STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT IV	*For Official Use*

CITY OF VERONA,
Represented by attorney KYLE ENGELKE,

Plaintiff-Respondent,

-vs-

EDWARD A.SIEVERDING,

Defendant-Appellant,

Appeal No. 2017AP001813

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY,

THE HONORABLE NICHOLAS J McNAMARA, PRESIDING

Reply Brief

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Introduction:

This reply brief sets forth to corrects a number of misrepresentations, out of context quotes, and logical falsities that were presented by Verona City Attorney Kyle Engelke in the Brief of respondent.

B. COUNTER ARGUMENTS REGARDING 800.14(1):

I. Response to the respondents claim that the argument that Mr Sieverding failed to meet 800.14(1) was/or is undisputed.

Mr. Sieverding is and has been dispute with the city in regards to 800.14(1). There was a question as to if the city clerk directly handled the document on April 7th, however it has always been the defendant's position that the April 11th email that the city received met the requirements of 800.14. The respondent falsely argued that Mr. Sieverding did not dispute the city attorney's position that the requirements of 800.(14) were not met. To support this claim the city attorney used the partial quote:

"Well, frankly there is no
evidence that he did"

However the full quote paints a different picture:

"Well, frankly there is no
evidence that he did <u>other than</u> communication
through email where he was led to believe and
in fact it happened that his communication
would be forwarded to the City Attorney, and at
one point he probably assumed that he would,
that that would happen with all communications."
[emphasis added]
(R. 16, 23:1I-24:3)

If one reads the full sentence, it is clear that Mr.

Sieverding's attorney is saying that the records of Email communication (s) is the only evidence that the city attorney received notice.

A second instance was taken out of context by the City attorney. The statement referenced at (R.16 14:9-12) was in regards to a conversation strictly regarding April 7th, where Mr. Sieverding's attorney said

"There was no direct notice by Mr. Sieverding in that stage of the game we would assume."

The "stage of the game" here is April 7th, 4 days before the city received the PDF notice. It is not a statement of non dispute.

Furthermore the statue does not require that the notice must be delivered directly from Mr. Sieverding to the city attorney. Hence the argument that Mr. Sieverding failed to comply with 800.14(1) is and has always been disputed.

II. Response to the respondent's claim that Mr. Sieverding failed to meet the appellant obligations defined by 800.14(1).

The city attorney's argument is a betrayal of the intention of the statue as he received a fully functional written notice of Mr Sieverdings appeal within 20 days. The emailed PDF document that city attorney received on April 11th stated that it was written notice of Mr. Sieverding's intent to appeal. This document was used by the city attorney to refer to the absence of one of the four case numbers from the appeal form. This was the basis of the separate June 26, 2017 motion to dismiss one count. This motion was not yet decided by circuit court and would remain open if returned to circuit court.

Mr. Sieverding is not stating that it was the municipal clerk's legal responsibility to relay the written notice of legal intent to the city attorney. However, just as the clerk copied the city on every communication by email she also chose to send a copy of Mr. Sieverding's written notice to the city. The plaintiff should not be punished because a municipal clerk was extra helpful or for the differences in that municipalities court procedures.

It is not a stretch to accurately quote the court of appeals when it said in Fisk that

"Wisconsin Stat. § 800.14(1) places no requirements on the method of delivery for a written notice of appeal."

(Village of Thiensville v. Fisk, No. 2015AP576, ¶ 3,), unpublished slip op. (Wis. Ct. App. Aug. 26, 2015)

The plain language of the statue 801.(14) simply does not specify that notice needs to be given directly or through specific delivery / service methods. The only limitation is that the other party must receive written notice with 20 days as he did in this case. Written notice meaning, a viewable, saveable, shareable, and referenceable document. Email and Fax has already been accepted as being a type of written notice. (Village of Thiensville v. Fisk, No. 2015AP576), unpublished slip op. (Wis. Ct. App. Aug. 26, 2015) (State v. Sorenson, 2001 WI App 251, ¶ 2, 248 Wis.2d 237, 635 N.W.2d 787.).

Email and fax notices often travel through a second party or proxy.

There are other statutes that impose a requirement for a specific delivery method for serving written notice (that do not apply to this case). For example, the part of statute 801.14(2) reads "by leaving it with the clerk of the court" in reference to accepted methods of delivery in serving the other party. We presume that when the legislature has excluded words from a statute, that it has excluded them for a purpose. C. Coakley Relocation Sys., Inc. v. City of Milwaukee, 2008 WI 68, ¶24 n.10, 310 Wis. 2d 456, 750 N.W.2d 900. Therefore it could be reasoned that the legislature choose to omit the requirement of a specific deliver method because it did not want to impose one. Therefore all methods that succeed in the delivery of the written notice should be accepted. This would include leaving it with the clerk of the court as long as the clerk delivers the notice in time.

B. COUNTER ARGUMENTS REGARDING 807.07:

III. The decision State v. Colstad, 2003 WI App 25, T 28,

260 Wis. 2d 406, 659 N.W.2d 394.: does not prevent Mr Sieverding from asking the court if the circuit court's ruling violated the rules of civil of civil procedure 807.07

The issue in this case regarding 807.07 is whether or not the circuit court ruling conformed with the rules of civil procedure. There is no rule or case law that excludes an appellant from making arguments that were not made in the circuit court or that revokes the higher courts ability to question if the rules of civil procedure were followed in a jurisdictional dismissal.

The case referenced by the city attorney, Wisconsin state v. Colstad, 2003 WI App 25, T 28, 260 Wis. 2d 406, 659 N.W.2d 394, is appeal from a circuit trial decision in which the defendant requested "only that this court review the record and remand for any necessary factual findings", but then included a separate issue in his brief that was not part of the circuit court trial. The appeals court decide "this court will not treat this as a separate issue on appeal, but instead will consider these arguments in the context of the substantive issues raised on appeal".

This is different then the type of appeal requested in Sieverdings case; where Mr. Sieverding was never given an appeal trial because the circuit court judge decided that he did have jurisdiction. Mr. Sieverding is asking the circuit court if there is jurisdiction either because he met the requirements of 800.14(1) or because such a judgment would violate the rules of civil procedure 807.07.

Also it should be noted that Mr. Sieverding was given very little time to prepare a response to the motion filed on July 21, 2017. Infact state statute 801.15(4) requires there to be 8 days (5 days plus 3 additional days for service by mail) before a motion can be heard in court. Mr Sieverding was only given 7 days. In addition he was given until July 28th to hire a lawyer, his lawyer was on retainer for 2 days before the July 28, 2017 court proceedings.

IV. The 7/21/2017 motion is a new and separate motion that does not replace the 6/26/2017 motion.

The city attorney filed its first motion to dismiss on 6/26/2017. This motion was only dismiss one count of the appeal, arguing that Mr. Sieverding did not include the 4th count on the written notice of appeal... You see Wisconsin gives two tickets to first time DUI suspects but will only sentenced a person for one infraction. Mr Sieverding thought that he was convicted of only of one of the DUI/BAC counts and he did not include the count that lacked a sentence. Mr Sieverding explained to the court on 6/27/2017 that he wants to appeal every count that he was convicted of.

This motion is entirely separate from the 7/21/2017 motion to dismissal Mr Sieverdings appeal on all four counts. The city attorney claims that the dismissal motion filing of 7/21/2017 was an "amended filing" however that is false. The 6/26/2017 and 7/21/2017 filings remain separate. The 7/21/2017 motion is clearly dated 7/21/2017 and does not state that is should replace the 6/26/2017 motion. During the court session of 7/28/2017 the judge asked the City attorney " You're not waiving your prior motion or argument on the prior motion if you lose this one?". To which the City attorney replied "correct" (R. 16 : 9 22-25). Thus the City has already admitted the 7/21/2017 filing is a completely different motion, made in addition to, and filed after his previous motion.

The city wants to have its cake and eat to too. It wants to say that 7/21/2017 was an amended motion, however the first motion on 6/26/2017 remains unanswered/open. So if the case is returned to the circuit court, then the city can still ask the judge to decide on earlier motion to dismiss 1 count of Mr Sieverdings appeal. The two motions cannot be both seraparte and the same.

V, Mallet does not apply here as the City of Verona participated in multiple court proceedings and strategies before filings its motion 26 days after its first day in court.

If there was a question to the jurisdiction of all 4 counts then the city would had to make it the first issue it presented and it should not have participated in other strategies or filed other motions until the jurisdictional issue was resolved.

The situation here is unlike City of Milwaukee v. Mallet. In Mallet, the Milwaukee city attorney filed its motion to dismiss at the first pretrial conference. Mallet, unlike Sieverding, did not contest that he failed to provide notice of his intent to appeal (or amended intent to appeal) to the City of Milwaukee. No other arguments or motions were made by the city and the motion to dismiss was the next item in the docket after the pretrial conference.

In Mr. Sieverding's case, the city attorney employed and participated in multiple concurrent offensive legal strategies at the circuit court level before filing his second motion to dismiss on 7/21/17, 26 days after the pretrial conference. At the pretrial conference the City Attorney requested that a witness list must be presented so that he could object to the use of Mr. Sieverding's previous expert witnesses. The city filed its witness list on 7/14/2017 and then on 7/21/2017 it filed a motion asking for Sieverding to be barred from presenting evidence of his innocence. If granted, the city attorneys motion would have crippled Mr. Sieverding's defense. A six docket entries were made between the pretrial conference and the motion to dismiss. Surely all of this constitutes "participation" as referred to by 807.07.

CONCLUSION

Based upon the arguments contained in his brief, and reply, that Sieverding moves the Court to reverse and remand this matter back to the trial court for entry of an Order that the circuit court had jurisdiction to hear the appeal taken directly from the municipal
court.

Authorities

Cases:

Village of Thiensville v. Fisk, No. 2015AP576, ¶ 3,), unpublished slip op. (Wis. Ct. App. Aug. 26, 2015)

C. Coakley Relocation Sys., Inc. v. City of Milwaukee, 2008 WI 68, ¶24 n.10, 310 Wis. 2d 456, 750 N.W.2d 900.

Wisconsin state v. Colstad, 2003 WI App 25, T 28, 260 Wis. 2d 406, 659 N.W.2d 394

State v. Sorenson, 2001 WI App 251, ¶ 2, 248 Wis.2d 237, 635 N.W.2d 787.

Statutes:

800.14(1)
801.14(2)
801.15(4)
807.07

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I certify that this reply brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on 1/24/2018. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Date: 1/24/2018

Signature Ed Sieverding

OR

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