

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2121-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EDWARD A. MOORE,

PLAINTIFF-APPELLANT,

V.

**SHANE DALBEC AND AMERICAN FAMILY MUTUAL
INSURANCE CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Edward Moore appeals judgments dismissing his claims against Shane Dalbec and American Family Insurance Company.¹ He

¹ This is an expedited appeal under RULE 809.17, STATS.

argues that the trial court erroneously dismissed his claim against Shane for lack of personal jurisdiction and erroneously dismissed his claim against American Family as a consequence. Because the record fails to support his arguments, we affirm the judgments.

On September 12, 1994, Moore filed a summons and complaint against Cody Smith, Kathy Olson, and Shane² Dalbec, alleging that he was injured as a result of an August 29, 1993, car accident. Although Smith and Olson appeared and answered, Shane did not. A deputy sheriff's certificate of service stated that on September 19, the deputy served process on Shane by leaving a true copy of the pleadings "at the usual place of abode of the said Shane Dalbec in the presence of Sean Dalbec - brother"

On March 31, 1995, Moore filed an amended summons and complaint, adding Sharon and Hubert Dalbec, Shane's parents. The complaint alleged that Shane was a minor operating with a license sponsored by his parents at the time of the accident. It alleged liability on a theory of negligent entrustment. In response to the amended complaint, Shane appeared for the purpose of contesting personal jurisdiction and moved to dismiss, asserting that personal jurisdiction was "not obtained by valid service of process pursuant to Wis. Stats. 801.11"

On May 20, 1997, Moore filed a second amended summons and complaint, deleting Olson and Smith, and adding American Family Mutual

² At various places in the record, Shane's name is also spelled "Shayne." We will refer to him as "Shane" throughout this opinion.

Insurance Company, Shane's insurer, as a defendant. American Family raised the statute of limitations as a defense.

In January 1998, in support of his motion to dismiss for lack of personal jurisdiction, Shane filed an affidavit asserting that he was not a resident of Sean Dalbec's household from 1992 through 1997, and that during September 1994, he was a Michigan resident. He asserted that he was not served with the summons and complaint. Additionally, Shane filed portions of his deposition, in which he explained that he lived in Ironwood, Michigan, where he worked as a mechanic between 1993 and 1996. Sean Dalbec, who had accepted the substituted service, also filed an affidavit that Shane did not reside with him at any time in 1994.

In response to Shane's motion to dismiss and affidavit, Moore filed a memorandum of law, pointing out that Shane's friend and co-defendant, Smith, admitted in his answer that Shane lived at the address where substituted service was made. Moore also points out that notice of a scheduling conference was mailed to that address and never returned.

The trial court concluded that it never acquired personal jurisdiction over Shane, that Shane's objection was raised in his pleadings and preserved throughout the proceedings. It therefore dismissed the action against Shane. The trial court also concluded that the three-year statute of limitations barred Moore's claim against American Family and dismissed American Family from the action. This appeal followed.

Moore argues that the trial court erroneously dismissed his claim against Shane because Shane was properly served and his objection to personal jurisdiction was not preserved. We disagree. Personal jurisdiction may be

obtained if there exist jurisdictional grounds and a summons is served upon the person pursuant to § 801.11, STATS. *See* § 801.04(2), STATS. Service may be achieved by personally serving the summons on the defendant. Section 801.11(1)(a), STATS. If with reasonable diligence the defendant cannot be personally served, service may then be achieved "by leaving a copy of the summons at the defendant's usual place of abode." Section 801.11(1)(b), STATS.

"An officer's *uncontradicted* certificate of service is adequate proof of service." *Honeycrest Farms v. A.O. Smith Corp.*, 169 Wis.2d 596, 603, 486 N.W.2d 539, 541 (Ct. App. 1992) (emphasis added). Such evidence may be overcome with clear and satisfactory proof to the contrary. *Id.* Here, the trial court considered the uncontradicted affidavits and deposition testimony that Shane resided in Michigan at the time in question and not at the address where substituted service was attempted. As a result, the trial court was entitled to conclude that Shane was not a member of the household where substituted service was attempted. Because § 801.11(1), STATS., was not satisfied, the trial court correctly concluded that it did not obtain personal jurisdiction.

Moore argues that Shane's proofs were refuted by Smith's answer where he admitted Shane's address. He also suggests that unreturned mail rebuts Shane's proofs. We are unpersuaded. The trial court has discretion regarding the nature of proof the parties may present. *Honeycrest*, 169 Wis.2d at 604, 486 N.W.2d at 542. Here, no counter-affidavit was filed to refute Shane's proofs. The trial court was entitled to conclude that a responsive pleading, or an inference derived from unreturned mail, was insufficient to raise an issue of fact. Instead, the court properly relied upon Shane's sworn affidavit and deposition testimony.

Moore further argues that Shane's attorney failed to deny the address alleged in the amended complaint as Shane's Wisconsin address. The record fails to support his claim. Shane's responsive pleading denied the complaint's allegations with respect to the address alleged and moved to dismiss for lack of personal jurisdiction on grounds of invalid service of process.

Next, Moore argues that Shane waived his objection to personal jurisdiction by entering a general appearance. Moore further suggests that Shane's motion in his responsive pleading was untimely because it failed to comply with the first scheduling order. We disagree. The filing of an appropriate motion in a responsive pleading preserves jurisdictional defenses. Section 802.06(2), STATS. "If a defendant has properly raised his objection to jurisdiction in his answer, he may later take part in pretrial discovery or otherwise contest the merits of the action without waiving his objections to personal jurisdiction." *Honeycrest Farms v. Brave Harvestore Sys.*, 200 Wis.2d 256, 268, 546 N.W.2d 192, 197 (Ct. App. 1996) (citations omitted). Because the first responsive pleading Shane filed contains his motion to dismiss on personal jurisdiction grounds, and the record reveals no earlier appearance of any kind, his defense is preserved.

Next, Moore argues that the trial court erroneously entered summary judgment dismissing his claim against American Family. He argues that under § 893.13, STATS., the statute of limitations applicable against Shane has been tolled as a result of commencing this action.³ He further argues that the statute of

³ Section 893.13, STATS., provides:

Tolling of statutes of limitation.

....

- (2) A law limiting the time for commencement of an action is tolled by the commencement of the action to enforce the cause of action to which the period of limitation applies. The

(continued)

limitations against American Family is also tolled by virtue of the application of the direct action statute, § 632.24, STATS., relying on *Biggart v. Barstad*, 182 Wis.2d 421, 513 N.W.2d 681 (Ct. App. 1994). We disagree.

Under Wisconsin's direct action statute, § 632.24, STATS., plaintiffs are entitled to bring their action against the insurer without naming the insured as a defendant. *Id.* at 428, 513 N.W.2d at 683. "Section 801.02(1), STATS., states that a civil action is commenced by the filing of a summons and complaint with the court provided that the defendant is served with an authenticated copy of the summons and complaint within sixty days after filing." *Honeycrest Farms*, 200 Wis.2d at 262, 546 N.W.2d at 194.

Moore apparently contends that the commencement of an action against Shane tolls his direct action claims against American Family. We need not reach this argument, however, because service on Shane was not accomplished, and no action was commenced against Shane for purposes of a statute of limitations. *See id.* 261-62, 546 N.W.2d at 194-95. Also, it is undisputed that this action was not commenced as to American Family until the filing of the second amended summons and complaint on May 20, 1997, more than three years after the accident. As a result, § 893.54, STATS., the applicable statute of limitations, bars Moore's claim against American Family.⁴ Because the trial court correctly concluded that the statute of limitations bars Moore's action against American

law limiting the time for commencement of the action is tolled for the period from the commencement of the action until the final disposition of the action.

(3)

⁴ Section 893.54, STATS., reads: "Injury to the person. The following actions shall be commenced within 3 years or be barred: (1) An action to recover damages for injuries to the person."

Family, and that the court lacked personal jurisdiction over Shane, it properly dismissed Moore's claim.⁵

By the Court.—Judgments affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

⁵ Moore does not raise, and therefore we do not address, the effect of § 893.19, STATS., “Limitation when person is out of state.” The application of § 893.19 is inconsistent with Moore’s argument that Shane was properly served in Wisconsin.

