Appeal Nos. 2015AP1016
2015AP1119

Cir. Ct. Nos. 2014CV1232
2014CV871

WISCONSIN COURT OF APPEALS
DISTRICTS IV and II

MARGARET PULERA,

PETITIONER-APPELLANT,

V.

TOWN OF RICHMOND AND TOWN OF JOHNSTOWN,

RESPONDENTS-RESPONDENTS.

FILED

DEC 23, 2015

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATIONS BY WISCONSIN COURT OF APPEALS

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

These consolidated appeals require a court to apply a certiorari filing deadline statute that the supreme court has previously described as "not clear." The supreme court suggested two possible interpretations of the statute, but did not resolve the issue, and our current appellant proposes a third interpretation. While all three interpretations have positive aspects, each also appears to have significant flaws. Therefore, we certify these appeals to the supreme court pursuant to WIS. STAT. RULE 809.61 (2013-14).[1]

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In the two circuit court cases underlying the current appeals, Margaret Pulera filed a certiorari petition for judicial review of town highway orders. Because the highway in question is partly on the border of Rock County and Walworth County, she filed a certiorari petition in each county. Each circuit court dismissed her petition as untimely, although each court used a different interpretation of the applicable certiorari filing deadline statute. Pulera appeals from each decision. Because both appeals are based on the same underlying facts and require interpretation and application of the same statute, we consolidated them on our own motion after the briefs were filed.

I. LEGAL BACKGROUND

Stated broadly, the legal problem arises from the fact that the legislature has connected the procedure for town highway orders under WIS. STAT. ch. 82, to the judicial review provision of the municipal administrative procedure chapter, WIS. STAT. ch. 68. The language of that judicial review provision does not connect easily to the procedure that occurs for town highway orders.

Under WIS. STAT. ch. 82, towns make changes to their highways by issuing highway orders. The process for changes can be started in two ways. Under one method, residents may apply to the town board to have a highway laid out, altered, or discontinued. WIS. STAT. § 82.10(1). In the other method, the town board itself may initiate the process by introducing a resolution. WIS. STAT. § 82.10(2). At the start of either method, the town board must provide notice to a variety of landowners and government bodies. WIS. STAT. § 82.10(3) and (4).

The town board then holds a public hearing to decide, in its discretion, whether granting the application or resolution is in the public interest. WIS. STAT. § 82.11(1). If the board decides to lay out, alter, or discontinue a

highway, it shall issue a highway order. WIS. STAT. § 82.12(2). A highway order must contain a legal description of what the order intends to accomplish and a scale map of the land affected by the order. WIS. STAT. § 82.01(3). The highway order must be recorded with the register of deeds for the county where the highway is located. WIS. STAT. § 82.12(2). The statutes do not appear to require that the highway order, or any other kind of notice of a decision in response to the application or resolution, be sent to the broad group of landowners and agencies that were given notice when the process started.

Judicial review of highway orders is provided for in WIS. STAT. § 82.15: "Any person aggrieved by a highway order, or a refusal to issue such an order, may seek judicial review under s. 68.13. If the highway is on the line between 2 counties, the appeal may be in the circuit court of either county." The cross-referenced judicial review statute provides in relevant part: "Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination." WIS. STAT. § 68.13(1).

That last provision seems plain enough when viewed in the context of a matter decided using the municipal procedures set forth in WIS. STAT. ch. 68. That chapter creates a process for review of municipal decisions regarding permits, licenses, rights, privileges, grants of money, and so on. WIS. STAT. § 68.02. It creates a process for administrative review of such determinations, and then for administrative appeals after that. WIS. STAT. §§ 68.09 and 68.10. At the end of that process, "the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination." WIS. STAT. § 68.12. Then follows the judicial review provision we quoted above, WIS. STAT. § 68.13.

In that context of municipal procedure, it is obvious that when WIS. STAT. § 68.13 requires a certiorari petition to be filed "within 30 days of receipt of the final determination," it is referring to the "final determination" that was issued at the end of the administrative appeals process, as required by WIS. STAT. § 68.12. In addition, the running of the certiorari deadline from "receipt" of the final determination seems straightforward, because the decision maker must send the final determination to the person who requested the administrative review, again under § 68.12.

However, in the context of the highway order process described in WIS. STAT. ch. 82, it is unclear how the certiorari filing deadline of WIS. STAT. § 68.13(1) should be applied. The highway order process does not use the term "final determination," or any similar term. The highway order process does not have a "party to a proceeding" in the same way that a municipal administrative proceeding under ch. 68 does. And, because the highway order process does not require that the order be sent to anyone, it is not clear how to apply the requirement that a certiorari petition be filed within thirty days of "receipt" of the "final determination."

The supreme court previously acknowledged this problem, but did not resolve it, in ***Dawson v. Town of Jackson***, 2011 WI 77, 336 Wis. 2d 318, 801 N.W.2d 316. One of the issues decided in ***Dawson*** was whether the above certiorari review process under WIS. STAT. § 82.15 is the exclusive method of seeking judicial review, to the exclusion of relief by declaratory judgment. ***Id.***, ¶64. The court held that § 82.15 is the exclusive method for judicial review. ***Id.***, ¶72.

In the course of its analysis, the ***Dawson*** court observed that certiorari review of highway orders may be sought within thirty days of receipt of the final determination, and then stated:

> The phrase "receipt of a final determination" is not clear in the context of a highway order. It could mean the date that one or more municipalities votes to grant or deny an application or resolution. It could mean the date that a notice of that determination is received by an applicant, if a notice is sent. In this case, the Dawsons did not comply with a 30-day time limit under any reasonable interpretation of the statute. Cedarburg voted not to approve the Dawsons' application on January 9, 2008. The Dawsons did not file suit until June 20, 2008.

336 Wis. 2d 318, ¶66 n.5.

II. OUR CURRENT CASES

Pulera filed certiorari petitions in both Rock and Walworth counties. The named respondents in each petition were the Town of Johnstown and Town of Richmond. In each case Pulera alleged that the Town of Richmond passed a resolution proposing a redesign of a certain intersection, and that the towns held a joint meeting at which they approved the redesign on September 9, 2014. She alleged that the towns failed to follow proper procedures for highway redesign and that the redesign creates safety issues.

In the Rock County case, the towns provided affidavits averring dates in late September 2014 that Pulera was sent copies of the two highway orders, one by postal mail and one by email. Pulera did not dispute that she received these copies. Instead, she argued that the certiorari time should not run from her receipt of the highway orders, but from the recording of the highway orders with the register of deeds. The court rejected that interpretation of the certiorari deadline statute because the statute allows judicial review of a town

board refusal to issue a highway order, and in such a case, no document would be recorded and the time to petition for certiorari would never start to run. The court dismissed the petition as untimely because Pulera did not file it within thirty days of when she received copies of the highway orders.

In the Walworth County case, the court dismissed the petition as untimely because Pulera did not file it within thirty days of when the municipalities voted to make the highway change. In doing so, the court agreed with the Rock County court's conclusion that the time should not run from the recording of the highway order. However, the court expressly rejected the Rock County court's conclusion that the time could be measured from when Pulera received the highway orders, because that conclusion would potentially mean different filing dates for different petitioners, depending on when each petitioner received the highway order. The court concluded that running the certiorari time from the town board vote was the most certain answer.

III. SOME POSSIBLE READINGS OF WIS. STAT. § 68.13(1)

As we quoted above, the supreme court in ***Dawson*** previously suggested two possible ways of interpreting WIS. STAT. § 68.13(1) in the highway order context. The circuit courts in our current cases each adopted one of those interpretations. However, it appears unlikely that they can both be correct. If the filing time runs from the town board vote, then the date that a person receives the highway order issued as a result of that vote would be irrelevant. On the other hand, if the time runs from receipt of the highway order, that will always be a date later than the vote, and it will then be irrelevant when the vote occurred. In addition to the two interpretations noted in ***Dawson***, appellant Pulera suggests a

third, which is that the filing time should run from recording of the highway order. We next discuss some of the strengths and flaws of each interpretation.

A. The thirty days runs from the town board vote

The Walworth County court concluded, and the Towns argue in that appeal, that the thirty days should run from the vote of a town board adopting (or refusing to adopt) a highway change. In this interpretation, it is the vote that constitutes the "final determination" for purposes of applying WIS. STAT. § 68.13(1). One positive aspect of this interpretation is that all potential petitioners would have the same filing deadline. Another is that there are not likely to be factual disputes about what the date of the vote was. And, because this is the earliest event from which the certiorari filing date could plausibly run, it would mean that the town board decision becomes final at the earliest possible date. This is important because in some cases the town may delay the actual highway work until it is satisfied that judicial review will not occur.

This interpretation also has several flaws. One flaw is that the judicial review section of the town highway statutes provides: "Any person aggrieved by *a highway order*, or a refusal to issue such an order, may seek judicial review under s. 68.13." WIS. STAT. § 82.15 (emphasis added). As we described above, "highway order" is a statutorily defined term. A highway order is a written document that must contain a legal description and a scale map. It is difficult to see how a town board's vote could be considered a highway order. Therefore, it is debatable whether the vote, by itself, creates a decision that is subject to judicial review.

In the current cases, the highway orders were dated seven and seventeen days after the town board vote. Pulera argues that a potential petitioner

should be able to see the full description and map before deciding whether to seek judicial review, and therefore the time should not start to run before the highway order has been issued. Furthermore, if the court's interpretation is adopted and the certiorari time runs from the vote, that could become a trap for the unwary who read the statute and believe that a filing for judicial review cannot be made until a highway order is issued.

Another flaw with running the certiorari time from the town board vote is that it appears to omit any role for the concept of "receipt" that appears in the language of WIS. STAT. § 68.13(1), which states that certiorari must be sought within thirty days of "receipt" of the final determination. It is unlikely that all potential petitioners will receive the result of the town board's vote on the day that the vote occurs.

This interpretation might be modified to say that potential petitioners have "receipt" of the vote if they are in attendance at the meeting. However, this is also a flawed interpretation because it creates the potential for factual disputes about who was at the meeting, and for how long. This potential is evident in Pulera's argument on appeal that, due to her hearing impairment, she did not actually know what the vote was when she left the meeting. Furthermore, this interpretation still leaves unanswered the question of how potential petitioners who were *not* at the meeting will be said to have received the final determination that starts the certiorari time running.

B. The thirty days runs from an individual petitioner's receipt

The Rock County circuit court concluded that Pulera's petition is untimely because she did not file it within thirty days of when she received copies of the unrecorded highway orders. One positive aspect of this interpretation is that

it closely tracks the statutory language about "receipt of a final determination." If the unrecorded highway order is the final determination, and the certiorari petitioner has received it, then this provision can easily be applied to those specific facts.

However, Pulera notes a significant flaw in this interpretation. As we discussed, there is no requirement in the town highway chapter that highway orders be sent to anyone other than the register of deeds, the town clerk, and the county highway commissioner. WIS. STAT. § 82.12(2). Therefore, if the certiorari time for each petitioner starts to run only from that petitioner's receipt of the highway order, there could exist a continuing series of certiorari filing dates that are individual to each potential petitioner, depending on when that person received the highway order. Under this interpretation, a person could ask the town to send a copy of the highway order months or years after it was issued, and the person's certiorari time would then begin to run upon receipt of the order.

This result would cause obvious problems due to the lack of finality. For example, it would leave the town uncertain as to when it could begin the actual road work without the peril of judicial review.

On appeal, the Towns offer no response to this seemingly substantial flaw. Instead, they appear to rely on the date of the town board vote and the fact that Pulera was present at that meeting. Thus, it may be that in these appeals *neither* side is arguing for this interpretation that was suggested in ***Dawson***. The parties may agree that it is not tenable to conclude that each person's certiorari time begins to run whenever that person receives a copy of the highway order.

C. The thirty days runs from the recording of the highway order

Pulera argues that the certiorari time should run from the recording of the highway order with the register of deeds, an act required by WIS. STAT. § 82.12(2). She argues that because this is the last act in the highway order process, this is the point at which the highway order becomes "final," in the sense of being the "final determination"[2] that is referred to in the statute setting the date for certiorari filing, WIS. STAT. § 68.13(1).

There are several positive aspects to this interpretation. First, it creates a certiorari filing date that is the same for all potential petitioners. Second, the date of recording will normally be easy to establish from the record. Third, the recording of the highway order creates a wide potential for notice to potential petitioners, because this is a place that attorneys and others will know to check for land records. Fourth, at the time it is recorded, the highway order will be in its final legal form, thus allowing potential petitioners to fully evaluate its effects and decide whether to seek judicial review.

However, this interpretation also has flaws. Under this interpretation, there is again no sense in which it can be said that there is "receipt" of the final determination by each potential petitioner. Although recording creates a wider potential for interested persons to learn of the highway order, it does not lead to receipt of that order by anyone other than the register of deeds.

[2] Actually, WIS. STAT. § 82.12(2) provides that the order shall be both recorded with the register of deeds and filed with the town clerk. Either could equally be considered the final determination; the statute treats them equally. All of the arguments regarding the date of recording, both pro and con, apply equally to the date of filing.

Another flaw in this interpretation is that it leaves no answer to the question of when the certiorari time starts to run when the town board *declines* to order a highway change. Under the judicial review provision, it is not only highway orders that are reviewable, but also "a refusal to issue such an order." WIS. STAT. § 82.15. When the board refuses to issue an order, no document will be recorded with the register of deeds. However, one solution to this problem may be to create different methods for determining the certiorari filing dates. There could be one method that applies when a highway order is issued, and another method when a town refuses to issue a highway order.

IV. OTHER ISSUES AND CONCLUSION

We briefly mention two other issues that are argued in the briefs.

One additional issue in the Walworth County case is whether relief can properly be granted in that county. The circuit court there dismissed the petition for lack of venue, on the ground that the review should proceed in Rock County due to the location of the highway. The respondent Towns support that decision on appeal. However, we are not aware of a basis on which improper venue is grounds for dismissal, and the respondent Towns do not explain one. Normally improper venue is a basis only to order a change of venue. ***State ex rel. Hansen v. Dane Cnty. Circuit Court***, 181 Wis. 2d 993, 1001-02, 513 N.W.2d 139 (Ct. App. 1994).

The second additional issue is in the Rock County case. The respondent Towns argue that, even if Pulera's petition is timely, it should still be dismissed because it is duplicative of the one she filed earlier in Walworth County. The Towns rely on WIS. STAT. § 802.06(2)10., which provides for dismissal if another action is pending between the same parties for the same cause. This may

turn out to be a proper basis to resolve the Rock County case, depending on what happens in the Walworth County case.[3]

In conclusion, these appeals require a court to interpret and apply a certiorari filing deadline statute that seems poorly designed for its intended purpose. Although normally the goal of statutory interpretation is to discern the intent of the legislature, in this case the language of the relevant certiorari statute has so little connection to the highway order process, and is so lacking in language that provides useful guidance, that it is difficult to believe the legislature held any intent on this question at all. Resolution of the issue will likely require the consideration of statutory language and various factors related to policy and judicial administration. Therefore, we certify these appeals to the supreme court.

[3] We note that, reading the two appeals together, these last two arguments by the Towns would lead us to conclude that each petition must be dismissed because relief should occur in the other county. However, in arguing that the Rock County case should be dismissed because it is duplicative of the Walworth County case, the Towns failed to inform us that the Walworth County court had already concluded that relief was proper only in Rock County. Even after filing the appellate brief arguing that the Rock County case is duplicative, the Towns then still argued in the Walworth County appeal that relief is proper only in Rock County.

Taking these arguments together, the Towns were asking separate districts of this court to conclude that the certiorari proceeding must occur in a county of the other district. This became apparent to us only because we consolidated the appeals on our own motion, after briefing. We doubt that counsel for the Towns was unaware of this potential for decisions that would leave Pulera without a petition in either county. This variant on "heads I win, tails you lose" appears to be a form of gamesmanship that we discourage, and can potentially lead to judicial estoppel.