

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 20, 2004**

Cornelia G. Clark  
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. 03-2659  
STATE OF WISCONSIN**

**Cir. Ct. No. 03SC003302**

**IN COURT OF APPEALS  
DISTRICT IV**

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**BELMAR APARTMENTS,  
  
PLAINTIFF-RESPONDENT,  
  
V.  
  
DARRYL POWELL,  
  
DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for La Crosse County:  
DENNIS G. MONTABON, Judge. *Affirmed.*

¶1 DYKMAN, J.<sup>1</sup> Darryl Powell appeals from a judgment against him in an eviction action. Powell contends that the circuit court lacked jurisdiction

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

over him because the process server improperly served an eviction summons contrary to WIS. STAT. §§ 799.42, 799.12(1), and 801.11. Because the summons and complaint were properly served under WIS. STAT. § 799.16(3), we affirm.

¶2 The parties do not dispute the material facts. Belmar Apartments asked the La Crosse County Sheriff's Department to serve Powell in an eviction action. A sheriff's deputy attempted three times to serve Powell personally, but did not find him. On September 9, 2003, the sheriff's deputy posted an eviction summons and complaint on the door of Powell's apartment. Belmar Apartments sent a copy of the summons and complaint to Powell by certified mail, which ordered him to appear at a hearing ten days later. At a hearing held on September 26, 2003, Powell moved to dismiss for insufficiency of service. The trial court denied Powell's motion and issued a writ of restitution. Powell appeals.

¶3 Powell argues that WIS. STAT. § 801.11(1)(c) requires service by publication in addition to service by mailing because the La Crosse County Sheriff failed to serve him with personal or substituted service. He concludes that Belmar Apartments' failure to prove compliance with the statutory service requirements constitutes "a fundamental defect fatal to the action, regardless of prejudice." *Hagen v. City of Milwaukee Employee's Ret. Sys. & Annuity & Pension Bd.*, 2003 WI 56, ¶13, 262 Wis. 2d 113, 663 N.W.2d 268. He contends that therefore the trial court lacked personal jurisdiction over him and demands that the writ be quashed.

¶4 Personal jurisdiction is a question of law, which we review de novo. *Marsh v. Farm Bureau Mut. Ins. Co.*, 179 Wis. 2d 42, 505 N.W.2d 162 (Ct. App. 1993).

¶5 A small claims court obtains personal jurisdiction over a defendant “when the defendant is served with a summons in the manner prescribed by the statutes.” *Hagen*, 262 Wis. 2d 113, ¶12. The plaintiff has the burden to prove that the defendant was properly served. *Id.*

¶6 The Wisconsin Statutes have a detailed provision for service of process in eviction actions when the defendant cannot be served by personal or substituted service. WISCONSIN STAT. § 799.16(3)(a) provides that:

(3) In eviction actions, when the defendant has not been served with personal or substituted service pursuant to s. 799.12(1) and does not waive the defense of lack of jurisdiction over the person under s. 802.06(8), service may be made as follows:

(a) If the summons is returned more than 7 days prior to the return date with proof that the defendant cannot be served with personal or substituted service within the state under s. 799.12 (1), the plaintiff may, at least 7 days prior to the return date, affix a copy of the summons and complaint onto some part of the premises where it may be conveniently read. At least 5 days prior to the return date an additional copy of the summons and complaint shall also be mailed to the defendant at the last-known address, even if it is the premises which are the subject of the action,...

¶7 Belmar Apartments properly served the summons and complaint under WIS. STAT. § 799.16(3). Powell does not dispute that the sheriff’s deputy could not personally serve him with reasonable diligence. The deputy could not use substituted service. Therefore, he posted a copy of the summons and complaint on the door more than seven days before the hearing, so that Powell could conveniently read them. Powell read them, acknowledged receipt of the copy mailed to him, and appeared at the hearing. Powell did not then and does not

now question whether the copy was mailed at least five days before the hearing.<sup>2</sup> Because the summons and complaint were properly served, service by publication was unnecessary.

¶8 Belmar Apartments asks us to dismiss this appeal as frivolous. Powell responds that WIS. STAT. § 809.25(3) requires either a finding of bad faith or that the appeal is without a reasonable basis in law. We cannot make a finding of any sort, let alone one of bad faith. *Wis. Bell, Inc. v. DOR*, 164 Wis. 2d 138, 144, 473 N.W.2d 587 (Ct. App. 1991). But whether Powell’s appeal lacks a reasonable basis in law is another matter. WISCONSIN STAT. § 799.16(3) exactly pertains to what occurred here. An appeal based on an inapplicable statute is frivolous. *Estate of Koenigsmark v. Richardson*, 119 Wis. 2d 394, 398-99, 351 N.W.2d 169 (Ct. App. 1984). Powell’s appeal is based on several inapplicable statutes, and he has failed to cite or discuss § 799.16(3) in the trial court or in this court. We conclude that this appeal is frivolous. However, this conclusion is probably of no consequence. Section 809.25(3) provides as a sanction the imposition of costs, fees and reasonable attorney fees. Belmar Apartments is already entitled to any costs and fees it has incurred pursuant to WIS. STAT. § 799.25. And its brief gives no indication that it was filed by an attorney, so that no attorney fees can be assessed. We therefore do not remand to determine the appropriate costs, fees and attorney fees for this appeal.

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<sup>2</sup> Powell asserts in his briefs: “Bellmar Apartments did not provide any proof at the eviction hearing of mailing the Summons and Complaint to Mr. Powell by certified mail.” First, certified mail is unnecessary; ordinary mail is acceptable. WIS. STAT. § 799.16(3). Second, Bellmar Apartments’ representative testified that he mailed a copy of the summons and complaint to Powell. The trial court obviously accepted that testimony. Third, Powell’s motion to dismiss admitted that he received a copy of the summons and complaint by certified mail.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS.  
STAT. RULE 809.23(1)(b)4.

