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CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT

GREENWALD FAMILY LIMITED PARTNERSHIP
And
DARWIN GREENWALD,

Plaintiffs-Appellants-Petitioners,

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

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

1. Did the service of the Notice of Appeal required by Wis. Stats. § 66.0703(12) on the Attorney of record for the Village, who had previously admitted service of the underlying summons and complaint in the case, satisfy the requirement to serve written notice of appeal on the Village clerk?

The Circuit Court determined impliedly that the clerk had to be personally presented with the Notice of Appeal document in order for the Clerk and thus the Village to be served with the Notice of Appeal. This was contrary to the rule of Wis. Stats. § 801.14(2) which requires that filings shall be served on a party's counsel of record once service of the jurisdictional document, the summons and complaint, has been served on the party.

Both the Circuit Court and the Court of Appeals presumed incorrectly that to "serve" a document may only mean physically present the document to the Clerk. That is not required or correct under any statute. Physical in-person presentment of the documents is only one of several methods by which to "serve" a document. However, because of this mistaken presumption, both the lower courts started their analysis with the belief that Petitioner had conceded that the clerk was not served. That was incorrect, the service was delivery to the Village's and thus the Clerk's attorney of record in the matter.

The issue is whether the Special Assessment Statute, Wis. Stats. § 66.0703(12) clearly and unambiguously requires in-person physical presentment of a document

entitled Notice of Appeal as the only acceptable method of serving a Notice of Appeal under that section. Its plain language certainly does not. Indeed how to serve the Notice of Appeal under that statute is the opposite of clear and unambiguous.

CRITERIA SUPPORTING GRANT OF THE PETITION

There is good reason for the Court to grant review in this matter. The Circuit Court and Court of Appeals decisions undo and in effect reverse previous decisions of this Court requiring that ambiguous procedural statutes be construed so as to preserve a parties' legal rights and remedies. Here, Petitioner Greenwald Family Limited Partnership ("GFLP") timely filed its summons and complaint against the Village challenging a special assessment against it. That special assessment will increase GFLP's property tax obligation by in excess of $140,000. Fortunately, GFLP had counsel and was able to discern by reviewing the caselaw the proper method of initiating a special assessment challenge. Serving the Notice of Appeal document, which is the document at issue in this matter, is not the jurisdictional document. The "appeal" for a special assessment no longer begins with the filing of a document with the Clerk of the municipal body. However, while the legislature changed the law to call for commencing a special assessment challenge through an initial filing in circuit court, the older portion of the statute remained, which requires also serving a somewhat and perhaps completely redundant "Notice of Appeal" document on the municipal clerk. There is no apparent reason for this requirement to still be a part of the statute.

However, while that makes the loss of its rights in this matter even more

puzzling and frustrating, GFLP did "serve" the Clerk for the Village by serving her and the municipalities' attorney of record. This Court has made clear that an underlying rule of construction, even for those procedural statutes that are to strictly applied, is that in the case of ambiguity on how to execute a required process, the law should be construed to afford property owners their rights and chance at relief rather than extinguish those rights and claims. The Court needs to take this matter on review to clarify the proper procedure under Wis. Stats. § 66.0703(12) and more generally to reaffirm that civil process in the Court is not a "game of skill in which one misstep by counsel may be decisive to outcome," and affirming the principle that the purpose of pleading is to facilitate a proper decision on merits. *See Korkow v. General Casualty Insurance Co.,* 117 Wis.2d 187, 193 (1984); *see also Canadian Pacific Ltd. v. Omark-Prentice Hydraulics*, 86 Wis.2d 369 (Ct. App. 1978) *citing Conley v. Gibson*, 355 U.S. 41 (1957).

This matter is thus appropriate for review pursuant to Wis. Stats. §809.62 (1r)(e) because it is contrary to long settled doctrines of this Court and federal decisional law. It also creates a new category of entity, which is that under Wis. Stats. § 66.0703(12) a municipal clerk is not a representative of her or her municipality and this the party to a special assessment challenge. As will be further described below, the Court of Appeals' decision has created a new entity in Wisconsin law, which is that when a municipal government is a party in a special assessment challenge the clerk becomes a different stand-alone governmental entity and is not to be considered the official representative of the municipal "party" to the case.

This matter is also appropriate for review in that it is not fact bound. The facts are not in dispute. The issue is what is the meaning of the word "serve" in Wis. Stats. § 66.0703(12). More precisely, how must or may that be accomplished. It is a question that warrants this Court's review and clarification. Even though the Court of Appeals' ruling is considered non-precedential, the decision and its reasoning are not unavailable to the bar, which may apply the ruling to create mischief – at least in terms of municipal government attorneys making arguments that service on the municipal parties' Clerk is not service on a "party."

STATEMENT OF THE CASE AND THE FACTS

Plaintiff-Appellants-Petitioners Greenwald Family Limited Partnership and Darwin N. Greenwald (hereinafter "GFLP") sought to challenge a special assessment adopted by the Village affecting two of their properties. The Village finalized the resolution adopting the special assessment on December 18, 2019. *See Appendix at p. 4 noting date of resolution.* The Village through the Village Clerk provided the statutory notice of the adopted and publication of the resolution on January 16, 2020. *See App at p. 4.*

GFLP filed its action in circuit court challenging the special assessment on March 17, 2020. *See Record at Doc. No. 1.* GFLP then sought an admission of service of the summons and complaint from the Attorney for the Village. *See App at p. 8 – email to Attorney Blum.* The Village attorney agreed to admit service in an email to counsel. *See App at p. 8.* He then provided a signed admission of service noting that

service was admitted on March 23, 2020. *See App 9-10.*

Thereafter, GFLP delivered to the Village Attorney the second document in the case, which is the Notice of Appeal. This was delivered to counsel for the Village along with the required Bond Amount of $150.00. *See App 11-14.* This was delivered by email and also regular U.S. Mail. *See App at 11-12.* There is no dispute about these facts. Further, there is no dispute that the summons and complaint was timely filed and served within the required 90 days of the Village resolution on January 16, 2020. And that the subsequent "Notice of Appeal" was properly delivered within 90 days of January 16, 2020 to the Village's legal counsel, who had already accepted and admitted service of the jurisdictional document the summons and complaint. GFLP did not deliver the Notice of Appeal to the clerk at the Village but instead directed and delivered those documents to the attorney for the Village following what it thought was the requirement to do so in Wis. Stats, § 801.14(2). *See App 11-14.*

The Village filed a motion to dismiss claiming that under Wis. Stats. § 66.0703(12) GFLP had not served the Clerk by serving her attorney and therefore GFLP's claim had to be dismissed. The Village does not actually assert it but its argument apparently is that the Notice of Appeal had to be personally presented to the clerk in order to be considered "served."

After briefing the Circuit Court held a hearing on November 17, 2020. The Circuit Court agreed with the Village and ordered the case dismissed. *See App at pp.15-29.*

The case was appealed and the Court of Appeals affirmed. The Court of

Appeals misstated GFLP's argument in certain respects but that Court's primary reasoning was as follows:

> The plain text of WIS. STAT. § 66.0703(12) requires a party to accomplish service of a written notice of appeal upon the *clerk* within ninety days. It is undisputed that Greenwald did not do so. Greenwald's failure to comply with the statute required dismissal of his Complaint. "[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, and our cases require strict compliance with the terms of § 66.0703(12)(a), *see* ***id.***, ¶30 (citation omitted). Further, *the Village clerk is not and never was a party to Greenwald's action. As such, Greenwald's reliance on WIS. STAT. § 801.14(2) is misplaced*. Accordingly, the circuit court correctly dismissed the action.

See Court of Appeals decision at Appendix at pp A-1-A-3 esp at A-3 (emphasis added).

The Court of Appeals notes that service of a written notice of appeal must be accomplished within 90 days. The Court claims that it is "undisputed that GFLP did not do so." However, that is incorrect. What is not disputed is that GFLP did not deliver a copy of the Notice of Appeal to the Clerk or her office. That is not the same as failing to serve the Clerk. This fallacy has permeated this matter since the outset. The meaning and how one executes service on the Clerk is definitely not explained in Wis. Stats. § 66.0703(12). All the participants in this matter, the Courts and the attorneys for the parties, it is safe to say, have been trained in the law and thus have a background understanding that to "serve" often means to physically present or deliver the subject document. However that does not mean, (i) that physical delivery is the only way to serve a document – it clearly is not, nor (ii) that a reasonable non-attorney would know that is what was implied by the term "serve."

This issue has been discussed in the briefing, but it is worth noting that an individual property owner and taxpayer who wanted to challenge a special assessment

without having to hire legal counsel would very likely be at a loss on what "serve" means in Wis. Stats. §66.0703(12) based only on the "plain" language of that section. That reasonable property owner and property tax-payer may well mail the document certified mail. Or perhaps deliver it themselves. Or maybe deliver it to the Attorney for the Village. All these would be flawed and fatal to their claim under the decisions below.

The other aspect of the Court of Appeals decision is its holding that the "Village clerk is not and never was a party to Greenwald's action." This appears to create a new role for municipal clerks in special assessment actions or at least remove from them their status as the official representative of the municipality. It also suggests that a property tax payer should name the clerk as an express and separate party to the action, though that does not seem to make sense given the overall purpose of the statute. The Court of Appeals reasoning thus exempts parties who pursue special assessment challenges under § 66.0703(12) from the requirements of Wis. Stats, §801.14(2). However, the Clerk is the representative of the municipal party. Indeed the statute in several spots refers to the "clerk of the City, Town or Village." *See e.g.* Wis. Stats. § 66.0703(12). It seems inconsistent to *require* service on the attorney for a represented party in almost every other circumstance but find that it is inadequate when service on the "clerk" of the party is called for in the procedural statute at issue.

Further facts will be noted as appropriate below.

ARGUMENT

I. Standard of Review.

The Circuit Court made a legal determination based on undisputed facts. The determination was the interpretation Wis. Stats. § 66.0307(12). Specifically, what is required under the language, "The person appealing shall serve a written notice of appeal upon the clerk of the city, town or village …" This Court's review is *de novo*. *See Emjay Inv. Co. v. Village of Germantown*, 333 Wis.2d 252, 263 (2011); *Mayek v. Cloverleaf Lakes Sanitary Dist. No. 1*, 238 Wis.2d 261, 266-67 (Ct.App.2000).

II. Delivering the Notice of Appeal to the Village Attorney who had accepted service of the jurisdictional document (the summons and complaint) was service on the party-defendant and its official representative, the Village Clerk.

Petitioner GFLP served the Village clerk by mailing the written notice of appeal to the Village Attorney. *App at 12.* As noted, at the time of the delivery of the Notice of Appeal to the Village Attorney, the Village Attorney had previously accepted service of the underlying summons and complaint that initiated the action. *App 9-10.* The Village Attorney accepted service and admitted service for the Village on March 23, 2020. *App 10.*

Subsequent to that, undersigned on behalf of the Appellants served the Notice of Appeal on the Village Attorney by mail and email on April 9, 2020. *App 11-14.*

There is no dispute about these facts. As described in the statute, the Notice of Appeal is a separate document from the initiating pleading – the summons and

complaint.[1] The Summons and Complaint, which is the jurisdictional document, was properly and timely filed. It was then properly served on the Village by delivering the authenticated Summons and Complaint to the Attorney for the Village and asking whether he would admit service on the Village. The Village Attorney admitted service as was appropriate.

Then, as contemplated by the statute, Appellant through undersigned Counsel prepared and delivered a Notice of Appeal and appropriate bond amount to the attorney for the record for the Village. *App 11-14.*

The language of § 66.0703(12) requires service of a written notice of appeal upon the clerk:

> (12)(a) 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. The clerk, if an appeal is taken, shall prepare a brief statement of the proceedings in the matter before the governing body, with its decision on the matter, and shall transmit the statement with the original or certified copies of all the papers in the matter to the clerk of the circuit court.

See Wis. Stats. § 66.0703(12) (emphasis added)

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[1] The process for initiating a challenge under Wis. Stats. § 66.0703(12) is not explicitly described in the statute but case law makes clear that it begins with serving a summons and complaint in circuit court . This was recognized by the Court of Appeals in *Mayek*, which ruled that filing and service of a summons and complaint in circuit court to commence the action was the equivalent of filing of a notice of appeal. *Mayek*, 238 Wis.2d 261, 269-70. In an earlier case, the Court determined that the circuit court filing should come first. *Outagamie County v. Town of Greenville,* 233 Wis.2d 566, 575 n. 3 (Ct.App. 2000).

"Serve" is not defined in Wis. Stats. § 66.0703 or elsewhere in the statutes that undersigned could locate. However, Wis. Stats. § 801.14 controls service of papers after the filing of the summons and complaint.

> (1) Every order required by its terms to be served, ... and every written notice, appearance, demand, offer of judgment, undertaking, and similar paper shall be served upon each of the parties.
>
> (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(1) and (2). (emphasis added).

There was no order of the Court in this matter requiring delivery upon the party in-person. Pursuant to Wis. Stats. § 801.14(2) Appellant and its undersigned counsel were thus required to serve the Village's attorney. There was no other manner provided for GFLP to serve the Village Clerk than by serving the Village's, and thus the Village Clerk's, Attorney.

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

The Village argued below 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. The Village then accused GFLP of creating and "end around" by creating a new procedure.

This is erroneous. GFLP followed the procedures carefully given that the attorney for the Village had admitted service of the underlying summons. The

Village's arguments below in effect seek to punish GFLP - and the lower courts' rulings have affirmed that approach - 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 execute to do so - is not at all clear based on a simple and plain review of the language in Wis. Stats. § 66.0703(12). GFLP determined that a summons and complaint was required to obtain jurisdiction in the circuit court by reviewing the caselaw. 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 accomplished 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 first, and then serving the notice of appeal on the clerk. *See Outagamie County v. Town of Greenville*, 233 Wis.2d 566, 574-75 and n.3 (Ct.App.2000). The Village's argument below, which were in effect adopted by the lower courts, 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.

The Court of Appeals approach to this was to reason that the clerk is not a "party" and so the service requirement of Wis. Stats. § 801.14(2) do not apply. That creates an confused situation but also does not answer the underlying question of what "serve" means and requires in § 66.0703(12). The Court needs to resolve this issue.[2]

IV. The Court of Appeals misapplied this Courts rules regarding construction of procedural statutes.

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 briefing, GFLP took the appropriate and indeed stricter approach to making

[2] *See Outagamie County v. Town of Greenville*, 233 Wis.2d 566, n.3 (Ct.App.2000). In that case the Court of Appeals equated the clerk with the party being challenged as make sense "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 being filed in circuit court has been changed since this case but the clerk is the representative of the party defendant in this type of "appeal."

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 grant review of this matter to 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 of GFLP's claims. 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 municipalities and their clerks to respond to the merits of GFLP's current challenge under that provision.

V. There is no conflict between the relevant statutes.

The Village argued below 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."

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 struggled below to highlight the actual conflict probably due to the fact that there is no conflict. The Village responded that applying § 801.14(2) would render the "explicitly" clear language in Wis. Stats. § 66.0703(12) meaningless surplusage. It did 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 not explicitly clear language. It is not even explicitly clear to experienced attorneys much less reasonable citizens reading the statutes. It is thus manifestly ambiguous because "serve" 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.

As described in GFLP's briefing below, 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."). The two statutes are easily harmonized by allowing service under the procedure mandated by Wis. Stats. §801.14(2), which requires serving the party's attorney of record. It is noted that Wis. Stats. § 801.14(2) directive applies to service on a represented party in all circumstances under the Wisconsin *statutes*. It is not limited to applying only to civil actions directly addressed by the rules of civil procedure in chaps. 801 to 847. *See* Wis. Stats. § 801.14(2).

There is no explanation or reason why serving the Village and its clerk's attorney is not sufficient in a case like this. Serving the attorney with the jurisdictional document, the summons and complaint, was perfectly appropriate. The Village admitted service. This was accomplished by the Attorney for the Village admitting service on behalf of the Village. If the attorney was authorized by the Village to accept service of the summons and complaint, why then would serving a subsequent notice of appeal not also be considered served if delivered to the same attorney of record that already admitted service of the underlying summons and complaint? This confused process makes no sense. It is unnecessary and not at all required by any reasonable of for that matter strict interpretation or construction of the plain language of Wis. Stats § 66.0703(12).

Further as Wisconsin Courts have ruled in special assessment cases, ambiguous procedural language of the special assessment statute should be construed to allow challenges on the merits. *See Outagamie County v. Town of Greenville*, 233 Wis.2d 566, 573 (Ct.App.2000) ("[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."). This Court has confirmed the same:

> Our supreme court has held that "where an ambiguity exists, '[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.' " *DOT v. Peterson*, 226 Wis.2d 623, 633, 594 N.W.2d 765 (1999) (quoting *Kyncl v. Kenosha County*, 37 Wis.2d 547, 555–56, 155 N.W.2d 583 (1968)). The *Peterson* court further held that "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).

CONCLUSION

For the above reasons, Appellant-Petitioner respectfully requests that the Court grant review in this matter and reverse the decision of the lower courts and remand this matter so that GFLP may proceed to the merits of its special assessment claim.

Dated this 18th day of March, 2022
*As corrected March 30, 2022

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

I certify that this Petition conforms to the rules contained in s. 809.62(4) and 809.19(8) (b) and (d) for a Brief produced with a proportional serif font. The length of this brief is 4357 words.

Joseph R. Cincotta

I hereby also certify that filed with the petition in this matter as a part of the petition is an appendix that complies with s. 809.62(2) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues and the Court of Appeals decision.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Joseph R. Cincotta

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

Joseph R. Cincotta