

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2009

David R. Schanker
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. 2008AP1678

Cir. Ct. No. 1997SC14505

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

v.

ANTHONY WARDEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ American Family Mutual Insurance Company (American Family) appeals an order reopening a small claims default judgment

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

and dismissing its action, which emanated out of an automobile accident. The default judgment was entered in June 1997. American Family contends that the trial court erroneously exercised its discretion when it granted Anthony Warden's motion to reopen the judgment and dismiss the action after Warden showed the court proof that he was incarcerated in Illinois at the time of the accident.² Because the service by publication on Warden was defective, the original trial court had no personal jurisdiction and the judgment is void. Thus, this court affirms the trial court's ruling, albeit on other grounds. See *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (We may affirm a trial court's decision on other grounds even if we do not agree with its reasoning.).

I. BACKGROUND.

¶2 On May 9, 1997, an attorney filed a small claims action alleging that Warden had been involved in an automobile accident on September 29, 1995, with a car driven by Reino Lesseda, Jr., who was insured by American Family. The complaint claimed that Warden was at fault for the accident and it sought \$836.54 from him. The complaint listed an address for Warden in Joliet, Illinois. The record contains a document entitled "AFFIDAVIT OF PROCESS SERVER." (Capitalization in original.) This document lists Warden's name and the same address in Illinois listed on the complaint. A box is checked besides the typed notation, "Moved, Left no Forwarding," and it was signed by someone who claimed to be a "Licensed or Registered RBI PRIVATE DETECTIVE."

² In its brief, American Family contends that the trial court "abused its discretion." Appellate courts have not used the phrase "abuse of discretion" since 1992 because of its unjustified negative connotations. See *Hefty v. Hefty*, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992). The correct phraseology is "erroneous exercise of discretion." *Id.*

(Capitalization in original.) Also in the record is a document entitled “PROOF OF PUBLICATION,” which reflects that a notice was published in *The Daily Reporter*, a Milwaukee newspaper, listing Warden’s name and the Illinois address, along with a statement he was being sued by American Family, and a command that he appear in the Milwaukee County Courthouse on a particular date. (Capitalization in original.) When Warden did not appear on the date reflected in the notice, a default judgment was entered against him in the amount of \$1006.54. In addition, the record contains a document entitled “INFORMATION FOR CERTIFICATION OF JUDGMENT TO MVD,” which contains, among other things, Warden’s name, an address in Illinois, a Illinois driver’s license number and the amount of the judgment. (Capitalization in original.)

¶3 Besides a letter notifying the court that there was a substitution of lawyers in 1999 and the forwarding of the judgment to the Motor Vehicle Department, nothing occurred in this case until Warden filed a notice to reopen in 2005. In his 2005 motion Warden wrote, with regards to why the matter should be reopened, that his failure to appear should be excused because the underlying complaint contained “the wrong address plus I was in the State of Illinois when the accident took place.... I was in Jail when the accident took place.... I never had an accident in Wis[consin].” The trial court granted him a hearing, at which time Warden told the court that he was incarcerated at the time of the accident, but it was his mother’s car that was involved in the accident and he suspected that it was his brother who was the actual driver. An attorney for American Family opposed the motion. The trial court refused to reopen the case, reasoning that Warden had constructive notice of the judgment when he was charged with operating after revocation in April 2000, and at that time he should have discovered the outstanding judgment. Consequently, the trial court found that his motion was

untimely and urged Warden to enter into a payment schedule with American Family.

¶4 In April 2008, Warden filed another motion to reopen. In this motion, he argued that the matter should be reopened and his failure to appear excused “[b]ecause I was never served with any paper stating that I was being sued.... I have legal documents stating that I was in custody in another state from 1-26-1994 to 8/03/1997.” The trial court set the matter for a hearing. On the hearing date, Warden appeared with a lawyer who argued that Warden was the victim of identity theft and that the initial publication supporting the default judgment was faulty. The trial court addressed Warden’s publication argument, stating that the trial court assumed that it had been raised in the earlier motion and found that it was untimely to bring it up now. The trial court did, however, give Warden an opportunity to present proof of his incarceration.³ On an adjourned date, Warden presented evidence that he was incarcerated at the time of the accident. Again, an attorney for American Family opposed the motion. Ultimately, the trial court remarked that the documentation “is compelling,” and in the interests of justice, granted the motion to reopen, vacated the judgment and dismissed the case. This appeal follows.

II. ANALYSIS.

¶5 American Family argues that the trial court erroneously exercised its discretion when it reopened the default judgment, vacated the judgment and dismissed the action. American Family first argues that WIS. STAT. § 799.29(1)

³ Getting proof of Warden’s incarceration was further complicated by the fact he was booked into the Illinois prison under the name “Timothy Warden.”

limits the time within which a motion to reopen a default judgment can be filed to twelve months after entry of judgment.⁴ Next, American Family submits that WIS. STAT. § 806.07, which allows for relief from judgments under certain conditions, does not apply to small claims actions, and, in any event, under § 806.07, the motion has to be made within a reasonable time; and here, the second motion to reopen was untimely as it was brought nearly eleven years after the default judgment was entered. While this court agrees that the trial court cannot extend the time for bringing a motion to reopen a default judgment; § 806.07 does not apply to small claims cases; and normally bringing a motion to reopen nearly eleven years later would be untimely, because here, the service by publication was defective, the trial court never had personal jurisdiction over Warden; thus, the judgment is void.

¶6 We review a motion to reopen under the erroneous exercise of discretion standard. See *Kovalic v. DEC Int'l*, 186 Wis. 2d 162, 166, 519 N.W.2d 351 (Ct. App. 1994). “We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court’s decision.” *Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶7 WISCONSIN STAT. § 799.29(1)(a) and (c) control the time in which a motion to reopen can be brought in a small claims case:

(1) MOTION TO REOPEN. (a) There shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown.

⁴ Actually, the 1997-98 version of the statutes provides for a six-month limit.

....

(c) In other actions under this chapter, the notice of motion must be made within 6 months after entry of judgment unless venue was improper under s. 799.11. The court shall order the reopening of a default judgment in an action where venue was improper upon motion or petition duly made within one year after the entry of judgment.

American Family correctly notes that the trial court could not enlarge the time period or waive the time limits found in § 799.29. *See Wisconsin Natural Gas Co. v. Kletsch*, 95 Wis. 2d 691, 696-97, 291 N.W.2d 640 (Ct. App. 1980) (When a specific statute controls the reopening of default judgments, a motion to reopen that is untimely cannot be granted.). So, too, American Family is correct that WIS. STAT. § 806.07 does not apply to small claims actions. *See King v. Moore*, 95 Wis. 2d 686, 689-90, 291 N.W.2d 304 (Ct. App. 1980) (The time limit set by the small claims statute within which a small claims defendant must make a motion to reopen a default judgment takes precedence over the time limit in § 806.07.).

¶8 This court now turns to Warden’s final claim that the trial court never obtained personal jurisdiction over him because the publication was defective and, as a consequence, the judgment is void. American Family suggests that this matter has been waived because it was not addressed at the trial court. This is incorrect. As noted, the trial court, mistakenly believing that the service issue had been addressed at the earlier motion to reopen, did address it and found it was now “untimely.”

¶9 A court gains jurisdiction over the parties to a lawsuit only by valid personal or substituted service of the summons and complaint. *See WIS. STAT. § 801.04; Span v. Span*, 52 Wis. 2d 786, 789, 191 N.W.2d 209 (1971). One who cannot obtain personal service can resort to substitute service by a showing of reasonable and due diligence in attempting personal service of the summons and

complaint. *See* WIS. STAT. § 801.11(1)(c). “[O]ne who seeks substituted service by publication must first exhaust with due diligence any leads or information reasonably calculated to make personal service possible.” *West v. West*, 82 Wis. 2d 158, 166, 262 N.W.2d 87 (1978).

¶10 The record reflects that American Family was unable to serve Warden personally with the small claims summons and complaint as the process server’s affidavit stated that Warden had moved from his address in Joliet, Illinois, and left no forwarding address. Thus, American Family had to resort to publication. In order to obtain jurisdiction by publication, American Family was required to publish the notice under WIS. STAT. § 985.02. Section 985.02(1) directs that “a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected.” It is undisputed that the driver in the accident claiming to be Warden gave an Illinois address and an Illinois driver’s license number. The notice in this case was published in Milwaukee. Milwaukee is not an area likely to give notice to someone who lives in Joliet, Illinois, which is approximately 118 miles from Milwaukee.⁵

¶11 A similar situation arose in the Minnesota case of *Electro-Measure, Inc. v. Ewald Enterprises, Inc.*, 398 N.W.2d 85 (Minn. Ct. App. 1986). The Minnesota court said that “the publication must be ‘reasonably calculated’ to reach the interested party.” *Id.* at 88. Consequently, the judgment was found void. *Id.* at 90. There, Electro-Measure, Inc., published its notice in a Wisconsin newspaper after it failed to serve Ewald Enterprises, a Minnesota company with an

⁵ This court has taken judicial notice that Joliet, Illinois, is approximately 118 miles from Milwaukee.

office and phone in Minnesota, personally. *Id.* at 87. The Minnesota court determined that publication of the summons and complaint in Wisconsin was not reasonably calculated to give notice to the respondent, a Minnesota company, and thus, there was no personal jurisdiction to enter a judgment against Ewald. *Id.* at 89. The Minnesota court analyzed Wisconsin statutes and cases to reach its conclusion. *See id.* at 88-89. It is axiomatic that a judgment secured without obtaining personal jurisdiction over a party is void, and a void judgment can be collaterally attacked at any time in any proceeding, state or federal. *See Neylan v. Vorwald*, 124 Wis. 2d 85, 99, 368 N.W.2d 648 (1985).

¶12 In this case, the original trial court never had personal jurisdiction over Warden. Thus, the judgment was void from its inception. Accordingly, the order of the circuit court is affirmed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

