

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-3226

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MICHAEL SKAARER,

Plaintiff-Respondent,

v.

**NANCY SKAARER, f/k/a NANCY MILLER,
n/k/a NANCY BOLLIG,**

Defendant-Appellant.

APPEAL from an order of the circuit court for Rock County:
PATRICK J. RUDE, Judge. *Reversed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Nancy Bollig appeals from an order holding her in contempt. Although she raises many issues, we address only one: whether the trial court had personal jurisdiction over Bollig. Because we conclude that the trial court did not have personal jurisdiction, we reverse.

Section 801.11, STATS., sets forth the means by which a court attains personal jurisdiction over a defendant. The statute provides:

A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:

- (1) NATURAL PERSON. Except as provided in sub. (2) upon a natural person:
 - (a) By personally serving the summons upon the defendant either within or without this state.
 - (b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode

As the statute provides, personal service must be attempted with "reasonable diligence" before an alternative method of service can be employed. *See also Heaston v. Austin*, 47 Wis.2d 67, 73, 176 N.W.2d 309, 312 (1970). If the defendant is not personally served and challenges the service, "the server shall state in [an] affidavit when, where and with whom the copy was left, *and shall state such facts as show reasonable diligence in attempting to effect personal service on the defendant.*" Section 801.10(4)(a), STATS. (Emphasis added.) Whether "reasonable diligence" was exercised has, at times, been treated as a question of fact, but it is actually a mixed question of fact and law. What attempts were made at service is a question of fact. *Welty v. Heggy*, 124 Wis.2d 318, 324 n.2, 369 N.W.2d 763, 767 (Ct. App. 1985). The legal significance of those attempts is a question of law. *Id.*

Bollig contends that the process server did not exercise reasonable diligence in attempting to personally serve her in the underlying action and that, therefore, the trial court did not have personal jurisdiction over her.¹ After

¹ The order in the underlying action was issued on October 19, 1992. The order holding Bollig in contempt for failing to comply with the October 19 order was issued on November 30, 1993. That is the order from which this appeal is taken.

reviewing the issue, we concluded that an evidentiary hearing was necessary to determine whether Bollig was properly served. We remanded to the trial court. The trial court's findings are now before us. The trial court found that "[the process server] used reasonable diligence in attempting to serve [Bollig]." This is the only finding that addresses reasonable diligence.

Although the trial court characterizes its "reasonable diligence" finding as a factual finding, the trial court did not state what attempts were made at service or what facts underlie its conclusion that reasonable diligence was exercised. The trial court simply stated an ultimate fact--that "reasonable diligence" was exercised. This is a conclusion of law. *Welty*, 124 Wis.2d at 324 n.2, 369 N.W.2d at 767.

When a trial court has not made findings of evidentiary or historical facts, we may: (1) affirm the judgment if clearly supported by the preponderance of the evidence, (2) reverse if not so supported, or (3) remand for the making of findings and conclusions. *Walber v. Walber*, 40 Wis.2d 313, 319, 161 N.W.2d 898, 901 (1968).

We have reviewed the record for any evidence to support the trial court's legal conclusion that reasonable diligence was exercised. The only evidence in the record regarding service in the underlying action is an affidavit from the process server in which he states: "I attempted to personally serve defendant, Nancy Skaarer ... and was unable to do so." The affidavit does not state how or what steps the process server took to locate Bollig before making substituted service. Because the trial court did not find evidentiary facts which support its conclusion that the process server exercised reasonable diligence in attempting to serve Bollig, and because the record does not establish those facts, the trial court lacked personal jurisdiction over Bollig in the underlying action. Accordingly, we reverse the order holding her in contempt.

By the Court. — Order reversed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.