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DISTRICT III

January 18, 2024

To:

Hon. Luke M. Wagner
Circuit Court Judge
Electronic Notice

Brian D. Anderson
Electronic Notice

Katie Schalley
Clerk of Circuit Court
Dunn County Judicial Center
Electronic Notice

Charles Ed Massey
Electronic Notice

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

2022AP2209	Tamra Lynn Sivertson v. Brock Morgan Johnson
2022AP2210	(L. C. No. 2022CV63)
	Timothy Sivertson v. Brock Morgan Johnson
	(L. C. No. 2022CV64)

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

Tamra Sivertson and Timothy Sivertson appeal from summary judgment orders that dismissed their respective personal injury lawsuits against Brock Johnson and Daniel Johnson for lack of personal jurisdiction. Based upon our review of the briefs and records, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The following facts from the summary judgment materials are undisputed. On April 8, 2019, the Sivertsons were involved in an accident with a car that was owned by Daniel and driven by Daniel's then-minor son Brock. On April 5, 2022, shortly before the expiration of the statute of limitations period, the Sivertsons each filed a personal injury lawsuit against both of the Johnsons. On or about April 14, 2022, the Sivertsons mailed copies of the summonses and complaints to each of the Johnsons at Daniel's address. The envelopes were placed in Daniel's mailbox without anyone signing for them, although there were green certified mail cards attached to them. Brock had not lived at Daniel's residence since July 21, 2021, when he began active service duty in the United States Navy.

A court in Wisconsin cannot exercise personal jurisdiction over a defendant unless the defendant has been properly served with an authenticated copy of a summons and complaint within ninety days after the filing of the complaint, or the defendant waives the defense of lack of personal jurisdiction. *See* WIS. STAT. §§ 801.02(1), (3); 801.06; 801.11; 802.06(8). A defendant's actual notice of an action is insufficient to confer personal jurisdiction. *Welty v. Heggy*, 124 Wis. 2d 318, 322-23, 369 N.W.2d 763 (Ct. App. 1985).

WISCONSIN STAT. § 801.11 sets forth the means by which service can be properly accomplished. First, personal service may be made by physically placing the papers in the hand of the defendant. Sec. 801.11(1)(a). Second, if a defendant cannot be personally served "with reasonable diligence," substituted service may be made by leaving a copy of the summons and complaint at the defendant's usual place of abode in the presence of a family member at least fourteen years of age or a competent adult residing in the abode. Sec. 801.11(1)(b). Finally, if neither personal service nor substituted service can be accomplished with reasonable diligence,

service may be made by publication of the summons and mailing of the summons and complaint. Sec. 801.11(1)(c).

Here, the Sivertsons failed to make any attempt at personal service or substituted service upon either of the Johnsons, nor did they publish the summonses. They assert that their failure to comply with any of the three methods of service set forth in WIS. STAT. § 801.11 was a “technical defect” that should be deemed “excusable neglect” due to their pro se status and an allegation that the Johnsons “sought to avoid service.”² Under Wisconsin case law, however, a failure to strictly comply with the statutory service procedures is deemed a fundamental defect that is fatal to an action, even when the consequences are harsh. *Johnson v. Cintas Corp. No. 2*, 2011 WI App 5, ¶9, 331 Wis. 2d 51, 794 N.W.2d 475 (2010).

The Sivertsons ask this court to afford them relief notwithstanding the strict compliance requirement, asserting that this court has discretion to “change law where appropriate.” That is not accurate, however, because the Supreme Court of Wisconsin serves as the primary law-declaring court of this state. See *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶¶60, 67, 403 Wis. 2d 1, 976 N.W.2d 263 (Rebecca Grassl Bradley, J., concurring). In contrast, this court’s primary function is error correction. *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93-94, 394 N.W.2d 732 (1986). Moreover, we are bound by the prior precedent of our own court, as well as that of the Supreme Court of Wisconsin. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

² This allegation appears to be based solely upon the fact that neither Johnson signed to receive the documents sent by certified mail. However, there is nothing in the records to suggest that either Johnson was at Daniel’s residence when the envelopes were placed in his mailbox.

Finally, the Sivertsons assert for the first time in their reply brief—without any citation to authority—that the circuit court gained personal jurisdiction over the Johnsons when the Johnsons filed “a Response.” This court need not address arguments raised for the first time in a reply brief. *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. We briefly note, however, that a defense of lack of personal jurisdiction is only waived if it is “neither made by motion ... nor included in a responsive pleading.” Here, the Johnsons challenged personal jurisdiction by filing summary judgment motions, without filing answers to the complaints. *See* WIS. STAT. § 802.06(8).

In short, the circuit court properly determined that it lacked personal jurisdiction over the Johnsons because the Sivertsons failed to properly serve the summonses and complaints upon the Johnsons according to the required statutory procedure. The Johnsons’ actual notice of the lawsuits did not excuse the Sivertsons from strict compliance with the service statute, nor did the Johnsons’ motions for summary judgment waive their challenge to personal jurisdiction.

Therefore,

IT IS ORDERED that the orders are summarily affirmed. WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals