COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2483 **Cir. Ct. No. 2009CV132**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RICHARD HOEFT,

PLAINTIFF-APPELLANT,

V.

ROBERT DEZOTELL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ashland County: JOHN P. ANDERSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Richard Hoeft, pro se, appeals from an order vacating a default judgment and dismissing his complaint against Robert Dezotell

without prejudice. Hoeft argues the circuit court erred by finding his summons fundamentally defective.[1] Hoeft also contends that any defect in the summons was technical, Dezotell was not prejudiced, and Dezotell waived any objection to a defective summons. Finally, Hoeft claims the court erred by vacating the damage award in the default judgment. We reject Hoeft's arguments and affirm.

¶2 This matter arises out of Hoeft's lawsuit against Dezotell alleging "slander, libel, and defamation of character." The complaint was based upon allegations that Dezotell "did in fact tell Ashland County Deputy Frostman that he saw Hoeft attempt to steal a load of firewood from a cabin in Ashland County." Dezotell was a witness in a pending criminal case against Hoeft. Hoeft's complaint demanded "[n]oneconomic damages in the amount of $1,000,000.00 against Dezotell."

¶3 Hoeft's summons and complaint were served on Dezotell on August 18, 2009. Dezotell sent a letter to the Ashland County District Attorney, which Dezotell believed constituted an answer to Hoeft's complaint.[2] Dezotell's letter stated, "My actions regarding this complaint are filed in the police report that the deputy sheriff took about the incident. I stand by that report." Dezotell also indicated that he considered Hoeft's lawsuit to be a "threat to get me to change my statement as to what I saw."

[1] Hoeft uses the phrase "abused its discretion." We have not used that phrase since 1992, when our supreme court changed the terminology in reviewing a circuit court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion." *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

[2] The letter is date-stamped received by the Ashland County District Attorney's office on September 15, 2009. However, Dezotell testified that he answered the complaint within twenty days.

¶4 On March 17, 2010, the circuit court issued a notice of hearing for a status conference to be held on March 24.[3] Dezotell did not appear at the March 24 status hearing. At the hearing, the circuit court indicated that the court file contained a copy of Dezotell's letter to the district attorney, but noted "there's nothing in the file indicating proof of service." The court then asked Hoeft, "On the assumption that he's been served, what would you like to do today?" Hoeft responded:

> I would like to ask for a default judgment and have that be granted and the day that I bring the service of – the proof of service of it – be entered, or ordered, or whatever. I don't see why that can't be out of the line.

¶5 The court indicated it would grant default judgment "conditionally, upon the filing of adequate proof of service and that the proof of service indicates that the statutory time frame has elapsed to file an answer." However, the court subsequently stated, "Mr. Hoeft, your Summons is defective." The court indicated it would still grant default judgment "because nobody raised the issue, but I'm telling you your Summons is defective." The court then stated, "Again, conditionally default judgment on one million dollars plus interest, costs and disbursements will be granted." On April 12, 2010, Hoeft filed a "certificate of service," and an order granting default judgment was filed on April 23.

¶6 On May 3, 2010, Dezotell filed a motion for relief from judgment pursuant to WIS. STAT. § 806.07, together with a motion to stay execution of the default judgment.[4] An affidavit supporting the motion for relief averred that

[3] The following day, the circuit court executed an amended notice of hearing for the status conference on March 24. It appears from the record that the original notice indicated the court would appear via video conference.

[4] References to the Wisconsin Statutes are to the 2009-10 version unless noted.

Dezotell did not receive notice of the status hearing prior to leaving town to work as a laborer for an extended period. Dezotell subsequently filed an amended motion for relief from judgment, and a second amended motion for relief, together with a motion for dismissal, contending that the default judgment was void because the summons was fundamentally defective and otherwise not in conformity with WIS. STAT. ch. 802.

¶7 Following a hearing, the circuit court concluded, "There is no question in my mind that Mr. Hoeft's Summons falls substantially short of the statutory guidelines …." The court concluded that the summons "is so lacking in substance that it becomes a fundamental defect." The court further stated that even if the defects could be assumed to be technical, "the inadequacy of the Summons here, together with … the criminal case which apparently existed and [in] which the Defendant was a witness, caused enough confusion that the defect becomes prejudicial." The court further determined that it had erred by not requiring, at an evidentiary hearing, proof of monetary damages. Finally, the court determined that the interests of justice required relief from the judgment. The court therefore voided the default judgment and dismissed the matter without prejudice. Hoeft now appeals.

¶8 To commence a civil action, a plaintiff must file and serve a summons and complaint. WIS. STAT. § 801.02. The form and content of the summons are governed by mandatory statutory language, and the statutes provide specific examples of proper summonses. The content of a summons is addressed in WIS. STAT. § 801.09. Section 801.095 provides that "the summons shall be substantially in one of the forms specified in subs. (1) to (4)."

¶9 There is no question that Hoeft's summons is defective. Hoeft's summons is not in substantial compliance with any of the four statutory examples in WIS. STAT. § 801.095(1) to (4). The issue then hinges on whether the defects are fundamental or technical in nature. *See* ***American Family Mut. Ins. Co. v. Royal Ins. Co.***, 167 Wis. 2d 524, 534, 481 N.W.2d 629 (1992). A fundamental defect deprives the circuit court of personal jurisdiction over the defendant even if there is no prejudice. *See* ***DNR v. Walworth County Bd. of Adjust.***, 170 Wis. 2d 406, 417, 489 N.W.2d 631 (Ct. App. 1992). If a defect is technical, the court has personal jurisdiction only if the complainant can show the defendant was not prejudiced. ***American Family***, 167 Wis. 2d at 533. Whether a defect is technical or fundamental is a question of law that we review independently. *See* ***Rabideau v. Stiller***, 2006 WI App 155, ¶¶8-9, 295 Wis. 2d 417, 720 N.W.2d 108.

¶10 Here, we agree with the circuit court's common-sense conclusion that Hoeft's summons was so lacking in substance as to constitute a fundamental defect. As the court properly observed, the summons did not provide notice of where to file or serve copies of a responsive pleading. The summons also did not provide notice that Dezotell must respond with a written answer, as that term is used in WIS. STAT. ch. 802, and that the court may reject or disregard an answer that does not follow the requirements of the statutes. Moreover, the summons did not provide notice that failure to properly answer may result in a default judgment. The court concluded:

> I think that had Mr. Hoeft's Summons missed maybe one or two highlighted areas that we have talked about, it may be more technical, I think. His Summons, though, is so lacking in substance that it becomes a fundamental defect. And again, had you just looked in the statute book, you would have seen the form. You could have typed it verbatim. It's all there for you.

The summons deviated so substantially from the form requirements in WIS. STAT. § 801.095 as to render it fatally defective, depriving the circuit court of personal jurisdiction, and requiring dismissal of the lawsuit.[5]

¶11 Even if we could assume the defects were technical, we would also agree with the circuit court that Dezotell was prejudiced. Based upon Dezotell's testimony under direct examination by Hoeft at the hearing on the motion for relief from judgment, the court concluded that the defects in the summons, together with the concurrent existence of the criminal case in which Dezotell was a witness, "caused enough confusion that the defect becomes prejudicial." Hoeft has failed to persuade us to the contrary.

¶12 Hoeft insists that "[t]he only function of a summons is notice to the defendant." However, that argument merely begs the question. Quite simply, the scope of Hoeft's noncompliance was contrary to the legislative purpose of clearly informing persons who are unfamiliar with court proceedings as to what response is required of them. *See, e.g.*, 1983 Wis. Act 323, § 1. The summons failed in numerous respects to provide Dezotell the required notice.

¶13 Hoeft also argues that Dezotell waived his right to raise any issues because it "is undisputed that Dezotell did not file a motion pretrial." Hoeft's argument is difficult to discern. In any event, the record is clear that Dezotell filed

[5] We also note that WIS. STAT. § 802.02(1m) specifically provides that "[w]ith respect to a tort claim seeking the recovery of money, the demand for judgment may not specify the amount of money the pleader seeks." Hoeft's complaint improperly demanded $1,000,000. As a result, the circuit court properly concluded that it had erred by failing to require proof of monetary damages prior to entry of judgment. As the court stated, "I did not at the time put Mr. Hoeft to his proofs."

motions in accordance with WIS. STAT. § 802.06(2), and the defense of lack of personal jurisdiction was not waived.

¶14 Finally, we note that Hoeft suggests circuit court bias or prejudice. Hoeft's briefs contain generalized statements such as "Dezotell … gets the judge to reverse the judgment, simply because [Judge] Anderson doesn't like Hoeft." Hoeft fails to provide record citations to support these very serious contentions, and we will not further address the issue.[6]

By the Court.—Order affirmed.

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

[6] Dezotell has filed a motion pursuant to WIS. STAT. RULE 809.25(3), contending Hoeft's appeal is frivolous. We conclude the appeal is not entirely frivolous and therefore deny the motion. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶2, 277 Wis. 2d 21, 690 N.W.2d 1.