

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2369

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**COORDINATED CAPITAL SECURITIES OF WISCONSIN,
INC.,**

**THIRD-PARTY PLAINTIFF-
RESPONDENT,**

v.

JOHN C. ROBERTS,

DEFENDANT-APPELLANT.

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

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. John Roberts appeals an order denying his motion to vacate a default judgment. The issue is whether the trial court properly denied

relief, given the evidence Roberts presented that he was not properly served with the summons and complaint. We affirm.

¶2 In 1993 Coordinated Capital Securities of Wisconsin, Inc., sued Roberts. Proof of service was filed stating that Roberts was personally served with a copy of the summons and complaint at his Oklahoma residence on February 20, 1993, by Aletha Sinclair, a process server licensed by the State of Oklahoma. Roberts never appeared in the action, and in 1998 Capital Securities obtained a default judgment of approximately \$1,400,000 plus interest against him.

¶3 Roberts then moved under WIS. STAT. § 806.07 (1997-98)¹ to vacate the judgment. His supporting affidavit stated that he was never served. He also provided evidence that he was away from home for a substantial part of February 20, 1993. Capital Securities submitted an affidavit from Sinclair, reaffirming that she personally served Roberts on February 20, 1993 at his home, after verifying his identity.

¶4 At his motion hearing, Roberts argued that even if he was served, Sinclair's proof of service affidavit did not provide the information required by WIS. STAT. § 801.10(4). The trial court concluded that Roberts had the burden of proving non-service, that he failed to carry that burden and that the proof of service affidavit was sufficient under § 801.10(4). Roberts challenges those ruling on appeal.

¶5 It was Roberts's burden to prove non-service. "The party seeking to vacate judgment has the burden of proving lack of effective service." *Haselow v.*

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Gauthier, 212 Wis. 2d 580, 587, 569 N.W.2d 97 (Ct. App. 1997). His argument to the contrary has no merit.

¶6 The trial court properly concluded that Roberts failed to meet his burden. The process server, a presumably disinterested person, averred that she served Roberts on February 20, 1993 at his home. Roberts flatly denied he was served and demonstrated that he was not at home for a good part of that day. However, he did not conclusively prove his whereabouts for the entire day, leaving open at least the possibility of service at home. Consequently, he carried his burden of proving non-service only if the trial court believed the absolute denial in his affidavit, which it was not obliged to do and, in fact, did not do.

¶7 The deficiencies in the proof of service affidavit are also not grounds to vacate the default judgment. WISCONSIN STAT. § 801.10(4) requires certain information to be in a proof of service affidavit that was undisputedly missing in this case.² However, that information is required only if the defendant appears in the action and challenges the service. *Id.* See also *Dietrich v. Elliott*, 190 Wis. 2d 816, 828, 528 N.W.2d 17 (Ct. App. 1995). Here, Roberts never appeared in the action. To obtain a default judgment the moving party must offer proof that proper service occurred. WIS. STAT. § 806.02. There is no requirement that the proof conform to the requirements of § 801.10(4). It is the fact of service which gives the court personal jurisdiction, not the proof of service. See *Dietrich*, 190 Wis. 2d at 828.

² The affidavit must include the time, date, place and mode of service, must indicate that the server is an adult and not a party, and must state that the server knew the person served was the defendant and that the server gave the defendant an authenticated copy of the summons. WIS. STAT. § 801.10(4)(a).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

