Stats. § 66.0703(12) and because the Court of Appeal's decision is contrary to long settled doctrines of this Court and federal decisional law. (See Petitioners' Brief, pg. 6). However, as the Circuit Court and Court of Appeals determined, this is a straightforward matter of statutory interpretation and longstanding precedent, which is governed only by Wisconsin law. Thus, none of the criteria under Wis Stat. § 809.62(1r) are met and the Court should deny GFLP's

I. PRECEDENT AND BASIC STATUTORY INTERPRETATION SUPPORTS THE OUTCOME REACHED BY BOTH THE CIRCUIT COURT AND COURT OF APPEALS.

Precedent and basic statutory interpretation supports the only outcome in this case that the challenger of a special assessment must follow the plain and clear dictates of the controlling statute. Under Wis. Stat. § 66.0703(12)(a), the Legislature has provided a mechanism for review by the challenger or objector to a special assessment, as follows:

> 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 issue in this case is not filing of the Summons and Complaint in Circuit Court as suggested by GFLP. (See Petitioners' Brief, pg. 11-12). Rather, as Wis. Stat. 66.0703(12)(a) explains and GFLP admits in its brief, the crux of the dispute is whether GFLP properly and timely filed the Notice of Appeal as required by the special assessment statute. Here, the Notice of Appeal must be served on the clerk in 90 days upon the Village Clerk and, because GFLP did not do that, GFLP did not properly commence its action objecting to the special assessment.

The Wisconsin Supreme Court and Courts of Appeals have 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. Glendale,* 67 Wis. 2d 43, 54, 226, N.W. 2d 190, 196 (1975)).

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.

GFLP argues that service upon the Village's legal counsel of the notice of appeal is sufficient. However, GFLP is incorrect for several reasons. First, the plain language of the statue requires service upon the Village Clerk, no one else. Second, 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.

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. Because the statutory

interpretation is clear, this Court should deny GFLP's Petition as the criteria set forth in Wis Stat. § 809.62(1r) is not met.

The operation of Wis. Stat. §66.0703 and the adjudication here by the Circuit Court and Court of Appeals in this case – based on the simple facts and the plain and clear statutory and decisional law on the subject – does not present any need for review. Indeed, it is already the well-established rule in this State that many kinds of controversies must fulfill certain statutory requirements before a court can properly adjudicate the matter and proceed to judgment. "A circuit court's ability to exercise its subject matter jurisdiction in individual cases, however, may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction." *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 2, 273 Wis. 2d 76, 82, 681 N.W.2d 190. "The failure to comply with these statutory conditions does not negate subject matter jurisdiction but may under certain circumstances affect the circuit court's competency to proceed to judgment in the particular case before the court. A judgment rendered under these circumstances may be erroneous or invalid because of the circuit court's loss of competency but is not void for lack of subject matter jurisdiction." *Id.* See also *Matter of Commitment of M.W.*, 2022 WI 40, ¶¶ 35-36, 974 N.W.2d 733 ("Unlike a court's subject matter jurisdiction, …competency may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction in individual cases. … In the specific area of ch. 51 commitments, our precedent establishes the premise that "[t]he circuit court must hold a hearing on the petition for extension before the previous order expires or it loses competency to extend the commitment."); *Xcel Energy Servs., Inc., v. Lab. & Indus. Rev. Comm'n*, 2013 WI 64, ¶ 28, 349 Wis. 2d 234, 253, 833 N.W.2d 665 ("Although a circuit court may not be deprived

of jurisdiction by operation of a statute, a circuit court may lack competency to render a valid order or judgment when the parties seeking judicial review fail to meet certain statutory requirements."); *Vill. of Elm Grove v. Brefka*, 2013 WI 54, ¶ 44, 348 Wis. 2d 282, 304, 832 N.W.2d 121, 132, amended, 2013 WI 86, ¶ 44, 350 Wis. 2d 724, 838 N.W.2d 87 ("we conclude that the circuit court is without competency to hear Brefka's request to extend the ten-day time limit set forth in Wis. Stat. § 343.305(9)(a)4. and (10)(a). The ten-day time limit is a mandatory requirement that may not be extended due to excusable neglect.").

II. WIS. STAT. § 66.0703 IS THE CONTROLLING STATUTE FOR SPECIAL ASSESSMENTS, NOT FEDERAL LAW OR WIS. STAT. § 801.14.

This is a special assessment proceeding. The entire process – from the municipality's imposition of a special assessment through the challenge thereto – is governed by Wis. Stat. § 66.0703, not unlike the aforementioned Wisconsin Supreme Court decisions that similarly found that statutory provisions governing certain kinds of matters control the inquiry.

GFLP obfuscates the controlling statute and outcome here by directing this Court to federal law. There is simply no federal statute or federal decisional law involving special assessments of Wisconsin local units of government, or otherwise addressing Wis. Stat. § 66.0703.

Next, GFLP asserts that the highly generic provisions of the statute governing service and filing of pleadings in civil litigation (Wis. Stat. § 801.14) governs here and baldly asserts that there is no conflict between Wis. Stat. § 66.0703 and Wis. Stat. § 801.14. However, this argument is contrary to the express terms of the special assessment statute

and decisional law already established in this state, that is: "[A]n appeal under WIS. STAT. § 66.0703(12) is the 'sole remedy' of a property owner aggrieved by a special assessment[,]" *Emjay*, 333 Wis. 2d 252, ¶¶31, 36. 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. Wis. Stat. § 66.0703 states that a person appealing a special assessment shall serve a written notice of appeal upon the Village Clerk and do so in 90 days. Sidestepping the specific statute that informed it how to go about challenging the special assessment, GFLP theorizes that Wis. Stat. § 801.14 allows for service on the Village's legal counsel. Such may be true once an action is properly commenced, which begs the issue whether this action was properly commenced. It was not. If it had been properly commenced, then Wis. Stat. § 801.14 would have governed service of every order, pleading, and the like in the litigation after commencement of the action.

Apart from the controlling and well-established case law above governing this statute and similar statutes providing similar mechanisms of review, another general rule shows the criteria for review are not met here, that 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; *Jones v. State*, 226 Wis.2d 565, 576, 594 N.W.2d 738 (1999); *Adams Outdoor Advert., L.P. v. Cnty. of Dane*, 2012 WI App 28, ¶ 22, 340 Wis. 2d 175, 190, 811 N.W.2d 421, 429. A perfect example of this doctrine of interpretation is found in *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 185, 532 N.W.2d 690, 696 (1995). In this case, this Court said, "Section 343.30(5) which permits drivers license suspensions for the

violation of any state or local traffic laws, is a general statute when compared to the more specific secs. 800.09 and 800.095, which set forth municipal procedure and provide municipal courts with the means to secure compliance with orders they issue. This court has held, and we so hold here that, when we compare a general statute and a specific statute, the specific statute takes precedence."

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 civil disputes. Thus, the Circuit Court and Court of Appeals correctly held that Wis. Stat. § 66.0703 is the applicable statute and that GFLP failed to comply with the statute.

The Petition for Review is weak for further reasons. 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. § 801.14 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 behind the statutory mechanism to have the Village Clerk served, who is the statutory officer for the Village obligated to attend the Village Board's meetings, keep and maintain records, and to perform many other duties as required by law, ordinance or direction of the Village Board. See Wis. Stat. § 61.25. In this way, the Village Clerk is the one who receives, handles and informs the governing body of challenges to the special assessments they have levied and to prospect of or filing of legal action in the courts. Whether it is a Town Clerk for towns that have such power, a Village Clerk or City Clerk, the special assessment statute creates uniformity in accomplishing the special assessment process from start to finish and makes sure the governing body is properly following its process and being hailed into court if there is an objection, versus having some patchwork of varied processes at the local levels or through other statutory schemes governing other general matters. As noted by the court in *Emjay Inv. Co. v. Village of Germantown.* 333 Wis. 2d at 255, 797 N.W. 2d 844, (2011) "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)).

GFLP asks the court to overlook a huge assumption in its case that the Village's General Counsel or litigation counsel (being involved in a different case) would not see the copy of the assessment appeal as anything but that – a courtesy copy for which official service would yet occur upon the proper governmental official. GFLP also overlooks another assumption in its case – that either counsel would be the assigned counsel to represent the Village in the special assessment litigation.

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," no matter how GFLP tries to pit it against other statutes or align its case with inapposite cases like *Outagamie County v. Town of Greenville.* The statute, plain and simple, required GFLP to serve its written notice of appeal upon the Village Clerk and do so in 90 days. Here, it failed to do so. Accordingly, its lawsuit was properly dismissed by the Circuit Court and Court of Appeals under basic statutory interpretation and longstanding precedent.

CONCLUSION

For the reasons set forth above, this Court should deny this Petition for Review.

Dated this 7th day of July, 2021.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is thirteen (13) pages and 3,681 words.

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CERTIFICATIONS

I hereby certify that I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of s. 809.62(4) and s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the response filed as of this date.

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

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