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**DISTRICT IV**

February 22, 2013

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

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2011AP2912

Kenneth A. Roberts v. Deb McCulloch (L.C. # 2010CV422)

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

Kenneth Roberts appeals pro se from orders granting summary judgment dismissing his action and denying his motion to reconsider the dismissal of the action. He argues that summary judgment was improper because he did not receive the motion for summary judgment and the motion was filed late. 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(1) (2011-12).<sup>1</sup> We affirm the orders of the circuit court.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Roberts commenced this action against officers and the director of the Sand Ridge Secure Treatment Center, employees of the State of Wisconsin. He alleged that at times when he was confined at Sand Ridge, he was subjected to body cavity strip searches without probable cause for the searches. Under an amended scheduling order, dispositive motions were to be filed by August 19, 2011. The State's motion for summary judgment was stamped as filed on August 29, 2011. The motion was accompanied by a certificate of service indicating that the motion was mailed to the circuit court clerk and Roberts on August 18, 2011. Roberts did not file a timely response to the motion. Summary judgment was granted dismissing the action. Roberts moved for reconsideration, claiming that he had not been served with the State's motion for summary judgment. Concluding that Roberts' denial that he did not receive the motion did not rebut the presumption that proper service was made by mailing, the circuit court denied Roberts' motion for reconsideration.

We first address Roberts' argument that the motion for summary judgment was filed late. Roberts raises the timeliness of the motion for the first time on appeal and we generally do not consider arguments not presented in the circuit court.<sup>2</sup> *Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154. Moreover, circuit courts have discretion to extend deadlines established in a scheduling order consistent with their authority to take actions that ensure their efficient and effective function. *See Parker v. Wisconsin Patients Comp. Fund*, 2009 WI App 42, ¶19, 317 Wis. 2d 460, 767 N.W.2d 272. Roberts' reliance on

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<sup>2</sup> In his reply brief, Roberts contends that his failure to raise the issue in the circuit court should be forgiven because he was not given a copy of the State's motion for summary judgment until after this appeal was filed. However, he timely received a copy of the circuit court's order granting summary judgment and that order states that the motion for summary judgment was filed on August 29, 2011.

federal precedent dismissing a complaint for lack of jurisdiction because the deadline for filing an appeal from an adverse administrative decision was missed by one day is misplaced. The time to file a motion for summary judgment is not jurisdictional and the circuit court acted within its discretion to accept and rule on the motion.<sup>3</sup>

Roberts contends that the State bears the burden of establishing that he actually received the summary judgment motion. He is wrong. There is a rebuttable presumption that mail sent is received, and therefore that service is complete upon mailing. *Mullen v. Braatz*, 179 Wis. 2d 749, 751, 755, 508 N.W.2d 446 (Ct. App. 1993); *see also* WIS. STAT. § 801.14(2). The burden is placed on the non-recipient to show that the mailed item was not actually received. *Mullen*, 179 Wis. 2d at 755. Where proofs establish proper mailing, whether or not the recipient actually received the mailed item is a factual determination. *Id.* at 751, 756. It is the circuit court's function to assess the weight and credibility of the evidence. *Id.* at 756. The circuit court's findings of fact will not be upset unless clearly erroneous. *Id.*

The State's certificate of service was accepted by the circuit court as proof of proper mailing.<sup>4</sup> It was then Roberts' burden to rebut the presumption that service was complete upon

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<sup>3</sup> For the first time in his reply brief, Roberts argues that the circuit court could not act without a motion to extend the time to file the motion for summary judgment and that the excusable neglect standard under WIS. STAT. § 801.15(2)(a) applies. *Parker v. Wisconsin Patients Compensation Fund*, 2009 WI App 42, ¶19, 317 Wis. 2d 460, 767 N.W.2d 272, holds that the excusable neglect standard does not apply to a deadline established in a scheduling order and that the circuit court may act on its own motion to ensure the efficient and effective function of the court.

<sup>4</sup> In his reply brief Roberts complains about the circuit court's reliance, if any, on the State's statement at the hearing on the motion for reconsideration that in fourteen years of practice, the State's attorney had never completed a certificate of service without actually mailing the document. The circuit court was entitled to credit counsel's office practice and to give it the weight to which the court thought it was entitled. *See State ex rel. Flores v. State*, 183 Wis. 2d 587, 612, 516 N.W.2d 362 (1994).

mailing by “presenting credible evidence of non-receipt.” *State ex rel. Flores v. State*, 183 Wis. 2d 587, 613, 516 N.W.2d 362 (1994). Roberts averred that “to the best of my knowledge I have never received the service of the defendant’s Motion for Summary Judgment.” “The factfinder may believe the denial of receipt or the factfinder may disbelieve the denial of receipt.” *Id.* The circuit court rejected Roberts’ denial of receipt as sufficient proof. As a function of weighing credibility, the circuit court was free to reject the self-serving assertion of non-receipt. The circuit court’s finding that service was complete is not clearly erroneous and the summary judgment ruling stands.

Upon the foregoing reasons,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*