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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 18, 2024

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You are hereby notified that the Court has entered the following opinion and order:

2023AP64

Jacob Kostrzewa v. Labor and Industry Review Commission
(L.C. # 2022CV6222)

Before Donald, P.J., Geenen and Colón, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jacob Kostrzewa, *pro se*, appeals an order dismissing his action for judicial review of an unemployment insurance decision of the Labor and Industry Review Commission (“the commission”). The circuit court concluded that Kostrzewa failed to serve his summons and complaint on the commission within the statutory deadline and that he failed to show that he was entitled to an extension of that deadline. Based upon a review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We summarily affirm.

The commission denied Kostrzewa unemployment insurance in a decision dated August 30, 2022, and mailed a copy to him that same day. An enclosure included with the decision provided an explanation of his appeal rights and the procedure he must follow to pursue them. The enclosure stated that any party could seek judicial review within thirty days after the date of the decision and that “the filing of the summons and the complaint with the court and service of authenticated pleadings must be completed within 30 calendar days of the decision date.” The enclosure further stated, in bolded text: “If the authenticated pleadings are mailed to the commission, service will only be effective if they are actually received by the commission within the appeal period (30 days). It is not sufficient for the appeal to be postmarked by the due date.”

Kostrzewa filed the summons and complaint in circuit court on September 29, 2022, the thirtieth day after the commission’s decision. The commission received a copy of the pleadings in the mail on September 30, 2022, the thirty-first day after the decision. The commission moved to dismiss the circuit court action on the ground that Kostrzewa served the commission after the thirty-day service deadline had passed. Following briefing and argument, the circuit court agreed with the commission and dismissed the case. Kostrzewa appeals to this court.

Judicial review of the commission’s unemployment insurance decision is governed by WIS. STAT. § 108.09(7). The statute required Kostrzewa both to file his summons and complaint

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

in circuit court and to serve those pleadings on the commission within thirty days of the August 30, 2022 decision. *See* § 108.09(7)(c). A party seeking judicial review must comply with § 108.09(7), because that statute is the “exclusive statutory scheme” for commencing the action. *DWD v. LIRC*, 2016 WI App 21, ¶4, 367 Wis. 2d 609, 877 N.W.2d 620 (citation omitted).²

The Wisconsin Administrative Code makes clear that service on the commission by mail “is effective only if the pleadings are actually received by the commission within the appeal period.” WIS. ADMIN. CODE § LIRC 1.14. Kostrzewa served the commission by mail with his summons and complaint. That is a permissible form of service, but it is effective only if the commission receives the pleadings within the thirty-day period allowed by WIS. STAT. § 108.09(7). *Schiller v. DILHR*, 103 Wis. 2d 353, 355-56, 309 N.W.2d 5 (Ct. App. 1981). Here, the commission did not receive the pleadings within the statutory deadline.

² We decided *DWD v. LIRC*, 2016 WI App 21, ¶4, 367 Wis. 2d 609, 877 N.W.2d 620, under a prior version of the Wisconsin statutes. *Id.*, ¶1 & n.1. Under that version, WIS. STAT. § 108.09(7) provided that a party could obtain judicial review “in accordance with [WIS. STAT. §] 102.23[.]” Pursuant to 2015 Wis. Act 334, §§ 54-56, the legislature transferred the procedure for obtaining judicial review to § 108.09(7). As the commission explains, the statutory amendment involved few substantive changes to the procedure for judicial review, and none of those changes are relevant here. The commission argues that we may therefore rely on cases decided under prior versions of the statutes governing judicial review, because “[l]egislative inaction following judicial construction of a statute, while not conclusive, evinces legislative approval of the interpretation.” *State v. Johnson*, 207 Wis. 2d 239, 246, 558 N.W.2d 375 (1997). Further, the commission argues that when, as here, “the legislature has made amendments to the statutory section in question and has not corrected the court’s interpretation, the presumption of adoption or ratification is strengthened.” *York v. National Cont’l Ins. Co.*, 158 Wis. 2d 486, 497, 463 N.W.2d 364 (Ct. App. 1990).

We agree with the commission and conclude that cases regarding judicial review decided under prior versions of WIS. STAT. § 108.09(7) and WIS. STAT. § 102.23 guide our analysis here. Moreover, Kostrzewa chose not to file a reply brief, and we view that choice as a concession regarding the applicability of cases interpreting earlier versions of those statutes. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578.

The circuit court lacks competency to proceed when the party seeking judicial review of the commission's decision fails to comply with a statutory requirement. *Brandt v. LIRC*, 166 Wis. 2d 623, 627, 634-35, 480 N.W.2d 494 (1992). Thus, WIS. STAT. § 108.09(7)(a) provides that “[i]f a plaintiff fails to ... serve the commission as required by this subsection, the court shall dismiss the action.” We acknowledge that dismissal denies Kostrzewa the opportunity for judicial review and therefore leads to a harsh result. “The cases are clear, however, that the statutory procedures must be strictly followed.... ‘Uniformity, consistency, and compliance with procedural rules are important aspects of the administration of justice.’”³ *Gomez v. LIRC*, 153 Wis. 2d 686, 693, 451 N.W.2d 475 (Ct. App. 1989) (citations omitted).

In the circuit court, Kostrzewa argued that dismissal was not required because the circuit court could make his service on the commission timely by extending his deadline under WIS. STAT. § 108.09(7)(c)1. That subsection provides: “If the circuit court is satisfied that a party in interest has been prejudiced because of an exceptional delay in the receipt of a copy of any order, the circuit court may extend the time in which an action may be commenced by an additional 30 days.” The circuit court concluded that Kostrzewa had not demonstrated an exceptional delay or prejudice as a result. On appeal, Kostrzewa does not challenge the circuit court's analysis under § 108.09(7)(c)1. We deem the issue abandoned and do not discuss it further. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998).

We observe that Kostrzewa argues on appeal that this court should reverse the dismissal order for an assortment of reasons that he did not present to the circuit court. Specifically, he

³ Because dismissal prevents judicial review of the commission's decision, we do not consider Kostrzewa's appellate arguments asserting that the commission erred.

alleges that: his deadline for serving the commission is controlled by WIS. STAT. § 227.48, not WIS. STAT. § 108.09(7); service on the commission is complete upon mailing, not upon the commission's receipt of the pleadings; he was denied due process; and the commission lacked standing to move for dismissal of the circuit court case. We reject those arguments. "A fundamental appellate precept is that we 'will not blindside trial courts with reversals based on theories which did not originate in their forum.'" *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (citation and ellipsis omitted). Thus, we generally do not consider issues raised for the first time on appeal. *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. This principle applies to due process arguments. *Northbrook Wis., LLC v. City of Niagara*, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851. We conclude that Kostrzewa has forfeited the arguments that he did not first present to the circuit court.⁴

⁴ For the sake of completeness, we observe that the commission accurately explains in its response brief why Kostrzewa could not prevail on the arguments that he raises for the first time in this court, even if we were to consider those arguments. First, his claim that judicial review in this matter is governed by WIS. STAT. § 227.48, is defeated by WIS. STAT. § 108.09(7)(c)1., which provides: "[T]he order of the commission is subject to review only as provided in this subsection and not under ch. 227[.]" Second, his argument that he completed service on the commission upon mailing the summons and complaint cannot withstand the provision of WIS. ADMIN. CODE § LIRC 1.14, which provides that service on the commission by mail "is effective only if the pleadings are actually received by the commission within the appeal period." Third, his argument that he was denied due process is refuted by the record. "The fundamental requirements of procedural due process are notice and an opportunity to be heard." *Sweet v. Berge*, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983). Kostrzewa received both. His failure to avail himself of the opportunity for judicial review that the law afforded him is not a violation of due process. *Id.* Fourth, and last, his argument that the commission lacked standing to move for dismissal is unsupported because, pursuant to § 108.09(7)(a), the commission is a necessary party to an action for judicial review of a decision of the commission; therefore, the commission had standing to defend its position, including by seeking dismissal for Kostrzewa's failure to effect service. *Rathjen v. Industrial Comm'n*, 233 Wis. 452, 457, 289 N.W. 618 (1940).

Finally, Kostrzewa asks us to “apply WIS. STAT. § 752.35 and reverse the ... [c]ircuit [c]ourt’s decision.” Pursuant to § 752.35, this court may reverse an order in the interest of justice when the real controversy has not been fully tried or when it is probable that justice has miscarried. “[R]eversals under WIS. STAT. § 752.35 are rare and reserved for exceptional cases.” *State v. Kucharski*, 2015 WI 64, ¶41, 363 Wis. 2d 658, 866 N.W.2d 697. Here, Kostrzewa cites § 752.35 but fails to develop any argument showing that this is the exceptional case warranting discretionary relief by this court.⁵ Accordingly, we reject the claim. *Neenah Foundry Co. v. LIRC*, 2015 WI App 18, ¶53, 360 Wis. 2d 459, 860 N.W.2d 524. For all the foregoing reasons, we affirm.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

⁵ Kostrzewa also fails to show that WIS. STAT. § 752.35 applies to judicial review of administrative proceedings. *Cf. Habermehl Elec. Inc. v. DOT*, 2003 WI App 39, ¶25, 260 Wis. 2d 466, 659 N.W.2d 463.