

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 4, 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. 98-2648-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**LOIS KROENER,**

**PETITIONER-APPELLANT,**

**v.**

**STATE OF WISCONSIN EMPLOYE TRUST FUNDS BOARD,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County:  
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. The appellant, Lois Kroener, appeals from an order of the circuit court granting the motion of respondent, State of Wisconsin Employee Trust Fund Board, to dismiss Kroener's Petition for Judicial Review. The issue on appeal is whether the circuit court properly dismissed Kroener's action because she did not serve a summons on the Board. Because the failure to serve and file a

summons is a fundamental defect which deprives the court of jurisdiction over the party, we affirm.<sup>1</sup>

## **BACKGROUND**

Kroener was employed as a nurse at the University Hospital. She developed psychiatric problems and began receiving disability benefits from the Wisconsin Retirement Fund. Some years later, she also began receiving Social Security benefits. When the Fund became aware that she was also receiving Social Security benefits, she was told that she would have to repay the overlapping amount.

The Department of Employee Trust Funds began making a monthly deduction of \$200 from her disability check. Kroener appealed to the Department of Employee Trust Funds and to the Employee Trust Funds Board. The Board upheld the decision that Kroener had to repay the amount of disability payments made to her after she began to receive Social Security benefits, and that the overpayment would be collected by making the monthly \$200 deduction from her future benefits.

Kroener then attempted to have the circuit court review the Board's decision by filing with the court a document labeled "Petition for Judicial Review" and serving it upon the Board. The Board moved to dismiss the petition and the circuit court granted the motion.<sup>2</sup> Kroener appeals.

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<sup>1</sup> This appeal was expedited pursuant to RULE 809.17, STATS.

<sup>2</sup> Kroener did not include a copy of the circuit court's decision and order in her appendix, as required by the rules of appellate procedure applicable to the expedited appeals program. *See* The Expedited Appeals Rules for Briefing and RULE 809.17(2), STATS.

Decisions of the Employe Trust Funds Board are reviewable only by certiorari review in Dane County Circuit Court. *See* § 40.08(12), STATS. Under § 801.02(5), STATS., a certiorari review may be started in one of three ways: (1) service of an original writ, if a copy of the writ is filed forthwith; (2) filing a summons and complaint pursuant to § 801.02(1), or (3) the filing and service of a complaint and a court order. *DNR v. Walworth County Bd. of Adjustment*, 170 Wis.2d 406, 415-16, 489 N.W.2d 631, 634-35 (Ct. App. 1992).

Kroener did not follow any of these three procedures for commencing her certiorari review. She did not file and serve a complaint accompanied by a court order, nor did she serve an original writ.<sup>3</sup> While her petition might be construed to satisfy the requirements of a complaint, she did not file or serve a summons.

Kroener asserts that this is merely a “hypertechnical” defect and that the petition served on the Board provided them with sufficient notice. She further asserts that she was merely complying with the notice she received from the Board which directed her to file a petition for judicial review. She asserts that since the notice from the Board did not direct her to the relevant statutes, she should be excused for her failure to comply with them.

Failure to serve a summons on a party is a fundamental defect which deprives the court of jurisdiction over that party. *Bulik v. Arrow Realty, Inc. of Racine*, 148 Wis.2d 441, 446, 434 N.W.2d 853, 855 (Ct. App. 1988). If a defect is fundamental, the court lacks jurisdiction regardless of whether the respondent was prejudiced by the error. *See DNR*, 170 Wis.2d at 417, 489 N.W.2d at 635. “It

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<sup>3</sup> In her brief, Kroener specifically denies that she intended to file a writ.

therefore does not matter that a party might have had knowledge that he or she was meant to be a party ....” *Bulik*, 148 Wis.2d at 446, 434 N.W.2d at 855. Since the defect was fundamental, the circuit court was deprived of personal jurisdiction over the Board and it properly granted the motion to dismiss.<sup>4</sup>

*By the Court.*—Order affirmed.

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

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<sup>4</sup> Because our decision is based on a failure of personal jurisdiction, we do not consider the statute of limitations issue.

