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DISTRICT IV

June 22, 2016

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

2015AP2520 David D. Austin II v. Shawn Parent (L.C. # 2015CV167)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

David Austin II appeals an order dismissing his complaint based on his failure to timely serve Shawn Parent following the filing of the complaint in a personal injury action. Because the statute of limitations ran shortly after he filed the complaint, the failure of service was fatal to his claim. He argues that service on counsel for Parent "should be viewed as valid service" for purposes of satisfying the requirement of timely service, even though evidence shows that counsel was not an authorized agent of Parent. *See* WIS. STAT. §§ 801.02(1), 801.11(1)(d)

(2013-14).[1] In the alternative, Austin argues that he should be granted an enlargement of time for service under WIS. STAT. § 801.15(2), based either on excusable neglect or on the breach of counsel's alleged duty to state affirmatively that he was not authorized to accept service for Parent. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the order.

On May 10, 2012, Parent rear-ended an inmate transport vehicle in which Austin was a passenger. Austin was injured in the crash. On April 27, 2015, Austin filed a summons and complaint. He unsuccessfully attempted personal service on Parent. On June 15, 2015, Parent's counsel filed a notice of appearance and an answer, preserving the issue of jurisdiction. On June 23, 2015, Austin had the sheriff's office present Parent's counsel with the summons and complaint. Austin received a form from the sheriff indicating that the summons and complaint were "served." On August 19, 2015, Parent filed a motion for summary judgment, alleging that Austin had failed to personally serve him as required. On September 11, 2015, Parent's counsel filed an affidavit in support of the motion for summary judgment, averring that he was not and had at no time ever been an authorized agent of Parent by appointment or by law for service under WIS. STAT. § 801.11(1)(d).

Austin opposed summary judgment, arguing that substitute service was accomplished on Parent's counsel. Austin alternatively sought the remedy of enlargement of time to effect personal service as required. The circuit court granted the motion for summary judgment on the grounds that Parent was not served as required by statute and that the time for service of process

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

under WIS. STAT. § 801.02 cannot be enlarged. The circuit court also rejected Austin's argument that Parent's counsel was obligated to inform Austin that he was not an authorized agent and that his failure to do so entitled Austin to an enlargement of time. The circuit court noted that the statute of limitations had run and dismissed the complaint.

"The legal issue[] concerning … whether personal service was sufficient [is] dependent on the interpretation and application of statutes, and therefore [is a] question[] of law which an appellate court reviews de novo." ***Richards v. First Union Sec., Inc.***, 2006 WI 55, ¶12, 290 Wis. 2d 620, 714 N.W.2d 913. The statute at issue is WIS. STAT. § 801.02(1), which states, "A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing."

"Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh." ***Dietrich v. Elliott***, 190 Wis. 2d 816, 827, 528 N.W.2d 17 (Ct. App. 1995). "Failure to comply with sec. 801.02(1) Stats., constitutes a fundamental error which necessarily precludes personal jurisdiction regardless of the presence or absence of prejudice." ***American Family Mut. Ins. Co. v. Royal Ins. Co. of Am.***, 167 Wis. 2d 524, 534, 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." ***Span v. Span***, 52 Wis. 2d 786, 789, 191 N.W.2d 209 (1971). "[A]n agent's representations to a process server, regardless of the reasonableness of the process server's reliance on those representations, is insufficient to establish the agent's authority to accept service on the principal's behalf." ***Mared Indus., Inc. v. Mansfield***, 2005 WI 5, ¶30, 277

Wis. 2d 350, 690 N.W.2d 835. "[A]pparent authority is insufficient to bind a principal to service on an agent. Wisconsin Stat. § 801.11(1)(d)'s 'authorized by appointment' language, therefore, refers only to actual authority." ***Id.*** "[I]t is well-accepted, black-letter law that an attorney is not authorized by general principles of agency to accept on behalf of a client service of process commencing an action." ***Gangler v. Wisconsin Elec. Power Co.***, 110 Wis. 2d 649, 657, 329 N.W.2d 186 (1983).

Fontaine v. Milwaukee Cnty. Expressway Comm'n, 31 Wis. 2d 275, 143 N.W.2d 3 (1966), the case on which Austin relies, does not contradict these principles. It states, "When an attorney-at-law formally acknowledges the receipt of a document as an attorney on behalf of a client, it may be presumed (in the absence of contradiction) that he was authorized by the client to accept it." ***Fontaine***, 31 Wis. 2d at 279. Austin relies on this language to support his argument that the service of the summons and complaint on Parent's counsel satisfied the requirements of WIS. STAT. § 801.02(1) for personal service on Parent. The ***Fontaine*** case, however, includes the words "in the absence of contradiction," which indicates that the presumption is one that can be rebutted by evidence. The ***Fontaine*** court found that in that case, the presumption that the client had authorized counsel to accept service had not been rebutted, noting, "In the instant case, no evidence whatsoever was offered by [the attorneys] or by [the client] to demonstrate that the attorneys did not have authority to act as her agent." ***Fontaine***, 31 Wis. 2d at 279. ***Fontaine*** clearly permits proof to be offered if there is in fact no authority. ***Id.*** at 280. In this case, such proof was offered in the form of Parent's counsel's affidavit stating

that counsel was at no time authorized to accept service.[2] This case is factually distinguishable from ***Fontaine***.[3]

Austin argues in the alternative that the circuit court erred in refusing to grant an enlargement of the time to serve Parent. The express language of the statute prohibits the circuit court from doing so: "The 90 day period under s. 801.02 may not be enlarged." WIS. STAT. § 801.15(2). The circuit court therefore did not err.

Austin also argues that he is entitled to an extension under WIS. STAT. § 893.10, which extends the period of limitation for one year "when the court … is satisfied that the person originally served knowingly gave false information to the officer with intent to mislead the officer in the performance of his or her duty in the service of any summons or civil process." Austin argues that intentionally omitting information should be deemed equivalent to the affirmative act of knowingly giving false information with the intent to mislead. However, Austin cites no legal authority for that proposition. We therefore decline to address it further.

[2] Austin may be asking this court to read ***Fontaine*** as requiring a party to offer evidence immediately to the process server at the time of attempted service, rebutting the presumption that the attorney has authority to act as the party's agent, but there is no basis for such a reading of ***Fontaine***.

[3] Austin cites this court's holding in ***Mared Indus., Inc. v. Mansfield***, No. 2003AP97, unpublished slip op. ¶19 (WI App Nov. 4, 2003), that a process server's reasonable reliance on a representation of authority to accept a summons was sufficient to support a finding that the person was an agent and service was proper. This holding was reversed on appeal and is not the law. *See* ***Mared Indus., Inc. v. Mansfield***, 2005 WI 5, ¶¶21 & n.11, 37, 277 Wis. 2d 350, 690 N.W.2d 835.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals