COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP810 **Cir. Ct. No. 2011FO2780**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

WILL J. SHERARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] Will J. Sherard appeals the circuit court order dismissing his appeal of six municipal court judgments that found him guilty of six building code violations issued by the City of Milwaukee (the City) which

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

resulted in a total fine of $10,000. He argues that the use of the word "shall" found in WIS. STAT. § 800.14(1) (2009-10),[2] the statute that governs appeals from municipal court, which reads, in relevant part: "The appellant shall appeal by giving the municipal judge and the other party written notice of appeal within 20 days after the judgment or decision[,]" is directory, not mandatory. This court disagrees and affirms the dismissal order.[3]

BACKGROUND

¶2 Sherard is the owner of numerous properties located in the City of Milwaukee. City building inspectors inspected six of his properties and found numerous violations. After Sherard failed to correct the deficiencies within the allotted period of time, he was charged with six building code violations, one for each property.[4] Sherard pled not guilty and a trial was conducted on October 25, 2011. The municipal judge found Sherard guilty on all counts and ordered him to pay a $7841.74 forfeiture, plus costs, all of which amounted to $10,000. Sherard was advised of his appeal rights.

¶3 On November 14, 2011, Sherard and his trial attorney appeared in municipal court and filed a motion to appeal the judgment. The matter was then

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] Both the City of Milwaukee and Sherard have requested publication of this decision. However, WIS. STAT. §§ 752.31(2)(b) & (3) dictate that in municipal ordinance violation cases only one judge decides the appeal and WIS. STAT. § 809.23(1)(b)4. prohibits the publication of one-judge cases. Although there is a procedure for requesting that a one-judge case be heard by a three-judge panel, neither party made such a request. Consequently, the decision will not be published.

[4] The record reflects that Sherard pled not guilty to seven violations. However, trial was held on only six violations.

transferred to the Milwaukee County Circuit Court. Sherard concedes that no notice was given to the City within twenty days of the decision. Consequently, the City filed a motion to dismiss in the circuit court based on the fact that no notice of the appeal was given within the prescribed time period.

¶4 The circuit court determined, after reading the briefs and the cited case law, that the word "shall" used in WIS. STAT. § 800.14(1) is mandatory, granted the City's motion, and dismissed the appeal. This appeal follows.

ANALYSIS

¶5 Whether a statute is mandatory or directory is a question of statutory interpretation. ***Cross v. Soderbeck***, 94 Wis. 2d 331, 340, 288 N.W.2d 779 (1980).

> We must give effect to statutory enactments by determining the statute's meaning, especially through its language, which we presume expresses the intent of the legislature. We favor a construction that will fulfill the intent of a statute or regulation, over a construction that defeats its manifest object. However, for questions of statutory construction, such as this one, our review is de novo.

Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 22, ¶11, 308 Wis. 2d 103, 746 N.W.2d 762 (citations omitted).

¶6 As noted, Sherard argues that the word "shall" found in WIS. STAT. § 800.14(1) should be read to be directory. In other words, he submits that the fact that the city was not given notice within twenty days of the decision is not fatal to his appeal to the circuit court. In support, he principally relies on the four-factor test found in ***Eby v. Kozarek***, 153 Wis. 2d 75, 80-81, 450 N.W.2d 249 (1990). He claims that applying these factors favors his interpretation of the statute.

¶7 Under general principles of statutory construction, the word "shall" in a statute setting a time limit is ordinarily presumed to be mandatory. ***County of Walworth v. Spaulding***, 111 Wis. 2d 19, 24, 329 N.W.2d 925 (1983). However, there are exceptions. In ***Eby***, our supreme court determined that the failure to request mediation within fifteen days of the filing of a medical malpractice suit did not require dismissal of the action. ***Id.***, 153 Wis. 2d at 77. Instead, the court concluded that "the statutory requirement is mandatory with respect to the requirement to file a request for mediation but directory with respect to the time limitation within which the request is filed." ***Id.*** The court came to this conclusion after applying the factors found in ***State v. Rosen***, 72 Wis. 2d 200, 207, 240 N.W.2d 168 (1976):

> In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation.

Eby, 153 Wis. 2d at 80 (citing ***Rosen***, 72 Wis. 2d at 207; quotation marks omitted).

¶8 In deciding to dismiss the appeal, the circuit court addressed the four factors found in ***Eby***. The circuit court noted that this statute is unlike that in ***Eby***. There, mediation was the issue under discussion and the supreme court noted that mediation could be accomplished in several ways. *See* ***id.*** at 81-83. Thus, the supreme court concluded that the statute provided a flexible procedure. *See* ***id.*** at 82-83. Here, the clear intent of the legislature in passing WIS. STAT. § 800.14 was not to provide a similar flexible procedure. Rather, the legislature was providing a road map to facilitate an appeal of a municipal judgment to the circuit court.

According to the circuit court, this factor weighed in favor of a mandatory construction. The circuit court also observed that, unlike ***Eby***, where the plaintiffs would not have received a trial on the merits if a mandatory construction had been imposed, *see* ***id.*** at 81-83, Sherard already had the benefit of a trial. The circuit court also found support for its interpretation in WIS. STAT. § 800.14(3), which reads, in pertinent part: "On meeting the requirements for appeal, execution on the judgment … shall be stayed." Finally, the circuit court observed that when both the word "shall" and "may" are used in the same section of a statute as was done here, that creates an inference that the author was aware of the different denotations and intended the words' precise meanings.

¶9 Sherard concedes that some of the circuit court's analysis is sound. However, with regard to the reference to WIS. STAT. § 800.14(3), Sherard writes that contrary to the circuit court's statement, nothing is self-evident in this statutory language. Further, he argues that the circuit court's belief that when both the words "shall" and "may" are used in the same section, the words are to be given their precise meaning is nonsensical. This is so because substituting the word "shall" in this statute for "may" would be silly, as it would require both parties to appeal the decision. In sum, he writes that "the circuit court placed too much emphasis on those considerations, ignored other considerations, and placed consideration of some considerations of suspect relevance." This court disagrees with all of Sherard's arguments.

¶10 First, as the circuit court noted, the purpose of the statute in question is a procedure to perfect an appeal to the circuit court. In the context of its purpose, the word "shall" is clearly mandatory. Having a statute that permits alternative procedures to transfer an appeal to the circuit court would result in administrative nightmares. Consequently, the first factor favors a mandatory

construction. Further, while Sherard observes that ***Eby*** suggested that trials are favored in the law, *see* ***id.***, 153 Wis. 2d at 81, he cites ***Cady v. Anson***, 4 Wis. 223 (1855), to argue that appeals are also favored. Therefore, he argues a directory interpretation should be given to WIS. STAT. § 800.14(1). However, the ***Eby*** court did not find that the lack of an appeal was a factor. Instead, the court concentrated on the failure to have a trial on the merits as being significant in deciding whether the word "shall" was directory or mandatory. *See* ***id.***, 153 Wis. 2d at 81. Thus, this factor also favors a mandatory interpretation.

¶11 Sherard also appears to be befuddled by the circuit court's reliance on WIS. STAT. § 800.14(3) as support for its determination that "shall" is mandatory. The statute reads: "On meeting the requirements for appeal, execution on the judgment of the municipal court or enforcement of the order of the municipal court shall be stayed until the final disposition of the appeal." In reviewing the record, it is clear that the circuit court was implicitly concentrating on the words "on meeting the requirements for appeal" because by using the word "requirements," the statute assumes that certain necessary actions must be taken in order for an appeal to proceed to the circuit court. Had the legislature envisioned "shall" to be directory in WIS. STAT. § 800.14(1), one would expect to see different wording in § 800.14(3), such as "whenever one completes the notice provision." This wording tilts toward "shall" being given a mandatory reading.

¶12 The circuit court also pointed to the fact that "shall" and "may" were in the same sentence, which suggests that the legislature intended the precise meanings for the two words. Sherard downplays this interpretation by stating that the distinction is irrelevant in this statute. This court disagrees. WISCONSIN STAT. § 800.14(1) reads, in pertinent part: "Appeals from judgments … may be taken by either party to the circuit court of the county where the offense occurred. The

appellant shall appeal by giving the municipal judge and other party written notice of appeal within 20 days after the judgment or decision." Had the legislature intended that notice could be given later or in some other manner, it could have easily said so. The use of "shall " as being mandatory is strongly suggested by the wording of the statute.

¶13 Next, Sherard contends that the legislative history weighs in favor of his interpretation. Sherard sets out the history of the statute in his brief and notes that the language "and other party" was not added until April 2006. Thus, he explains that while giving notice is probably a good idea, he writes that: "[A] directory, rather than a mandatory construction of 'shall' still ensures that the prevailing party will receive notice of the appeal, while at the same time, preserving the appealing party's right to appeal, despite a mere technical omission." He also notes that an appeal to this court has no requirement for notice to the other party. Again, this court disagrees.

¶14 Unlike Sherard's view of the legislative history, this court assumes that the legislature, by adding the words "and other party" did so because a problem existed with the old procedure and the new wording was intended to solve that problem. The old procedure required an appellant to file a notice only with the municipal judge within twenty days. By adding the words "and other party," the legislature was expanding the class of persons to be given notice in twenty days. To alert the opposing party of the appeal within twenty days is sound policy, as both parties, as well as the municipal judge, should know the status of the case. Thus, the legislative history does not support Sherard's position. As to notice to the Court of Appeals, although the notice of appeal goes to the clerk of the circuit court of the judge who issued the judgment or order and the clerk of this court, given that the factors favor a mandatory interpretation of WIS. STAT.

§ 800.14(1), any difference with the procedure used for perfecting an appeal to this court is irrelevant.

¶15 Finally, this court observes that very old case law regarding the former procedure to appeal a municipal case to the circuit court supports this court's determination. *See, e.g.*, ***Pelton v. Town of Blooming Grove***, 3 Wis. 310, 313-14 (1854) (In order to take an appeal from the judgment of a justice of the peace, all the requisites of the statute to that end were required to be complied with, within ten days after the rendition of judgment.); ***Clark v. Bowers***, 2 Wis. 123, 127-28 (1853) (If the appellant failed to comply with the requisites of the statute within the time prescribed, the appellate court was required to dismiss the appeal.); ***Ketchum v. Freeman***, 24 Wis. 296, 297-98 (1869) (Where no notice of appeal from a justice of the peace had been served, the circuit court did not acquire any jurisdiction, not even to render judgment against the appellant for costs on dismissing the appeal.).

¶16 For the reasons stated, the order of the circuit court is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.