

FILED
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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

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**

PETITIONERS' REPLY BRIEF

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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 Village 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.

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. Further, because the Clerk is a representative, indeed the official representative, of the Village, the Clerk is part of the “party” governed by Wis. Stats. 801.14(2). 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 of Respondent at p. 6.* The Village then accuses GFLP of creating and “end around” by creating a new procedure. *Brief at p. 25.*

This is erroneous. GFLP followed the procedures carefully given that the attorney for the Village had admitted service of the underlying summons and complaint. The Village now seeks to punish GFLP for being more careful and indeed “stricter.” And 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).

The Village essentially concedes that Wis. Stats. § 66.0703 is ambiguous despite its continuing insistence in portions of its brief that the statute is clear. It is not. To “serve” the clerk is not clear. And it is particularly not clear when the Attorney for the Village for which the Clerk is the official representative has already been served with the initiating document in the case. The Village tries to avoid agreeing that GFLP is correct on this point by arguing that, “GFLP does not argue that the statute is ambiguous other than it is unclear as to how the clerk is to be served.” *Brief at p. 30.* But this argument defeats itself. “Unclear” is “ambiguous.” And while GFLP has not dwelt on it, the statute is equally ambiguous in other portions of its language not directly relevant to the issues presented here.

What “serve” means is ambiguous, generally. But in the context of this case, the ambiguity is not material unless “serve” must be interpreted to mean that Wis. Stats. § 801.14(2) does not apply to serving the Notice of Appeal document required under the statute. There is no plain language in Wis. Stats. § 66.0703 explaining that, “*Wis. Stats 801.14 does not apply to actions under this section*” Or, “*the Clerk may only be served by personal delivery only to him or her.*” The answer to the ambiguity in this case to review what “serve” normally means in the rules of civil procedure. And more precisely, what accomplishing “service” normally means. The dictionary definitions of “serve” provided in the Village’s brief really only confirm that the term is not self-defining. The more meaningful analysis is, how service may be accomplished when the requirement is that a party or its representative must be served.

Thus, the first step for someone trying to learn how to serve the clerk would be to consult the statutes that describe how to do that. The primary statute that does that is Wis. Stats. § 801.11. That statute does not directly address serving a “clerk.” It addresses serving parties including Villages by delivery of the summons and complaint on the Clerk or leaving it in his or her office with the person in charge. Wis. Stats § 801.11 is pertinent however because it does address serving the summons and complaint, and also shows that the clerk of the Village is a representative of the Village for purposes of receiving service of process.

Wis. Stats. § 801.11 also raises the issue of whether approach taken by GFLP, which was to seek to serve the Village (or any represented party) by asking the attorney for the Village to accept service. Wis. Stats. § 801.11 does not by its language provide

for the method used here (and often used) which is to serve a party by having its counsel admit service. The Village does not and could not disagree that service of the initiating summons and complaint through obtaining an admission of service from the Village's attorney was proper, meaning it satisfied the requirement for service in Wis. Stats. § 801.11.

However, the Village argues against the same process being used with regard to serving the Clerk with the Notice of Appeal under Wis. Stats. § 67.0703. There is no basis to do so under the language of each statute, § 801.11 and 66.0703 - which is that the Clerk is the entity to be served. Said otherwise, if serving the attorney for the Village and seeking and obtaining an admission of service is valid and proper service of the summons and complaint, why would it not also be with regard to the second document in the case, the Notice of Appeal. There is no good reason to establish such a difference in this case.

More significantly, because the Village – and thus its representative the Clerk – was specifically represented by its attorney once he admitted service of the summons and complaint, the analysis of the broader definition and requirements of how to “serve” the clerk more generally, is not directly implicated. Indeed, that question is answered it seems by reference to Wis. Stats. § 801.11. In the absence of having the Village's attorney accept service, the more formal personal delivery service of the Notice of Appeal would be appropriate. But that is not the case here. The issue is whether Wis. Stats. § 801.14(2) controls the manner of serving the Notice of Appeal in a challenge under Wis. Stats. § 66.0703(12).

Here, 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. Because the Notice of Appeal is a separate document that comes after the summons, GFLP is 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 proper sequence, filing the summons and complaint in circuit court and then serving the Notice of Appeal on the clerk. *See Village brief at p. 30, citing Outagamie County v. Town of Greenville, 233 Wis.2d 566, 574-75 and n.3 (Ct.App.2000)*.

Unfortunately the Village fails to directly address the applicability of Wis. Stats. § 801.14(2). And indeed misstates the requirement of the statute:

"Wis. Stats. § 801.14(2) *allows* service of pleadings and other papers to be made upon a party represented by an attorney once an action is properly commenced."

See Respondents Brief at p. 19 (emphasis added)

But §801.14(2) does not "allow" service on the attorney it *requires* it:

(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(2)

GFLP was required to serve the attorney. There is nothing that would direct otherwise. When counsel for GFLP did serve the attorney with the Notice of Appeal, it even asked the Village attorney if anything else needed to be done to accomplish service of the Notice of Appeal. GFLP asked in its correspondence to the Village Attorney:

“Please let me know if the Village has any objection to this filing.”

See App p. 12 – April 8, 2019 transmittal letter to Attorney Blum

For the Village to argue now, as it does, that all GFLP had to do was ask if the Village attorney was accepting service for the Clerk is unavailing as well as being somewhat of an ambush. To the extent that GFLP was trying to clarify the process, the Village attorney should have responded. GFLP was at that point prohibited from serving the Clerk – if the Clerk is being served because he or she is a representative of the party-defendant. The Village created a trick bag of sorts. GFLP was trying to confirm the process with the party in charge of the process. GFLP asks for any objection. It receives none and is then is sandbagged after the fact by a motion to dismiss.

III. 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. § 801.14 governs general civil procedure over all sorts of disputes.” *Brief at p. 19.*

But the fact that §801.14(2) is part of a “conglomerate of procedural statutes” 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 if 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), which requires the Notice of Appeal to be served on the Clerk, meaningless surplusage. That is nonsense. Requiring a party to serve the Notice of Appeal required in § 66.0703 through the method required by Wis. Stats. § 801.14(2) does not in any way alleviate or weaken or otherwise impact that requirement of the statute. As has been argued, it is the Village's theory here that creates a conflict. It does so by arguing that Wis. Stats. § 66.0703(12) is exempted from Wis. Stats. § 801.14(2)'s requirement that documents after the summons must be served on the attorney for the party. Under the Village's theory the plain language of the two statutes directly conflict.

The Village also makes much of the fact that a challenge under Wis. Stats. § 66.0703 is a special proceeding. And thus should be seen as taking a challenge under that section out from under the operation and applicability of the rules of civil procedure in chs. 801- 814 stats. First, Wis. Stats. § 801.14(2) already addresses that issue because it makes its directives applicable to all actions under the "statutes." It is not limited to actions under 801-847.

Secondly, Wis. Stats. § 801.01(2) provides that Chapters 801 to 847 govern

procedure in circuit court in this state for all civil actions and special proceedings ... except where a different procedure is prescribed by statute or rule.” While a challenge under Wis. Stats. § 66.0703(12) may be a special proceeding, there is no “different” procedure prescribed by that statute.” The requirement is to serve the clerk. That is not any different than the procedures require under Wis. Stats. § 801.11 or § 801.14. There is nothing in Wis. Stats. § 66.0703(12) that would or should lead any reasonable person to think that the actions required to serve the clerk under that section are somehow different than performing service under § 801.11. Indeed, GFLP was required to file and serve its originating summons and complaint on the Village under chs. 801-847. Why would serving the second document – the Notice of Appeal- be exempt from those same provisions?

IV. The Clerk is identified in Wis. Stats. § 66.0703 as a representative of the party defendant not a separate entity.

The Village also makes the argument that the “Clerk” as described in Wis. Stats. § 66.0703 should be viewed as somehow independent of the actual party in the case – the Village. However, as described in the main brief, the Courts have addressed the issue in trying to establish proper guidance for litigants under the language of the statute.

In *Outagamie County v. Town of Greenville*, 233 Wis.2d 566 (Ct.App.2000) the Court of Appeals ruled that an aggrieved property owner may file its “appeal” in circuit court first and then serve the municipal clerk. In describing the proper procedure the Court explained that, “Certainly, the better procedure is for an aggrieved party to first file its notice of appeal with the circuit court and then serve the notice on the appropriate

party—here, the town *clerk*.” The requirement for the notice of appeal (or equivalent document) being first filed with the clerk has changed since *Outagamie County*, but the municipal clerk was and remains involved in the appeal procedure because he or she is the representative of the party defendant in this type of “appeal.”

The Village’s argument is that the Clerk in these types of cases shall be viewed as somehow independent of the party for whom he or she is the official representative and officer. That is confusing and contrary to the sensible understanding of the statute at hand. Wis. Stats. § 66.0703 was amended to take the filing of the initiating document away from the clerk. To initiate a challenge under the amended language, filing a notice of appeal (or summons and complaint) may not be done with the clerk but rather must be filed in circuit court. The amendment to the statute thus took matters *away* from the clerk. It brought the process more in line with the modern rules by having a challenger begin its case by filing in circuit court.

The Village notes that the Clerk has responsibilities under the statute in regards to preparing certain materials for the appeal. The Village argues from this that the Clerk should be viewed as somehow separate from the Village itself and therefore not the party or a part of the party being sued in the case. But that runs counter to the Legislature’s removal of responsibilities from the Clerk under the amended statute, where the focus shifts to the circuit court.

More fundamentally, the responsibilities of the Clerk under Wis. Stats. § 66.0703 do not in any way require that he or she be served directly with the Notice of Appeal to accomplish those tasks. Serving the Village’s (and thus the Clerk’s attorney) pursuant to

Wis. Stats. 801.14(2) is at least the equivalent of directly serving the clerk. The attorney already needs to forward the substantive document – the summons and complaint – to the Clerk and other Village officers. The attorney can certainly also forward the Notice of Appeal document, which for all practical purposes does not add anything to the process that the summons and complaint has not already accomplished.

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)

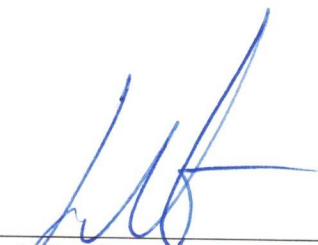
The Village’s responds that “there is absolutely nothing ambiguous with the sentence, ‘the person appealing shall serve written notice of appeal upon the clerk of the ... village. *See Village’s brief at p. 8.* This argument is again based on the premise that “serve” means only and always in-person delivery 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).

The Village’s argument is 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 at stake by equating “serve” with “personally present.” GFLP served the Clerk through service on the clerk’s attorney. 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 31st day of January, 2023



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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) for a Brief produced with a proportional serif font. The length of this brief is 2968 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