

Nowak filed a “Petition/Motion for Judicial Review/Appeal” in the circuit court, naming the Town of Little Suamico and its officials as defendants, and challenging a Town resolution concerning the discontinuance of a roadway. The Town appeared specially and moved to dismiss for Nowak’s failure to properly commence the action. Nowak subsequently filed a separate “Motion to Request an Order for Writ of Certiorari Judicial Review/Appeal Duly Verified of Resolution for Discontinuance of Right of Way of Park and Clay Street, in Town of Little Suamico.” Following a hearing, the circuit court granted the Town’s motion to dismiss and also denied Nowak’s separate motion. Nowak now appeals.²

WISCONSIN STAT. § 801.02 sets forth three separate procedures a party may use to commence a certiorari action. First, the action may be commenced under subsec. (1) by use of a summons and complaint. Second, the action may be commenced “by service of an appropriate original writ” Sec. 801.02(5) Third, the plaintiff may file a complaint and serve an authenticated copy of the complaint upon the defendant along with an order which may shorten the time for filing a responsive pleading, in lieu of a summons.³ See § 801.02(5); *Tobler v. Door Cty.*, 158 Wis. 2d 19, 24-25, 461 N.W.2d 775 (1990). The latter may occur in an emergency situation where the case may be moot before a response would be filed. See *Tobler*, 158 Wis. 2d at 24-25.

² Nowak did not file a reply brief in this court.

³ Nowak argues in his brief to this court, “There are only 2 ways for Cert. to be commenced (see Exhibit F).” Exhibit F, as appended to Nowak’s brief, purports to be a copy of WIS. STAT. § 801.02. Nowak circled sub. (5). However, sub. (5) references sub. (1), which makes the writ procedure available in an ordinary civil action in circuit court. See *Tobler v. Door Cty.*, 158 Wis. 2d 19, 24-25, 461 N.W.2d 775 (1990).

Nowak did not properly commence his action using the method set forth in WIS. STAT. § 801.02(1). We construe Nowak’s petition as a complaint, as the petition serves the same purpose as a complaint—i.e., notice to other parties of claims for relief. The only difference is the label, and it is the content of the pleading that is important. *See DNR v. Walworth Cty. Bd. of Adjustment*, 170 Wis. 2d 406, 415-19, 489 N.W.2d 631 (Ct. App. 1992). However, Nowak merely filed and served his petition; Nowak did not file or serve a summons, authenticated or otherwise.⁴

The failure to timely file a summons is a fundamental defect. *See Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶28, 339 Wis. 2d 493, 811 N.W.2d 756. When a defect is fundamental, personal jurisdiction does not attach. *American Family Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). The failure to abide by statutory mandates that are central to the statutory scheme of which they are a part also deprives the circuit court of competency to exercise its subject matter jurisdiction. *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶18, 348 Wis. 2d 282, 832 N.W.2d 121.

Moreover, Nowak did not properly commence his action by “service of an appropriate original writ.” We note that Nowak’s petition did not specifically seek a writ from the circuit

⁴ The affidavit of the Town Clerk submitted in support of the motion to dismiss averred that at the start of a Board of Supervisors special meeting, an individual “tossed a manila sealed unmarked envelope containing something, unknown at the time, at each Town Board member and to me.” The individual said nothing to any person at the time. The exterior of the envelopes were blank. There was also no indication on the envelope of from whom the envelopes came or what they contained. There was no documentation recorded from the individual or on the envelope as to the method of delivery, date or time, or even who served the packets. At the conclusion of the meeting, the Town Clerk opened her envelope to find Nowak’s “Petition/Motion for Judicial Review/Appeal.” The other Board members did not open their envelopes at that time. However, the parties do not discuss on appeal whether proper service was accomplished, and we therefore do not further address the issue.

court. But, at best, Nowak's petition was a *request* for a writ, and the circuit court decides whether to issue a writ. See *State ex rel. Skogstad v. Anderson*, 130 Wis. 227, 229, 109 N.W. 981 (1906). A petitioner must obtain a writ from the court and *then* timely serve it upon the defendant. *Walworth Cty. Bd. of Adjustment*, 170 Wis. 2d at 415-19. Nowak could not have served an appropriate original writ on the Town before the court had issued one. Merely serving the Town with the petition did not negate the need for a summons.

The third method of commencing an action is also not at issue. The record is unclear as to whether the petition served upon the Town was authenticated. In any event, Nowak did not serve an order in lieu of a summons.

Nowak's subsequent "Motion To Request An Order For Writ of Certiorari" does not ameliorate the jurisdictional deficiency. A party seeking judicial review of a municipal proceeding resulting in a final determination may seek review by certiorari within thirty days of receipt of the final determination. WIS. STAT. § 68.13(1). Moreover, a complaint must be filed within thirty days, whereas a writ must be served within thirty days. *Koenig v. Pierce Cty. Dep't of Human Servs.*, 2016 WI App 23, ¶26, 367 Wis. 2d 633, 877 N.W.2d 632. In the case of a town board's decision to discontinue a roadway, the thirty-day period during which certiorari review is available begins to run on the date the determination is recorded by the register of deeds. *Pulera v. Town of Richmond*, 2017 WI 61, ¶¶1-3, 375 Wis. 2d 676, 896 N.W.2d 342. The determination here was recorded by the register of deeds on August 25, 2017. As mentioned previously, Nowak merely served a *petition* without a summons or order shortening the time for response. Nowak's subsequent *motion* was filed on November 22, 2017, well outside the deadline by which Nowak needed to serve an original *writ*. The circuit court thus correctly concluded the "Motion To Request An Order For Writ of Certiorari" was time barred.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals