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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
APPEAL NOS. 2021AP000449 FT and 2021AP000450 FT

CITY OF PORT WASHINGTON,

Plaintiff-Respondent,

v.

SANDRA J. KOZIOL,

Defendant-Appellant.

Appeal of the Ozaukee County Circuit Court for the 2nd Judicial District
Case Nos. 2020CV000386 and 2020CV000387
The Honorable Steven M. Cain, Presiding

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Respondent, City of Port Washington (“City”) believes that the Appellant, Sandra Koziol’s (“Koziol”) rendition of the statement of the case and procedural status leading up to this appeal is generally accurate. Further, the City believes that the inclusion of supplemental facts, as well as clarification of certain facts asserted by Koziol, will be beneficial to the understanding of this appeal. Those supplemental facts and clarifications will be included and referenced in the City’s argument, as needed.

STANDARD OF REVIEW

A trial court’s findings of fact will be affirmed unless they are clearly erroneous. Wis. Stat. § 805.17(2). Findings of fact will not be reversed unless they are against the great weight and clear preponderance of the evidence. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615. In addition, when a trial judge acts as a finder of fact and there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of witnesses. *Stevenson v. Stevenson*, 2009 WI App 29, ¶14, 316 Wis. 2d 442, 765 N.W.2d 811.

In the instant case, application of the *clearly erroneous* standard of review is appropriate since the crux of the trial court’s decision to dismiss Koziol’s appeals of her municipal court convictions to circuit court is the finding that Koziol did not provide satisfactory evidence that her attorney’s

secretary gave the City the written notices of appeal required by Wis. Stat. § 800.14(1). Indeed, whether those notices were given to the City was the *sole* factual dispute between the parties decided by the trial court.

Answering “no,” the court applied the relevant law to its factual finding, ruling that Koziol failed to perfect her appeals pursuant to § 800.14(1) by giving the City notice within the 20-day time limit after the municipal court’s judgments. (R. 34, pp. 6-8, Supp. App. A, pp. 1-3) Consequently, the court held, it lacked competency to hear the appeals and granted the City’s motions to dismiss. (R. 34, p. 8, Supp. App. B, p. 3). Koziol does not challenge the court’s legal conclusions that if, in fact, she failed to give the requisite notices of appeal, then she failed to perfect her appeals and the court lacked competency to hear them.

Hence, the City disagrees with Koziol’s position that this case involves the interpretation of a statute and the application of statutory and case law to a set of facts, which present questions of law that this Court decides *de novo*. (Appellant’s Memo. Brief at p. 4) Contrary to Koziol’s assertion, the trial court did not interpret § 800.14(1) to *require* that Koziol “have additional proof of mailing” the notices of appeal to the City Attorney. (Appellant’s Memo. Brief at p. 5) Rather, the court made clear that its dismissal of Koziol’s appeals was premised on Koziol’s attorney’s secretary’s bare assertion (in the form of a copy of a December 16, 2020 transmittal letter to the City Attorney) that she mailed those notices,

without any other evidence to support that assertion. (R. 34, pp. 7-8, Supp. App. A, pp. 2-3) Koziol's response to the City's motion to dismiss, the court explained, could have included an affidavit of mailing or metadata of the word processor that created the December 16th transmittal letter to show that the document was created on that date versus a later date. (R. 34, pp. 7-8, Supp. App. A, pp. 2-3) But, as the court observed, "[S]aying I mailed it without any other evidentiary support doesn't cut it." (R. 34, p. 8, Supp. App. A, p. 3)

It is clear beyond peradventure that the foundation of the trial court's ruling granting the City's motions to dismiss Koziol's appeals is not the court's legal interpretation of § 800.14 (1), but its factual determination that Koziol filed "nothing of evidentiary value in opposition to the motion that would allow Ms. Koziol to prevail ..." (R. 34, p. 8, Supp. App. A, p. 3) Thus, the proper standard of review is the *clearly erroneous* standard applicable to a trial court's findings of fact, not the *de novo* standard applicable to questions of law.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED KOZIOL'S APPEALS TO CIRCUIT COURT SINCE KOZIOL FAILED TO FILE AN AFFIDAVIT OR OTHER EVIDENCE IN OPPOSITION TO THE CITY'S MOTION TO DISMISS, AS REQUIRED BY CASE LAW AND LOCAL COURT RULES

On January 8, 2021, in response to the January 5, 2021 filing of the City's Motions to Dismiss both of Koziol's appeals from municipal court to

circuit court, Koziol submitted to the trial court a copy of a letter dated December 16, 2020, signed by Koziol's attorney's legal secretary, Lori Plutowski, purportedly transmitting copies of Koziol's notices of appeal to the City. However, it was not until February 2, 2021 -- *27 days after* the City filed its Motions to Dismiss and *one day after* the February 1, 2021 hearing at which the trial court ordered the dismissal of Koziol's appeals -- that Koziol's attorney filed with the circuit court an Affidavit of Mailing signed and sworn to by Ms. Plutowski. The Affidavit of Mailing was proffered to bolster the assertion, contained in Koziol's Motion for Reconsideration, that the December 16th transmittal letter and notices of appeal were mailed to the City Attorney on December 16, 2020. (R. 35, pp. 2-4, Supp. App. B, pp. 4-6) However, the trial court essentially found that Affidavit of Mailing to be too little and too late. (R. 35, p. 19, Supp. App. B, p. 10) The trial court's finding was correct for at least two reasons.

First, Rules 204.2(a) and (b) of the Ozaukee County Circuit Court Local Rules - 2020 (hereinafter referred to as the "Local Rules") applicable to dismissal motions in civil proceedings provide, in relevant part:

204.2 SUMMARY JUDGMENT AND DISMISSAL MOTIONS

- (a) A motion for summary judgment under section 802.08, Wis. Stats., or a motion for dismissal under section 802.06, Wis. Stats., shall be filed with the clerk of circuit court, together with any brief, affidavits, or other supporting documents. [...]
- (b) *A respondent shall have 20 days from the service of the moving party's motion within which to serve and file a brief, affidavits, or other supporting documents, or waive in writing the right to do so. If the respondent fails to*

file any brief, affidavits, or other supporting documents, or a waiver of the same within the 20 day period, it shall be presumed that respondent has waived the right to do so. (emphases added)

By not filing the Affidavit of Mailing until 27 days *after* the City filed and served its motions to dismiss her appeals, Koziol violated Rule 204.2(b), and by failing to file the Affidavit within the 20-day period prescribed by that Rule it is conclusively presumed that she waived her right to do so. Accordingly, pursuant to Rule 204.5, the trial court had the discretion and express authority to disregard that untimely Affidavit of Mailing:

204.5 UNTIMELY SERVICE AND/OR FILING

Any motion, brief, affidavit, or other supporting documents served and/or filed in an untimely fashion may be disregarded by the court. (emphases added)

Although the trial court did not specifically cite Local Rules 204.2 or 204.5 in dismissing Koziol's appeals, those Rules are generally known within the jurisdiction of the court and are capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned. Wis. Stat. § 902.01(2). Those Local Rules are publicly available and easily accessed via the internet online at:

<https://www.co.ozaukee.wi.us/DocumentCenter/View/2947/2020-Ozaukee-County-Local-Rules> (see especially cover page and pp. 1, 17, 21-22).

Further, judicial notice can be taken at any stage of a proceeding. Wis. Stat. § 902.01(6). As such, the City respectfully requests that this Court take judicial notice of the foregoing Local Rules, and that the trial record be

supplemented to include those portions of the Rules. (R. 37, cover page and pp. 1, 17, 21-22, Supp. App. C, pp. 12, 13, 14, 15-16)

Second, the trial court's finding that Koziol did not provide sufficient evidentiary support for the bare assertion that the City was given written notice of appeal as required by § 800.14(1) was also correct based on well-established case law.

In this regard, Koziol's reliance on *American Family Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶33, 319 Wis. 2d 397, 768 N.W.2d 729 for the proposition that "... first-class mail service is an efficient mechanism that is reasonably calculated to provide actual notice of possible or pending litigation and effective alteration of substantive legal rights and interests" is a correct statement, as far as it goes. (Appellant's Memo. Brief at pp. 5-6). Unfortunately, it misses both the point and controlling legal authority.

The single dispositive issue before the trial court and this Court was and is whether Koziol gave the City timely written notices of appeal under § 800.14(1). Despite Koziol's mantra in her Brief that the legislature did not prescribe in § 800.14(1) that a written notice of appeal of a municipal court judgment must be delivered by hand, fax, or mail, or by certified mail or registered mail, or with any proof of delivery, neither the City nor the trial court read § 800.14 (1) to specify or impose such requirements.

Instead, as the City argued and the trial court agreed, where written notice of appeal is allegedly given by mail and the recipient denies receipt

of the mailing, the issue must be determined by the trial court. This rule and process was explained by the Wisconsin supreme court in State ex rel. Flores v. State, 183 Wis.2d 587, 516 N.W.2d 362 (1994) as follows:

“It is well established that the mailing of a letter creates a presumption that the letter was delivered and received. See, *Nack v. State*, 189 Wis. 633, 636, 208 N.W. 487 (1926), (citing 4 Wigmore, *Evidence* (2d ed.) § 2153; 1 Wigmore, *Evidence* (2d ed.) § 95); *Mullen v. Braatz*, 179 Wis.2d 749, 753, 508 N.W.2d 446 (Ct. App.1993); *Solberg v. Sec. of Dept. of Health & Human Services*, 583 F.Supp. 1095, 1097 (E.D.Wis.1984); *Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 418, 76 L.Ed. 861 (1932).

[...]

This evidence raises a rebuttable presumption which merely shifts to the challenging party the burden of presenting credible evidence of non-receipt. *United State v. Freeman*, 402 F. Supp. 1080, 1082 (E.D. Wis. 1975). Such a presumption may not, however, be given conclusive effect without violating the due process clause. *United States v. Bowen*, 414 F.2d 1268, 1273 (3d Cir. 1969); *Mullen v. Braatz*, 179 Wis.2d at 453, 508 N.W.2d 446. If the defendant denies receipt of the mailing, the presumption is spent and a question of fact is raised. See, *Reeves v. Midland Cas. Co.*, 170 Wis. 370, 377, 174 N.W. 475, 477 (1920); 31A C.J.S. *Evidence* § 136; 9 Wigmore, *Evidence* § 2519 (Chadbourn rev. 1981). The issue is then one of credibility for the factfinder. The factfinder may believe the denial of receipt or the factfinder may disbelieve the denial of receipt. See, *Nack v. State*, 189 Wis. at 636, 208 N.W. 487 (citing 4 Wigmore, *Evidence* (2d ed.) § 2153); 1 Wigmore, *Evidence* (2d ed.) § 95; see, also, *Solberg v. Sec. of the Dept. of Health & Human Services*, 583 F.Supp. at 1098. [...]

Id. at 612-613. (emphases added)

In this case, to support the City’s motions to dismiss Koziol’s appeals, the City Attorney filed an affidavit (credible evidence) denying receipt of Koziol’s notices of appeal by mail or any other means. Under the procedure articulated in *Flores* (and the authorities cited therein), the presumption of receipt of a mailed letter was “spent,” and a question of fact was raised for the trial court’s determination. Without a timely-filed,

countervailing affidavit or other evidence by Koziol in opposition to the City's motion, the trial court decided the factual issue in the City's favor.

In reaching its decision, the trial court fully considered the credibility of Koziol's attorney's secretary (Ms. Plutowski) and her version of events surrounding Koziol's appeal. Thus, for example, at the February 1, 2021 hearing on the City's motion to dismiss, the trial court stated it was "struck with" Koziol's attorney's January 8, 2021 filing of a copy of his secretary's December 16, 2020 transmittal letter in response to the City's motion (R. 34, p. 7, Supp. App. A, p. 2), which the trial court later described as "just this random copy of a letter." (R. 35, pp. 15-16, Supp. App. B, pp. 7-8). The trial court further noted it was "surprised" that no affidavit of mailing was included with Koziol's initial response to the City's dismissal motions (R. 35, p. 19, Supp. App. B, p. 10). Also noteworthy to the trial court's credibility determination were its findings that: (1) there was no metadata provided by Koziol suggesting that the secretary's word processor that created the December 16th transmittal letter showed the letter was created on that date versus a later date (R. 34, pp. 7-8, Supp. App. A, pp. 2-3); (2) when there is a document with certain importance that its mailing is key to some deadline, an affidavit of mailing is generally created at the time of mailing, which was not done in this case (R. 35, p. 16, Supp. App. B, p. 8); (3) it "defies believability" that the "digital trail" of metadata associated with the December 16th transmittal

letter was “somehow deleted, or erased, or couldn’t be referenced for purposes of this matter” (R. 35, pp. 19-20, Supp. App. B, pp. 10-11); and (4) “there’s metadata behind the scenes of every Word document that includes great detail about when it’s created, when it’s altered. And the fact that that information couldn’t be provided for either side to use is concerning to the Court ...” (R. 35, pp. 19-20, Supp. App. B, pp. 10-11)

In summary, following the procedure and rules set forth in *Flores*, the trial court found that it believed the City’s denial of receipt of Koziol’s December 16, 2020 transmittal letter and accompanying notices of appeal. Since the trial court’s exercise of discretion was reasonable and based on the record and controlling law, it should not be disturbed on this appeal.

II. KOZIOL’S MOTION TO RECONSIDER WAS PROPERLY DENIED SINCE IT FAILED TO CITE ANY NEW EVIDENCE OR MANIFEST ERROR BY THE TRIAL COURT IN DISMISSING KOZIOL’S APPEALS TO CIRCUIT COURT.

Although titled *Notice of Motion and Motion for Reconsideration*, Koziol’s February 2, 2021 post-hearing motion filed with the trial court utterly fails to cite or discuss Wis. Stat. § 805.17(3) (“*Reconsideration Motions*”) or case law interpreting that statute. And while the motion makes a lone reference to Wis. Stat. § 806.07, it is devoid of any specific legal grounds or facts warranting relief from the trial court’s orders dismissing Koziol’s appeals from municipal to circuit court. The instant appeals suffer

from the same legal defects and fail for the same reasons as Koziol's post-hearing motions filed in the trial court.

A. Koziol Failed to Properly Raise a Wis. Stat. § 806.07 Motion for Relief from Judgment or Order in the Trial Court.

The first paragraph of Koziol's motion confusingly and contradictorily states that Koziol "*moves the court pursuant to Wis. Stat. § 806.07 to reconsider its Order to Dismiss* in this case." (R. 11, p. 1) (emphases added.) While § 806.07(1) ("*Relief from judgment or order*") sets forth at least eight grounds upon which a court may relieve a party from a judgment or order, Koziol's motion cites none of those reasons as the basis for relief from the trial court's February 1, 2021, order dismissing her appeals. Hence, the trial court did not perceive Koziol's motion for reconsideration to be a § 806.07 motion for relief from judgment or order or treat it as such. (R. 35, pp. 17, 20, Supp. App. pp. 9, 11)

Although Koziol's counsel concedes that in Koziol's so-called motion for reconsideration "subparagraph (h) [of § 806.07(1)] was not specifically mentioned," he nevertheless alludes to a passing reference to the "interest of justice" in his March 2, 2021 accompanying cover letter to the court as "additional information" justifying relief from the trial court's order dismissing Koziol's appeals. (Appellant's Memo. Brief, pp. 7-8) Unfortunately for the parties, the trial court, and this Court, Koziol did not and does not provide any admissible evidence, legal authorities, analysis, or

argument demonstrating *why* relief from judgment or order is warranted in this case.

More importantly, because a § 806.07(1) issue was not properly raised below, Koziol has waived or forfeited the right to have this Court consider it. *In re Ambac Assurance Corp.*, 2012 WI 22, ¶35, 339 Wis. 2d 48, 810 N.W.2d 450. And since a § 806.07(1)(h) challenge is similarly undeveloped in Koziol's appellate brief, this Court should decline Koziol's invitation to address that matter on appeal. *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶18 n. 11, 291 Wis. 2d 283, 717 N.W.2d 17.

B. Koziol's Motion for Reconsideration Must Fail Since It Does Not Cite Any New Evidence or Manifest Error of Law.

To prevail on a motion for reconsideration, the movant must present either (1) newly discovered evidence or (2) establish a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, 275 Wis. 2d 397, 403-04, 685 N.W.2d 853 WI App 129. Significantly, "a party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000). Also, "manifest error" is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." A "manifest error" is not demonstrated by the disappointment of the losing party." *Koepsell's*, 2004 WI App 129, ¶44.

1. **Newly Discovered Evidence.** Koziol's motion for reconsideration included evidence in the form of Koziol's attorney's secretary's (Plutowski's) Affidavit of Mailing of the December 16th letter and notices of appeal to the City Attorney. However, Koziol's brief does not explain why that affidavit was not prepared or filed prior to the trial court's February 1, 2021 order dismissing Koziol's appeals. For example, Koziol does not contend that such affidavit of mailing, a standard practice in litigation, was "unknown" to Plutowski or Koziol's attorney. Nor can such affidavit be construed as newly discovered evidence since, if it existed, it would have been within the knowledge or under the control of Plutowski or Koziol's attorney. Thus, Koziol has made no showing why, through reasonable diligence, her attorney could not have submitted that Affidavit earlier.

In fact, as early as January 5, 2021, Koziol had notice of the filing of the City's motion to dismiss, which included the City Attorney's affidavit stating that he did not receive the notices of appeal. Yet, for whatever reason, Koziol's attorney waited until February 2, 2021, almost one month later and *after* the trial court dismissed Koziol's appeals, to submit Plutowski's affidavit of mailing to the trial court and to the City.

Thus, Koziol's motion to reconsider was a thinly veiled attempt to introduce *newly created*, but not "*newly discovered*" evidence in the form of an affidavit of mailing that should have accompanied the copy of Plutowski's

December 16th transmittal letter in Koziol's initial response to the City's motion to dismiss. A motion for reconsideration is a not vehicle to present evidence that could have been obtained and filed prior to a trial court's rulings. Koepsell's, 2004 WI App 129, ¶46.

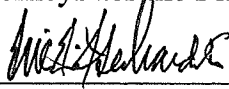
2. **Manifest Error.** Neither Koziol's motion for reconsideration in the trial court nor her brief on this appeal allege or demonstrate that in dismissing Koziol's appeals the trial court disregarded, misapplied, or failed to recognize controlling precedent. What is apparent is that Koziol's motion merely takes umbrage with the trial court's orders and seeks an opportunity to rehash failed arguments. Absent any showing of manifest error, this Court must affirm the trial court's denial of Koziol's motion for reconsideration.

CONCLUSION

Based on the applicable law, facts, and foregoing arguments, the Plaintiff-Respondent respectfully requests that this Court AFFIRM the trial court's orders dismissing the Defendant-Appellant's appeals from the municipal court judgments of conviction to the circuit court and denying the Defendant-Appellant's motion for reconsideration.

Dated at Port Washington, Wisconsin this 25th day of May, 2021.

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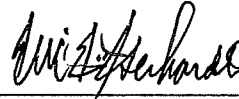
CERTIFICATION

I certify that this brief conforms to rules contained in s. 809.19(8)(b) and (c), Stats., as modified by this Court's order dated April 9, 2021, for a brief produced using the following font:

Proportional serif font; Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 15 pages.

Dated this 25th day of May, 2021.

Signed: _____



Eric E. Eberhardt, Esq.
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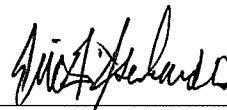
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)

I certify that this e-filed electronic copy of Plaintiff-Respondent's Brief conforms to the rules contained in s. 809.19(8)(b), Stats., as modified by this Court's order dated April 9, 2021, including for a brief produced using the following font:

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Dated this 26th day of May, 2021.

Signed: _____



Eric E. Eberhardt, Esq.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:


I have submitted an electronic copy of this brief, excluding the supplemental appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

The text of the electronic copy of this brief is identical in content and format to the text of the paper copy of the brief filed as of this date.

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

Dated this 25th day of May, 2021.

Signed: 
Eric E. Eberhardt, Esq.
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