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DISTRICT I

August 5, 2013

To:

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

2012AP2638

Fidelity National Title Insurance Company v. McClure Engineering Associates, Inc. (L.C. # 2012CV8359)

Before Curley, P.J., Fine and Kessler, JJ.

Fidelity National Title Insurance Company appeals the circuit court's order dismissing its action. The issue is whether Fidelity National timely commenced this action against McClure Engineering Associates, Inc., for work McClure Engineering completed on July 25, 2006. After review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

On July 17, 2012, Fidelity National attempted to commence an action against McClure Engineering by mailing a complaint to the clerk of circuit court. The clerk returned the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

complaint to Fidelity National on July 26, 2012, explaining that it could not be filed because Fidelity National did not include a summons. *See* WIS. STAT. § 801.02(1). On July 28, 2012, Fidelity National submitted the complaint with a summons to the clerk, commencing the action. McClure Engineering moved to dismiss on the grounds that Fidelity National filed the action after the applicable six-year statute of limitations had run. *See* WIS. STAT. § 893.37. The circuit court granted the motion to dismiss.

A plaintiff must file a summons and complaint with the clerk of circuit court to commence a civil action in which a personal judgment is sought. WIS. STAT. § 801.02(1). A defect in a summons or complaint is either technical or fundamental. *American Family Mut. Ins. Co. v. Royal Ins. Co.*, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). “[W]here the defect is technical, the court has personal jurisdiction only if the complainant can show the defendant was not prejudiced, and, where the defect is fundamental, no personal jurisdiction attaches regardless of prejudice or lack thereof.” *Id.* “Whether a defect is fundamental or technical is a question of law that we review without deference to the lower courts.” *See Burnett v. Hill*, 207 Wis. 2d 110, 121, 557 N.W.2d 800 (1997).

The supreme court has held that failing to file a complaint with the summons is a fundamental error because an action does not commence for purposes of tolling the statute of limitations until both a summons and a complaint are filed pursuant to WIS. STAT. § 801.02(1). *See Pulchinski v. Strnad*, 88 Wis. 2d 423, 427, 276 N.W.2d 781 (1979). The converse is also true. Where, as here, a plaintiff fails to file a summons with a complaint, no action is commenced. Fidelity National did not properly commence this action until July 28, 2012, when Fidelity National filed both a summons and a complaint with the clerk of courts. The six-year

statute of limitations ran on July 25, 2012, before this action was properly commenced. Therefore, the circuit court properly dismissed this case as barred by the statute of limitations.

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

Diane M. Fremgen
Clerk of Court of Appeals