COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2368 **Cir. Ct. No. 2007CV2300**

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

LOLITA BLACK,

PLAINTIFF-APPELLANT,

V.

CITY OF KENOSHA HOUSING AUTHORITY AND CITY OF KENOSHA HOUSING AUTHORITY BOARD OF COMMISSIONERS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Jurisdiction confirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Lolita Black appeals from a "Final Order" that dismisses the complaint on its merits and states that it is a final order for purposes of appeal. The record discloses an earlier "Decision and Order" that also

dismisses the action on its merits. We questioned which order triggered the time for appeal and required the parties to submit memoranda addressing whether the appeal was timely filed. We conclude that the appeal is timely filed from the final disposition made by the "Final Order" which states that it is final for purposes of appeal.

¶2 On April 21, 2009, the circuit court entered a "Decision and Order." That document notes that cross-motions for summary judgment had been filed and it concludes with the following language: "Accordingly, the defendants' motion is granted, and the action is dismissed on its merits." On September 9, 2009, Black filed a notice of appeal that refers to a June 11, 2009 "Final Order." The "Final Order" refers to the April 21, 2009 decision and concludes as follows: "IT IS HEREBY ORDERED; 1. The complaint is dismissed on its merits. 2. This is a final order for purposes of appeal." This court questions whether the April 21 order which explicitly dismisses the action "on its merits," or the June 11 order which states that it is the final order for purposes of appeal, triggered the ninety day time under WIS. STAT. § 808.04(1) (2007-08),[1] for filing a notice of appeal. If the April 21 order is the final order within the meaning of WIS. STAT. § 808.03(1), Black's notice of appeal is not timely filed and this court lacks jurisdiction. *See* WIS. STAT. RULE 809.10(1)(e).

¶3 In ***Wambolt v. West Bend Mutual Insurance Co.***, 2007 WI 35, ¶¶39, 49, 299 Wis. 2d 723, 728 N.W.2d 670, the supreme court required that all final judgments or final orders entered after September 1, 2007, include a

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

statement that it is a final judgment or final order for purposes of appeal. *See also* ***Tyler v. RiverBank***, 2007 WI 33, ¶25, 299 Wis. 2d 751, 728 N.W.2d 686 (repeating the directive). Black argues that the June 11, 2009 "Final Order" is the only document that meets all the requirements for a final order because it is the only one which complies with the ***Wambolt***/***Tyler*** directive. This suggests that an appeal cannot be filed from a judgment or order that disposes of the entire matter in litigation but does not include the statement that it is final for purposes of appeal. We cannot adopt such an absolute rule.

¶4 In ***Wambolt***, the court states: "Absent such a statement, appellate courts should liberally construe ambiguities to preserve the right of appeal." ***Wambolt***, 299 Wis. 2d 723, ¶4. ***Tyler***, 299 Wis. 2d 751, ¶26, states: "In the (hopefully) rare cases where a document would otherwise constitute the final document, but for not including a finality statement, courts will construe the document liberally in favor of preserving the right to appeal." Despite that the ***Wambolt***/***Tyler*** directive is more than two years old, this court frequently is presented with appeals from final judgments and final orders that do not include the finality statement. In those circumstances, we ignore the failure to comply with the ***Wambolt***/***Tyler*** directive in favor of preserving the appeal.[2] We must continue to make a liberal construction in favor of appeals, but take this opportunity to remind circuit courts and litigants of the need to comply with the ***Wambolt***/***Tyler*** directive to provide the desired clarity in appellate jurisdiction.

[2] If a notice of appeal is not timely filed from a final judgment or final order which does not include the finality statement and this court dismisses the appeal, it becomes law of the case that the judgment or order was final for purposes of appeal. No subsequent appeal can be taken from a subsequent judgment or order that does nothing new other than include the finality statement.

See ***Sanders v. Estate of Sanders***, 2008 WI 63, ¶¶31-32, 310 Wis. 2d 175, 750 N.W.2d 806 (recognizing that ***Wambolt*** and ***Tyler*** impose "a new requirement" for the sake of clarity).

¶5 The April 21, 2009 "Decision and Order" falls within the category of appeals where the order unambiguously disposes of the entire matter in litigation but does not contain a statement that it is final for the purposes of appeal. *See* ***Kenosha Prof'l Firefighters v. City of Kenosha***, 2009 WI 52, ¶23, 317 Wis. 2d 628, 766 N.W.2d 577 (if a decision contains "[e]xplicit language dismissing or adjudging the matter in litigation," the decision will be construed as a final judgment or final order for purposes of appeal). The notice of appeal is not timely filed from the April 21, 2009 order.

¶6 ***Wambolt*** and ***Tyler*** require this court to consider whether any ambiguity exists that can be construed in favor of saving the appeal. ***Wambolt***, 299 Wis. 2d 723, ¶¶46-47, specifically anticipates a circumstance like this where the order adjudicates the litigation with finality but lacks the required finality statement. ***Wambolt*** characterizes a final judgment or final order that does not include the finality statement as ambiguous. ***Id.***, ¶46. ***Wambolt*** requires this court to liberally construe the resulting ambiguity in favor of timely appeals:

> We anticipate that there may be final orders and judgments that arguably dispose of the entire matter in litigation as to one or more of the parties, but which do not contain a clear statement that they are the documents from which appeal of right may follow. In such cases, the appropriate course is to liberally construe documents in favor of timely appeals. That is, absent explicit language that the document is intended to be the final order or final judgment for purposes of appeal, appellate courts should liberally construe ambiguities to preserve the right of appeal.

> Such a liberal construction places an impetus for clarity on the prevailing party. It will want to avoid extending the time for appeal. Rather, the interests of the prevailing party will be furthered if the document contains explicit language regarding finality for purposes of appeal and thus begins the running of the clock for filing notice of appeal under [WIS. STAT.] § 808.04(1). As noted in [***Harder v. Pfitzinger***, 2004 WI 102, 274 Wis. 2d 324, 682 N.W.2d 398], however, the person aggrieved by the final order or judgment may have an even larger incentive to include such an explicit statement in the document. In the face of uncertainty, the time to appeal may begin to run and the right to appeal may be lost. ***Harder***, 274 Wis. 2d 324, ¶18.

Wamboldt, 299 Wis. 2d 723, ¶¶46-47 (footnotes omitted).

¶7 As required by ***Wambolt***, we liberally construe the April 21, 2009 "Decision and Order" to not be the document from which an appeal of right could follow.[3] The notice of appeal references the June 11, 2009 "Final Order" which states that it is final for the purposes of appeal. The June 11, 2009 order establishes with clarity when the time to appeal was triggered.[4] The notice of appeal is timely filed from the June 11, 2009 order.

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[3] The law is that finality is established by looking at the document itself and not to subsequent events. ***Radoff v. Red Owl Stores, Inc.***, 109 Wis. 2d 490, 493, 326 N.W.2d 240 (1982). "The test of finality is not what later happened in the case but rather, whether the trial court contemplated the document to be a final judgment or order at the time it was entered. This must be established by looking at the document itself, not to subsequent events." ***Fredrick v. City of Janesville***, 92 Wis. 2d 685, 688, 285 N.W.2d 655 (1979). Here ambiguity exists because the final order lacks the required finality statement and not by entry of the subsequent "Final Order," and we do not run afoul of ***Radoff*** and ***Fredrick***.

[4] In ***Wambolt v. West Bend Mutual Insurance Co.***, 2007 WI 35, ¶47, 299 Wis. 2d 723, 728 N.W.2d 670, the court put the burden of clarity on the prevailing party. Here the circuit court authored the April 21, 2009 "Decision and Order" and the June 11, 2009 "Final Order" was drafted and submitted by the prevailing party before the time to appeal the April 21, 2009 order expired. Although the respondent now disavows that the subsequent order was necessary to commence the time to appeal, the June 11, 2009 "Final Order" is consistent with the goal for thoughtful drafting of final judgments or final orders to eliminate uncertainty and traps as to when the time to appeal commences. We emphasize again the need for circuit courts and litigants to include the now required finality statement.

By the Court.—Jurisdiction confirmed.

Recommended for publication in the official reports.