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DISTRICT III

October 20, 2020

To:

Hon. Jay N. Conley
Circuit Court Judge
Oconto County Courthouse
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Oconto, WI 54153

Trisha LeFebre
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Frank Nowak
6550 Allen Rd.
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You are hereby notified that the Court has entered the following opinion and order:

2019AP690

Frank Nowak v. Oconto County Board of Supervisors
(L. C. No. 2018CV171)

Before Stark, P.J., Hruz and Seidl, 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).

Frank Nowak, pro se, appeals from an order dismissing his petition for a writ of certiorari. 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 (2017-18).¹ We summarily affirm.

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

Nowak filed a document in Oconto County circuit court entitled, “Petition for Writ of Certiorari for Judicial Review/Appeal of Approved Re-Zone of 6068 County Road S, Little Suamico, Parcel Number 024-4415004.” Nowak petitioned the court to “review and reverse” a rezoning of a neighborhood parcel from single family residential to general commercial. The Oconto County Board of Supervisors (the Board) adopted a planning and zoning committee recommendation to approve the rezoning of the parcel after the Town of Little Suamico (the Town) had recommended the zoning change. According to Nowak, an amendment to the Town’s twenty-year comprehensive zoning plan was required before the rezoning could be approved.

Nowak’s petition named the Board as the respondent. As relevant here, the Board filed a motion to dismiss for failure to comply with the procedural requirements for commencement of an action. Following a hearing, the circuit court dismissed Nowak’s action.

We advised Nowak in a previous matter he filed against the Town of the proper manner by which to commence an action for certiorari review of the Board’s decision. *See Nowak v. Town of Little Suamico*, No. 2018AP1078, unpublished op. and order (WI App Oct. 1, 2019). In affirming the dismissal of Nowak’s petition for a writ of certiorari in that case, we stated:

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.^[2] See § 801.02(5); *Tobler v. Door Cnty.*, 158 Wis. 2d 19, 24-25, 461 N.W.2d 775 (1990).

Nowak, No. 2018AP1078, at 2.

Here, the circuit court correctly recognized that Nowak once again did not properly commence his action by using a method set forth in WIS. STAT. § 801.02. At the February 22, 2019 hearing on the Board’s motion to dismiss, the court stated:

If you [had] followed procedure and filed a summons and complaint, the summons would command them to respond within a certain period of time. That’s one way to do it. You didn’t do it that way.

You did not serve a writ of certiorari on them. The writ would command them to produce the entire record of this proceeding. So the court could review it and it would command Oconto County to respond.

When Oconto County did not respond, I wrote you a note saying hey, send me a writ. You’ve never sent me a writ to this day. I sent you a letter. You still haven’t sent me a writ. The action is commenced by filing an appropriate writ. You haven’t filed an appropriate writ.

The other way of doing it is you can file a complaint and serve it with an order. The order again would command Oconto County to respond.

You haven’t ... followed any of these procedural things that you’re required to do and therefore, I’m going to grant Oconto County’s motion to dismiss.

In his reply brief, Nowak insists that he filed a summons and complaint. Nowak contends this fact is confirmed by the circuit court’s January 9, 2019 correspondence in which

² 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 Cnty.*, 158 Wis. 2d 19, 24-25, 461 N.W.2d 775 (1990).

the court stated, “The Summons and Complaint in the above matter [was] filed on September 21, 2018.” It is apparent, however, that the court misspoke in its reference to a summons and complaint, as there is none in the record and the court subsequently advised Nowak at the hearing on the motion to dismiss that Nowak had not followed the procedure, which allowed for the filing of a summons and complaint to commence an action.

Even if we construed Nowak’s petition as a complaint—given that the petition arguably serves the same purpose as a complaint—Nowak did not file or serve a summons, authenticated or otherwise.³ He merely served his petition.

As we stated in Nowak’s prior case involving the Town, the failure to comply with the requirements of WIS. STAT. § 801.02(1), including the filing of 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 Fam. 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

³ In correspondence to the circuit court, Nowak claimed that he served an authenticated copy of his petition, but the affidavit of service in the record on appeal fails to establish service of an authenticated copy.

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 121.⁴

Nor in the present case did Nowak properly commence his action by “service of an appropriate original writ.” A petitioner must obtain a writ from the court and then timely serve it upon the defendant. *DNR v. Walworth Cnty. Bd. of Adjustment*, 170 Wis. 2d 406, 415-19, 489 N.W.2d 631 (Ct. App. 1992). Although the circuit court requested it, Nowak did not file an appropriate writ. The third method of commencing an action is also not at issue because Nowak did not serve an order in lieu of a summons.

The circuit court thus correctly granted the motion to dismiss. Because we conclude the court properly dismissed Nowak’s petition, we need not address other issues raised by the Board in the circuit court regarding whether Nowak failed to exhaust administrative remedies or failed to state a claim upon which relief may be granted. See *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶2, 326 Wis. 2d 640, 785 N.W.2d 493.

Therefore,

⁴ Nowak also argues “Oconto County does not have a procedure for the Appeal Process, so State Statute 809.19(3) applies,” referring to the filing of a respondent’s brief. This argument is undeveloped, but we construe it as contending that the response to Nowak’s certiorari petition was required to be filed pursuant to the timeline prescribed by WIS. STAT. RULE 809.19(3), and because a response was not filed within that timeframe, “then it must be assumed that they agree with the Petitioner and the rezone must be reversed.” However, ch. 809 applies to proceedings in the court of appeals and is inapplicable to certiorari actions in the circuit court. In any event, Nowak’s failure to properly commence the action deprived the circuit court of competency to exercise its subject matter jurisdiction in the first instance.

IT IS ORDERED that the order is summarily affirmed pursuant to 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