

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2789

Cir. Ct. No. 2011CV11550

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

WINFIELD AVENUE, LLC AND MARK GIERCZAK,

PLAINTIFFS-APPELLANTS,

V.

CITY OF MILWAUKEE DEPARTMENT OF NEIGHBORHOOD SERVICES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
THOMAS R. COOPER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Winfield Avenue, LLC and Mark Gierczak (collectively “Gierczak”) appeal an order denying their request for a restraining order and a hearing. Gierczak sought to restrain the City of Milwaukee (“the City”) from razing his home and requested a hearing to determine the

reasonableness of the underlying raze order. The circuit court denied Gierczak's requests after concluding that service of the raze order was proper and that Gierczak had failed to seek relief in a timely manner. We affirm.

BACKGROUND

¶2 This appeal stems from an order issued by the City directing Gierczak to correct various code violations relating to a home that he owned. If the conditions identified by the City were not corrected, the order provided that the home could be razed.

¶3 On July 18, 2011, Gierczak filed suit seeking a restraining order prohibiting the City from razing the home and a hearing to determine the reasonableness of the underlying raze order. The City responded to Gierczak's suit with a motion to dismiss in lieu of an answer based on Gierczak's failure to appeal in a timely manner, pursuant to WIS. STAT. § 893.76 (2009-10).¹ *See id.* (“[A]pplication ... to a circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing a building ... shall be made within 30 days after service of the order ... or be barred.”). With its motion, the City filed an affidavit of service signed by Angela Ferrill, an employee of the City of Milwaukee Department of Neighborhood Services (DNS), documenting that she served Gierczak with a copy of the raze order on July 15, 2010. Gierczak then filed a motion to quash the raze order, arguing that service of the order was improper.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 At the hearing that followed, Ferrill testified that as part of her job duties, she served raze orders. She testified it was customary for her to be called to the front of the DNS office where she would verify the identity of the person she was serving, state that she was giving the person a copy of a raze order, serve the person, and document service on the back of the office copy. Ferrill testified that on July 15, 2010, she served the raze order on Gierczak in the customary manner. According to Ferrill, it was also customary for anyone coming into the office to sign in on the sign-in sheet at the front of the office.

¶5 Gierczak also testified during the hearing. He confirmed that he went to the DNS office on July 15, 2010, and signed the sign-in sheet. Gierczak went there after a real estate agent informed him of re-inspection fees and housing code violations that needed to be resolved before he could sell his home. Gierczak testified that Ferrill gave him two forms to appeal the fees and housing code violations, but he denied being served with a raze order. Gierczak testified that he did not become aware of the raze order until June 22, 2011.

¶6 When Ferrill was recalled, she stated that she was not responsible for helping individuals appeal building orders; rather, her function on July 15, 2011, was to serve Gierczak with the raze order and document that service.

¶7 After listening to the testimony and arguments of counsel, the circuit court concluded that Gierczak had been personally served with the raze order. The circuit court held that Gierczak's action was time barred and consequently, granted the City's motion to dismiss.

¶8 Gierczak filed a motion for reconsideration and stay pending appeal. He continued to deny that Ferrill gave him a copy of the raze order. However, in his reconsideration motion, Gierczak also argued—for the first time—that the

City's service of the raze order was deficient because the order was not authenticated and because Ferrill, as a City employee, was a party to the action. The circuit court denied Gierczak's motion, holding that: Gierczak was properly served by personal service; the raze order did not need to be authenticated; and Gierczak had failed to act in a timely manner as proscribed by WIS. STAT. § 66.0413(1)(h) or its municipal counterpart, MILWAUKEE, WIS., CODE OF ORDINANCES § 218-4(4) (2006).²

¶9 According to Gierczak's brief, his home has since been razed. Consequently, he seeks money damages.

DISCUSSION

¶10 Gierczak makes two arguments on appeal. First, he asserts that service of the raze order was fundamentally defective because the copy of the order Ferrill served was not authenticated. Second, he submits that service was fundamentally defective because it was effectuated by a City employee.³

² WISCONSIN STAT. § 66.0413(1)(h) provides: "*Restraining order.* A person affected by an order issued under par. (b) [i.e., a raze order] may within the time provided by [WIS. STAT. §] 893.76 apply to the circuit court for an order restraining the building inspector or other designated officer from razing the building or forever be barred." As previously set forth, § 893.76 affords individuals a thirty-day window following service to seek restraining orders. Likewise, MILWAUKEE, WIS., CODE OF ORDINANCE § 218-4(4) (2006) explains that anyone who is served with a raze order "shall, within 20 days of service[, if that service is in the manner provided for service of a summons pursuant to WIS. STAT. ch. 801,] ... file a notice of appeal to the standards and appeals commission ... or forever be barred."

³ Sprinkled throughout Gierczak's appellate brief are references to the "alleged" service of the raze order. However, he makes no argument related to the circuit court's factual finding that he was personally served with the order. Consequently, Gierczak appears to have abandoned this issue. See *State v. Johnson*, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) (issues not briefed or argued on appeal are deemed abandoned).

¶11 Resolving these issues will require us to review and interpret statutes and municipal ordinances. The rules for the interpretation of municipal ordinances are the same as those for statutes; they are questions of law that this court reviews *de novo*. See **Welin v. American Family Mut. Ins. Co.**, 2006 WI 81, ¶16, 292 Wis. 2d 73, 717 N.W.2d 690; **Marris v. City of Cedarburg**, 176 Wis. 2d 14, 32, 498 N.W.2d 842 (1993). “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” **State ex rel. Kalal v. Circuit Court for Dane Cnty.**, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute, and if the statute’s meaning is plain, our inquiry goes no further. See *id.*, ¶45.

A. Authentication.

¶12 The parties agree that service of the order is governed by WIS. STAT. § 66.0413(1)(d) and MILWAUKEE, WIS., CODE OF ORDINANCES § 218-4(2). Section 66.0413(1)(d) provides: “*Service of order*. An order under par. (b) [i.e., a raze order] shall be served on the owner of record of the building that is subject to the order or on the owner’s agent if the agent is in charge of the building *in the same manner as a summons is served in circuit court*.” (Some emphasis added.) ORDINANCE § 218-4(2) similarly provides that service of a raze order “shall be *in the manner provided for service of a summons pursuant to ch. 801, Wis. Stats.*” (Emphasis added.)

¶13 For the raze order to be served in the same manner as a summons, Gierczak argues that it was required to be authenticated. See **American Family Mut. Ins. Co. v. Royal Ins. Co.**, 167 Wis. 2d 524, 530, 533-34, 481 N.W.2d 629 (1992) (failure to serve a party with a properly authenticated copy of the summons

and complaint is a fundamental defect that, if challenged, deprives the court of jurisdiction). We are not convinced.

¶14 As the State points out, Gierczak is asking this court to read-in an authentication requirement for raze orders based on WIS. STAT. § 801.02(1). Section 801.02(1) pertains to the commencement of a civil action where a personal judgment is sought and states that such an action is commenced “when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.”

¶15 We conclude that if the drafters of WIS. STAT. § 66.0413(1)(d) and MILWAUKEE, WIS., CODE OF ORDINANCES § 218-4(2) had wanted a raze order to be authenticated as that term is used in WIS. STAT. § 801.02(1), they could have done so. Instead, they specified only that a raze order be served in the “manner” of a summons. A raze order is not the same as a summons and complaint. It does not amount to a commencement of a civil action for a personal judgment; instead, here, it was an order to correct the conditions noted, raze the building, or, if neither of the former options was pursued, risk having the property razed by the City. Given this distinction and the lack of express language requiring authentication, Gierczak’s argument fails.

¶16 Moreover, the State makes a compelling argument that reading the statute to require that raze orders be authenticated would lead to an absurd result. *See Kalal*, 271 Wis. 2d 633, ¶46 (statutory language is interpreted “reasonably, to avoid absurd or unreasonable results”). The State submits:

Should this court decide [Gierczak]’s interpretation of the requirement of WIS. STAT. § 801.02(1) [is correct], to authenticate a raze order prior to service, the City will be

compelled to file civil actions in circuit court for each raze order issued by the City, including the vast majority which are not contested. With approximately 5,000 vacant buildings in Milwaukee, many of which are beyond reasonable repair, this will become a daunting task for not only the City, but the Milwaukee County Circuit Court. This would not be in accordance with the express intent in WIS. STAT. § 66.0413(4)(b)[(]“This subsection shall be liberally construed to provide 1st class cities with the largest possible power and leeway of action.”[)]. Likewise for every municipality and circuit court throughout Wisconsin, adding this requirement would lead to an absurd result.

We agree.

B. Service by Ferrill.

¶17 Next, Gierczak argues that the City’s service of the raze order was fundamentally defective because Ferrill, as a City employee, was a party to the action. *See* WIS. STAT. § 801.10(1) (“WHO MAY SERVE. An authenticated copy of the summons may be served by any adult resident of the state where service is made who is not a party to the action.”). Gierczak contends that Ferrill had an interest in establishing service, which may have prompted her to fabricate her affidavit of service. He writes:

[Ferrill] is certainly an employee that is instructed to serve a raze order by a superior in the condemnation section. She is compensated directly by the [City]. Her employment may depend on the service, and future job promotions and pay raises may also affect her ability to have no bias in the filing of an affidavit of service.

¶18 The City disagrees with Gierczak, explaining that when Ferrill served the raze order, there was no lawsuit. The City submits that Ferrill was merely carrying out her employment duties when she served the raze order and that alone does not make her a party to this action. We agree.

¶19 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993) defines “party” as:

(1) [o]ne that constitutes the plaintiff or the defendant in a lawsuit: LITIGANT[;] (2) one directly disclosed by the record to be so involved in the prosecution or defense of a proceeding as to be bound by the decision or judgment therein[;] (3) one indirectly disclosed by the record as being directly interested in the subject matter of a suit or as having power to make a defense, control the proceedings, or appeal from the judgment.

Id. at 1648 (parenthetical and some internal punctuation omitted). Here, the City points out that Ferrill is not a named party in the lawsuit, has no right to make a defense, control the proceedings, or appeal from a judgment against the City. In addition, the City submits that Ferrill cannot accept service on behalf of the City or bring a lawsuit on its behalf. *See* WIS. STAT. § 801.11(4)(a)3. (in an action against the City, the mayor, city manager, or clerk can accept service); MILWAUKEE CITY CHARTER § 3-03(1)(a) (May 22, 2012) (duties and powers of city attorney include “[c]onduct[ing] all the law business” of the City). Ferrill holds none of these positions.

¶20 As such, we conclude that the City’s service of the raze order on Gierczak was not defective. Consequently, Gierczak had a relatively short window of time after Ferrill served him with the raze order to file an action seeking a restraining order in the circuit court, *see* WIS. STAT. §§ 66.0413(1)(h), 893.76 (thirty-day window), or an appeal with the Standards and Appeals Commission, *see* MILWAUKEE, WIS., CODE OF ORDINANCES § 218-4(4) (twenty-day window). He failed to do so, waiting nearly a year before commencing the action that underlies this appeal. As a result, the circuit court properly concluded Gierczak’s action was time barred.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

