

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 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 Nos. 03-3195-FT
03-3533-FT**

Cir. Ct. No. 03CV001091

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SOCIETY INSURANCE,

PLAINTIFF-RESPONDENT,

CLIFFORD E. TJUGUM,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

DAVID PONCE,

DEFENDANT,

LUIS CANDELARIA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ROBERT DeCHAMBEAU, Judge. *Reversed and cause remanded for further proceedings.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. In this appeal Luis Candelaria seeks review of an order denying a motion to vacate a default judgment.¹ The issue is whether Candelaria was properly served. We reverse.²

¶2 The circuit court granted default judgment against Candelaria on October 8, 2003. Candelaria moved to vacate the judgment on October 16, 2003, contending that he had never been served in accordance with WIS. STAT. § 801.11. The circuit court denied the motion to vacate.

¶3 WISCONSIN STAT. § 801.11(1)(b) provides “[i]f with reasonable diligence” the defendant cannot be served personally, service can be accomplished “by leaving a copy of the summons at the defendant’s usual place of abode ... [i]n the presence of a competent adult, currently residing in the abode of the defendant, who shall be informed of the contents of the summons.” The burden of proving that service was properly effectuated is on Society Insurance, the party “alleged to have served the defective pleading.” *See American Family Mut. Ins. Co. v. Royal Ins. Co.*, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). “The service of a summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction ... notwithstanding actual knowledge by the defendant.” *Id.* (citation omitted).

¹ This case was submitted to the court on the expedited appeals calendar. *See* WIS. STAT. RULE 809.17 (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² Candelaria’s notice of appeal references both the default judgment and the order denying the motion to vacate. We reverse only the order denying the motion to vacate the judgment. Whether the default judgment should be set aside will turn on whether proper service was obtained, a question the circuit court will address on remand.

¶4 Candelaria argues that he was not properly served because he was living at 4342 Melody Lane, Apt. 5, in Madison when the process server left the summons at 461 Primrose Lane for him.³ Society Insurance contends that Candelaria *was* properly served at 461 Primrose Lane because the Wisconsin Circuit Court Automation Project (CCAP) listed 461 Primrose Lane as Candelaria’s address and because the process server spoke to Candelaria by phone from that address and Candelaria told the process server to leave the summons there for him.⁴

¶5 Whether service was proper turns on whether Candelaria’s “usual place of abode” was 461 Primrose Lane. *See* WIS. STAT. § 801.11(1)(b). As summarized above, there is a factual dispute on this point. The circuit court erred

³ In support of his argument, Candelaria submitted an affidavit in which he stated: (1) that he had never been personally served with the summons and complaint; (2) that on the date of alleged service he was living at 4342 Melody Lane, Apt. 5, Madison, Wisconsin, where he had lived and stayed from March 1, 2003, until mid-June 2003; (3) that he was not living or staying at 461 Primrose Lane on April 30, 2003, when the summons and complaint were left with Leticia Tecalero at that address. This affidavit was made in Spanish and translated to English.

⁴ Society Insurance submitted three affidavits in support of its claim that it had properly served Candelaria. First, it submitted the affidavit of Jonathan Overlin, the process server, who stated: (1) that Leticia Tecalero, an adult at 461 Primrose Lane, informed him that Candelaria was “not home,” but that he could be reached by telephone; (2) that a second individual handed him a cellular telephone and identified the party at the other end of the line as Luis Candelaria; (3) that the individual on the telephone, identifying himself as Luis Candelaria and speaking in English, indicated that he understood that Overlin was serving a copy of the summons and complaint on him and told him to leave a copy of the summons and complaint at the 461 Primrose Lane residence with Ms. Tecalero, which he did.

Society Insurance also submitted two affidavits from employees of its attorney. Susan Burdick, a paralegal, submitted an affidavit in which she detailed a fruitless search for Candelaria’s address. Mary Mahoney submitted an affidavit detailing her attempts to locate Candelaria. She averred that, as part of her search, she obtained an address of 461 Primrose Lane from the Wisconsin Circuit Court information website, known as CCAP. She did not attach documentation to substantiate this, however, other than a handwritten notation, apparently written by her, that said: “461 Primrose Ln Madison WI 53713 CCAP – 3/28/03.”

in concluding that Candelaria had been properly served because it did not resolve this factual dispute. Instead, the circuit court concluded that Candelaria had knowledge of the suit because, according to plaintiff's counsel, Candelaria had personally talked to the process server. It is well established, however, that knowledge of a suit does not confer personal jurisdiction and that "Wisconsin compels strict compliance with the rules of statutory service, even though the consequences may appear to be harsh." See *Useni v. Boudron*, 2003 WI App 98, ¶8, 264 Wis. 2d 783, 662 N.W.2d 672. Therefore, we remand to the circuit court for an evidentiary hearing to determine whether 461 Primrose Lane was Candelaria's "usual place of abode" on April 30, 2003.

By the Court.—Order reversed and cause remanded for further proceedings consistent with this opinion.

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

