

memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2017-18).¹ Upon review of those memoranda and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Oral Surgery filed a summons and complaint alleging that Sutherland breached the parties' employment contract by failing to provide the requisite pre-termination notice. The employment contract stated Sutherland's address as 511 Court Touraine in Deer Park, Illinois (the Deer Park address), and expressly stated that Oral Surgery was to send notice and communications to Sutherland at this address. Oral Surgery attempted to personally serve Sutherland at the Deer Park address. Despite confirming with neighbors that the Deer Park residence was occupied and though he left several calling cards at the address, the process server was unable to accomplish personal service.

Oral Surgery then performed an internet search to try and locate Sutherland. The results listed as potential addresses both the Deer Park address and an address in Rolling Meadows, Illinois. Oral Surgery tried to personally serve Sutherland at the Rolling Meadows address but again, despite confirming with neighbors that the residence was occupied and after leaving several calling cards, the process server was unable to locate and personally serve Sutherland.

Unable to accomplish personal service, Oral Surgery provided service by publication under WIS. STAT. § 801.11(1)(c) (authorizing service "by publication of the summons as a class 3 notice, under [WIS. STAT.] ch. 985, and by mailing"). The Deer Park address is in Lake County. Oral Surgery published notice in the Lake County Journal, which is in general circulation

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

“throughout the county and surrounding area.” The Lake County Journal also published the notice on its statewide notice website. Oral Surgery mailed authenticated copies of the summons and complaint to the Deer Park address. Sutherland failed to enter an appearance and, in February 2018, the circuit court granted Oral Surgery’s motion for a default judgment against Sutherland.

In March 2019, Sutherland filed a motion to reopen the default judgment on grounds that Oral Surgery’s service by publication was improper because “the Summons was published in a newspaper in a county where Dr. Sutherland did not reside so it did not provide him notice of the lawsuit.” According to Sutherland, at the time the summons was served, he had leased and was living at the Rolling Meadows address, which is in Cook County, not Lake County. The circuit court denied Sutherland’s motion, finding that service by publication was appropriate because Oral Surgery exercised “tremendous diligence” in attempting personal service, and that the Lake County Journal was likely to give notice to Sutherland.

On appeal, Sutherland concedes that Oral Surgery attempted personal service with reasonable diligence, and that service by publication under WIS. STAT. § 801.11(1)(c) was therefore proper. Sutherland’s sole argument on appeal is that Oral Surgery should have published notice in a Cook County newspaper and mailed the summons and complaint to the Rolling Meadows address.²

² In Sutherland’s reply brief, he indicates that the process server might have used an address in “Deerfield” rather than “Deer Park,” and suggests that this might render service inadequate insofar as the summons and complaint were mailed to the Deer Park address. It appears that Sutherland is attempting to capitalize on a mere misstatement in the pleadings. Regardless, we decline to consider this argument because it is raised for the first time in his reply brief. *See Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

We review a circuit court’s discretionary decision under WIS. STAT. § 806.07 with great deference, and will uphold it so long as it is supported by a reasonable basis. *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. Additionally, when a motion to reopen involves a question of proper service, the burden of proof is on the moving party. *P.H.H. Mortgage Corp. v. Mattfield*, 2011 WI App 62, ¶8, 333 Wis. 2d 129, 799 N.W.2d 455.

The circuit court properly exercised its discretion in denying Sutherland’s motion to vacate the default judgment as void. First, it correctly determined that “[t] here is absolutely no way the Oral Surgery could have known the alternative address [on Rolling Meadows] was the right Frank Sutherland or that he actually resided there.” The parties’ employment contract required that communications to Sutherland be sent to the Deer Park address. Over five months after his termination, Sutherland was still using the Deer Park address in a separate legal action to recover wages from Oral Surgery. Sutherland never informed Oral Surgery or the post office of an address change. Oral Surgery reasonably concluded that publication in the Lake County Journal was likely to give Sutherland notice and that the summons and complaint should be mailed to the Deer Park residence, Sutherland’s last known address.

Second, regardless of Sutherland’s actual address, the circuit court made a well-supported factual finding that publication in the Lake County Journal was likely to provide him notice under WIS. STAT. § 985.02(1). The Lake County Journal was in circulation in Lake County and “the surrounding area.” The Deer Park and Rolling Meadows addresses are only seven miles apart. That they are in different counties is irrelevant for purposes of the statute. Additionally, Sutherland did not establish that he no longer lived, worked, or spent time in Lake County. Further, the Lake County Journal published the summons and complaint on a statewide notice website.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court 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