

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2018

Sheila T. Reiff
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. 2017AP710

Cir. Ct. No. 2016CV2241

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BARK RIVER BRIGADE, U.A.,

PLAINTIFF-APPELLANT,

v.

**WEXFORD HEIGHTS, LP, TOWN OF LISBON, TOWN OF LISBON PLAN
COMMISSION AND TOWN OF LISBON SPECIAL AD HOC BOARD OF
REVIEW,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County:

KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 GUNDRUM, J. Bark River Brigade, U.A. (Bark River) consists of a group of property owners who object to the nearby development of land by

Wexford Heights, LP, (Wexford) as a gas station/restaurant. Bark River appeals the dismissal of its certiorari action, filed on December 14, 2016, which challenged the Town of Lisbon’s September 2, 2015 grant of a conditional use permit to Wexford. Bark River concedes it was required to pursue a challenge to the Town’s grant of the permit within thirty days of September 2, 2015, and concedes its certiorari action filed on December 14, 2016, did not meet this requirement. It argues, however, that pursuant to WIS. STAT. § 893.13(2) (2015-16),¹ the thirty-day time limit was tolled by its October 2, 2015 filing of a motion to intervene in a separate certiorari action Wexford had pending against the Town of Lisbon (Wexford action) and through final denial of Bark River’s appeal.² We affirm as the time limit was not tolled and thus Bark River’s December 2016 certiorari action was not timely filed.

¶2 Whether a certiorari action is properly commenced is a question of law. *Koenig v. Pierce Cty. DHS*, 2016 WI App 23, ¶17, 367 Wis. 2d 633, 877 N.W.2d 632. “Whether a statutory limitations period requires dismissal of an action where the underlying facts are not in dispute is also a question of law.”

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² On October 7, 2015, just five days after Bark River filed its motion to intervene in the Wexford action, Wexford and the Town filed a WIS. STAT. § 805.04(1) stipulation to dismiss that action, and it was dismissed without Bark River’s motion to intervene being heard. Bark River moved for WIS. STAT. § 806.07 relief from that dismissal. See *Wexford Heights, LP v. Town of Lisbon Plan Comm’n*, No. 2015AP2331-FT, unpublished op. and order at 2-3 (WI App July 20, 2016), *review denied*, 2017 WI 8, 374 Wis. 2d 156, 895 N.W.2d 841. The circuit court denied Bark River’s motion on the basis that, pursuant to § 805.04(1), Wexford and the Town had the right to stipulate to dismissal without an order of the court, implicitly determining that Bark River was not a party to the suit as the court had not granted Bark River’s motion to intervene. We affirmed on appeal—also determining that Bark River was not a party to the Wexford action because the motion to intervene had not been granted. On November 14, 2016, our supreme court denied Bark River’s petition for review.

Town of Burnside v. City of Indep., 2016 WI App 94, ¶9, 372 Wis. 2d 802, 889 N.W.2d 186 (citation omitted).

¶3 WISCONSIN STAT. § 893.13(2) provides:

A law limiting the time for commencement of an action is tolled by the commencement of the *action* to enforce the cause of action to which the period of limitation applies. The law limiting the time for commencement of the action is tolled for the period from the commencement of the *action* until the final disposition of the *action*. (Emphasis added.)

By its plain language, this provision tolls a statutory time limitation in circumstances where an “action” is commenced. The law is well-settled that a motion to intervene is a “special proceeding” and the filing of such a motion does not constitute the commencement of an “action.” See *State v. Alger*, 2015 WI 3, ¶¶27-29, 360 Wis. 2d 193, 858 N.W.2d 346. Thus, § 893.13(2) simply does not apply here to toll the thirty-day time limit for commencing a certiorari action following the Town’s September 2, 2015 grant of the conditional use permit to Wexford. See *Colby v. Columbia Cty.*, 202 Wis. 2d 342, 362, 550 N.W.2d 124 (1996) (“[T]he operation of § 893.13 applies only to commenced actions.”). Because Bark River’s October 2, 2015 filing of its motion to intervene did not constitute the commencement of an action, that filing could not and did not toll the thirty-day limitation period.³

¶4 For the foregoing reasons, we affirm.

³ Bark River conclusorily asserts that “pursuant to [WIS. STAT] § 802.06(2)(10) [it] was not permitted under the Rules to file a new action raising the same claim that was already at issue between the Town and Wexford in the existing circuit court action.” We assume Bark River is referring to § 802.06(2)(a)10. Bark River develops no argument in support of this assertion, and thus we do not address it. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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¶5 REILLY, P.J. (*concurring*). I concur with the majority that Bark River’s certiorari action was untimely. Majority, ¶3. I cannot join the majority’s decision, however, as it entertains the premise that a tolling argument exists. One certiorari action can never toll the time limits in a different certiorari action given our scope of review.

¶6 Certiorari is an extraordinary remedy that tests the validity of a decision made by an administrative or quasi-judicial body. *Acevedo v. City of Kenosha*, 2011 WI App 10, ¶8, 331 Wis. 2d 218, 793 N.W.2d 500 (2010). The certiorari process bears “no resemblance to the usual processes of courts, by which controversies between parties are settled by judicial tribunals.” *Merkel v. Village of Germantown*, 218 Wis. 2d 572, 577, 581 N.W.2d 552 (Ct. App. 1998) (citation omitted). A court conducting a review on certiorari is limited to the record before it and a petition for certiorari must specify the specific errors in the record relied on and any error or defect not specified will be deemed as waived. *State ex rel. Kaczkowski v. Board of Fire & Police Comm’rs*, 33 Wis. 2d 488, 504, 148 N.W.2d 44 (1967); *Tourville v. S. D. Seavey Co.*, 124 Wis. 56, 58, 102 N.W. 352 (1905); *Merkel*, 218 Wis. 2d at 577-78.

¶7 Bark River’s tolling argument under WIS. STAT. § 893.13(2) is misplaced as tolling only applies where there is an identity of causes of action. Sec. 893.13(2); *see also Town of Burnside v. City of Indep.*, 2016 WI App 94, ¶¶30-34, 372 Wis. 2d 802, 889 N.W.2d 186. Wexford’s certiorari cause of action was against the Town for its *denial* of Wexford’s request for a conditional use permit. Bark River’s certiorari cause of action against the Town was for its *grant*

of the conditional use permit. A certiorari action is limited to the record before the court, and the issues are limited to whether the governmental body had a lawful basis for the decision it made. There is never “tolling” between two distinct certiorari actions.

