

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 2, 2010

A. John Voelker
Acting 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. 2009AP1961

Cir. Ct. No. 2009CV2571

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. RICHARD LUKSZYS,

PETITIONER-APPELLANT,

v.

**CITY OF MILWAUKEE ANNUITY AND PENSION BOARD
AND CITY OF MILWAUKEE EMPLOYEES RETIREMENT SYSTEM,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Richard Lukszys filed a petition for a writ of certiorari, seeking judicial review under WIS. STAT. § 68.13(1) (2007-08)¹ of a

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

decision of the City of Milwaukee Annuity and Pension Board in which the Board denied Lukszys's application for duty disability benefits. The City of Milwaukee Employees Retirement System (MERS) moved to dismiss the petition on the ground that the action was not timely commenced. The circuit court agreed with the City and dismissed Lukszys's petition. Lukszys appeals. Because Lukszys did not adhere to the statutory procedure for commencing an action by certiorari petition, we affirm the order of dismissal.

BACKGROUND

¶2 The salient facts are largely procedural, undisputed, and straightforward. Lukszys was employed with the Milwaukee Public Schools and injured his back in a work-related incident. Lukszys applied for a disability pension. His application was denied. Lukszys pursued an administrative appeal of that denial. Ultimately, the pension board denied Lukszys's application during a January 26, 2009 meeting, and a written denial was served on Lukszys after the meeting.

¶3 On February 23, 2009, Lukszys filed a "Petition for Writ of Certiorari" with the circuit court seeking judicial review of the pension board's decision, pursuant to WIS. STAT. § 68.13. On March 12, 2009, MERS moved to dismiss Lukszys's action, arguing that the circuit court "lack[ed] personal jurisdiction over the [pension b]oard since it was not served with an original writ, as required by WIS. STAT. § 801.02(5), and ... lack[ed] jurisdiction over this action because it was not properly and timely commenced within 30 days, as required by WIS. STAT. § 68.13 and WIS. STAT. § 801.02(5)." The record contains a "Writ of Certiorari" that was signed by the circuit court on March 18, 2009. After briefing

and oral argument, the circuit court granted the motion and dismissed Lukszys's action.

DISCUSSION

¶4 Judicial review of the decision of the pension board to deny Lukszys's application for disability benefits is governed by WIS. STAT. CH. 68. *See* WIS. STAT. § 68.02(3) ("The denial of a ... thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant" is reviewable under ch. 68.). WISCONSIN STAT. § 68.13(1) states that "[a]ny party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination." Therefore, the question becomes whether Lukszys properly commenced the action in the circuit court within the thirty-day limitation period of § 68.13(1).

¶5 In this case, it is undisputed that Lukszys filed an unsigned petition for a writ of certiorari with the circuit court on February 23, 2009. The circuit court signed a writ of certiorari on March 18, 2009. The question is whether those filings were sufficient to commence the action. Lukszys contends that WIS. STAT. § 68.13(1) does not require service of a signed writ of certiorari within thirty days, and he points to the deletion of the phrase "writ of" from § 68.13(1) in 1981 legislation. Lukszys contends that the deletion of "writ of" from § 68.13(1) "means that a petition for certiorari should be filed within thirty days and then an original writ should thereafter be served." Lukszys's argument is not supported by the statutes or case law.

¶6 The commencement of civil actions is governed by WIS. STAT. § 801.02. Under § 801.02(1), "a civil action in which a personal judgment is sought is commenced as to any defendant 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.” Because Lukszys was seeking certiorari review, § 801.02(5) is also relevant. That subsection provides:

An action seeking a remedy available by certiorari, quo warranto, habeas corpus, mandamus or prohibition may be commenced under sub. (1), by service of an appropriate original writ on the defendant named in the writ if a copy of the writ is filed forthwith, or by filing a complaint demanding and specifying the remedy, if service of an authenticated copy of the complaint and of an order signed by the judge of the court in which the complaint is filed is made upon the defendant under this chapter within the time period specified in the order. The order may specify a time period shorter than that allowed by s. 802.06 for filing an answer or other responsive pleading.

WISCONSIN STAT. §§ 801.02(1) and (5) create “two different procedures which can be used to commence certiorari review—a complaint procedure and a writ procedure.” *State ex rel. Dep’t of Natural Res. v. Walworth Cnty. Bd. of Adjustment*, 170 Wis. 2d 406, 415, 489 N.W.2d 631 (Ct. App. 1992). By filing a “petition for writ of certiorari,” Lukszys chose to commence this action using the writ procedure. Accordingly, “commencement of the [action] is measured by the act of serving the *original* writ, provided that a copy of the writ is filed ‘forthwith.’” *Id.*, at 416 (emphasis in original). As this court has stated, “[h]aving chosen to use a writ, [Lukszys] was obliged to obtain a writ from the court and serve the original writ upon the board within thirty days of the board’s decision.” *Id.*, at 419; *see also State ex rel. Schwochert v. Marquette Cnty. Bd. of Adjustment*, 132 Wis. 2d 196, 202-206, 389 N.W.2d 841 (Ct. App. 1986) (holding that the writ procedure remains available and, if that procedure is used, the signing of a writ after the expiration of the thirty-day deadline does not meet the commencement-of-action requirements of WIS. STAT. § 801.02(5)).

¶7 In this case, it is undisputed that Lukszys did not obtain a signed writ from the circuit court until March 18, 2009, more than thirty days after the pension board's decision of January 26, 2009.² Therefore, the circuit court properly dismissed Lukszys's action. *See Walworth County*, 170 Wis. 2d at 418-19 (the commencement of an action by writ is measured from the date of service of the writ).³

By the Court.—Order affirmed.

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

² Lukszys asks this court to deem the writ to have been signed by the circuit court on February 23, 2009 under “*nunc pro tunc*” authority. Because a circuit court’s authority to enter a *nunc pro tunc* order is “only valid for the purpose of correcting the judicial record, not altering it,” this court cannot do as Lukszys requests. *See Strawser v. Strawser*, 126 Wis. 2d 485, 487, 377 N.W.2d 196 (Ct. App. 1985).

³ We agree with the respondent that the 1981 revisions to WIS. STAT. § 801.02(5) do not mandate a different result. Both *State ex rel. Dep’t. of Natural Res. v. Walworth Cnty. Bd. of Adjustment*, 170 Wis. 2d 406, 489 N.W.2d 631 (Ct. App. 1992) and *State ex rel. Schwochert v. Marquette Cnty. Bd. of Adjustment*, 132 Wis. 2d 196, 389 N.W.2d 841 (Ct. App. 1986) postdate the 1981 amendments to the various statutes. As stated by the respondent:

[t]he deletion of the words “writ of” by Ch. 289, 1981 Wisconsin Laws, did not alter the writ procedure if that is the method chosen by the party seeking review, nor did it alter the requirement that an action must be commenced within thirty days. The deletion simply made the summons-complaint and order-complaint procedures in WIS. STAT. § 801.02(5) appropriate methods for commencing an action for judicial review.

