

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2015AP1280

Cir. Ct. No. 2013SC635

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RIPCO CREDIT UNION,

PLAINTIFF-RESPONDENT,

V.

VALERIE KENNEDY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County:
PATRICK F. O'MELIA, Judge. *Affirmed.*

¶1 HRUZ, J.¹ Valerie Kennedy appeals an order denying her motion to vacate a default judgment in favor of Ripco Credit Union entered in this small claims action. The circuit court concluded Kennedy's motion was untimely under

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WIS. STAT. § 799.29(1)(c), which generally establishes a twelve-month period within which motions to reopen default small claims judgments must be filed. Kennedy argues her motion was timely filed after the expiration of that period because § 799.29(1)(c) does not apply to void judgments, which may be vacated at any time under WIS. STAT. § 806.07(1)(d). Kennedy argues the judgment was void due to insufficient service of process.

¶2 We reject Kennedy’s argument that the judgment was void. In doing so, we assume without deciding that motions to vacate void judgments entered in small claims actions are not governed by the timeliness provision in WIS. STAT. § 799.29(1)(c). However, we conclude Ripco sufficiently served process on Kennedy by publication of a notice under WIS. STAT. § 799.12(6). As a result, the circuit court obtained personal jurisdiction over Kennedy, and we affirm the decision denying the motion to vacate the default judgment.

BACKGROUND

¶3 On July 24, 2013, Ripco filed a small claims summons and complaint alleging Kennedy defaulted on two loans. Ripco advanced both a claim for a \$10,000 money judgment and a claim for replevin of three vehicles. The form summons and complaint directed Kennedy to either appear in Judge O’Melia’s courtroom at the Oneida County courthouse in Rhineland at 10:00 a.m. on August 21, 2013, or file a written answer before that time.

¶4 On August 1, 2013, Ripco filed an affidavit from a process server indicating three failed attempts at personal service between July 26 and 29. The reason given was “Unable to Locate/Moved no Forwarding.” The process server averred that Kennedy did not reside at the designated address. Kennedy’s daughter was at the residence, but she would not give any information about

Kennedy's whereabouts. No other addresses for Kennedy were located in the process server's subsequent searches.

¶5 Also on August 1, a Ripco employee contacted two newspapers, the Vilas County News-Review and the Three Lakes News, about placing a legal notice of the small claims action in the August 7, 2013 issues. The notice, which was prepared by Ripco and entitled "PUBLICATION IN CIVIL ACTION," ran in the newspapers on that date. The published notice listed the same return date and time designated in the summons and complaint. *See infra* ¶13.

¶6 On August 2, 2013, Ripco mailed a copy of the small claims summons and complaint to a P.O. box it believed was rented in Kennedy's name. Kennedy failed to answer or appear on the August 21 return date, and a default judgment was granted, awarding Ripco a \$10,000 money judgment and replevin of the three vehicles. Ripco filed the published notice with the circuit court the following day, on August 22, 2013.

¶7 On March 2, 2015, Kennedy filed a motion to vacate the default judgment as void for lack of personal jurisdiction. Kennedy asserted that Ripco was required, but failed, to file and authenticate the notice that appeared in the newspapers prior to its publication, and that this failure constituted a "fundamental defect" in service that deprived the court of personal jurisdiction, resulting in a void judgment. Ripco responded that Kennedy was relying on authorities that do not apply in small claims proceedings under WIS. STAT. ch. 799. It also argued Kennedy's motion was untimely because it was filed after the twelve-month period established by WIS. STAT. § 799.29(1)(c) for motions to reopen default judgments. The circuit court accepted the latter argument and denied Kennedy's motion as untimely.

DISCUSSION

¶8 Kennedy first argues the timeliness of a motion to vacate a default judgment based on lack of proper service is governed not by WIS. STAT. § 799.29(1)(c) but rather by WIS. STAT. § 806.07(1)(d). Under § 799.29(1)(c), a notice of motion to “reopen” a default judgment must generally be made within twelve months after entry of the judgment. A motion under § 806.07(1)(d) alleging that a judgment is void may be made at any time. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶34, 273 Wis.2d 76, 681 N.W.2d 190 (“reasonable time” limitation in § 806.07(2) does not apply to motions to vacate void judgments); *Neylan v. Vorwald*, 124 Wis. 2d 85, 97, 368 N.W.2d 648 (1985) (“A void judgment may be expunged by a court at any time.”).

¶9 Ripco responds that the twelve-month time period for reopening default small claims judgments under WIS. STAT. § 799.29(1)(c) applies regardless of WIS. STAT. § 806.07 and the case law interpreting that statute. WISCONSIN STAT. § 799.04(1) states that “the general rules of practice and procedure in chs. 750 to 758 and 801 to 847 shall apply” to small claims actions “[e]xcept as otherwise provided in this chapter.” We construe Ripco’s argument to be that § 806.07(1)(d) does not apply because WIS. STAT. ch. 799 “otherwise provides” for the reopening of a default judgment under § 799.29.² Ripco cites considerable case law supporting this interpretation. *See, e.g., King v. Moore*, 95

² Ripco cites WIS. STAT. § 799.01 for the proposition that WIS. STAT. § 799.29 is the exclusive procedure applicable to motions to reopen a default small claims judgment. Section 799.01, however, discusses the availability of the small claims process generally. The statute most applicable to Ripco’s argument is WIS. STAT. § 799.04, which governs the interplay between the general rules of practice and procedure established by other chapters of the Wisconsin Statutes and the rules of practice and procedure applicable to small claims actions.

Wis. 2d 686, 689-90, 291 N.W.2d 304 (Ct. App. 1980) (concluding predecessor statute to § 799.29(1) “provides the exclusive procedure for reopening a default judgment in small claims proceedings”); *Wisconsin Nat. Gas Co. v. Kletsch*, 95 Wis. 2d 691, 696-97, 291 N.W.2d 640 (Ct. App. 1980) (holding in garnishment action that a motion to reopen a default judgment because it was “void” under WIS. STAT. § 812.14 was untimely under the predecessor statute to § 799.29(1)).

¶10 While these authorities used broad language suggesting that WIS. STAT. § 799.29 is the exclusive procedure available to reopen or otherwise seek relief from a default small claims judgment, none of the cases directly addressed a situation in which the judgment was alleged to be void for failure to properly serve the defendant. Indeed, the *Wisconsin Natural Gas* court issued a circumspect declaration that what is now § 799.29(1) provides the “sole means of attacking a default judgment in small claims actions *which have been commenced, as here, by personal service of the summons.*” *Wisconsin Nat. Gas*, 95 Wis. 2d at 696 (emphasis added).

¶11 We need not decide whether Kennedy’s motion to vacate the default judgment was timely filed, however, because even assuming it was, Kennedy has failed to show the judgment was void for lack of proper service.³ WISCONSIN STAT. § 799.12(4) provides that if “with reasonable diligence the defendant cannot be served by personal or substituted service under [WIS. STAT. §] 801.11, ... service may be made by mailing and publication under sub. (6).” Subsection (6),

³ We generally review the denial of a motion to vacate under WIS. STAT. § 806.07 for an erroneous exercise of discretion. *Werner v. Hendree*, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423. However, where a circuit court’s exercise of discretion turns on a question of law, such as the interpretation and application of statutes, we review the court’s decision de novo. See *Bank of Am., N.A. v. Prissel*, 2015 WI App 10, ¶8, 359 Wis. 2d 561, 859 N.W.2d 172.

in turn, states that “[s]ervice by mailing and publication authorized under sub. (4) may be made as provided in s. 801.11(1)(c) or as provided in this subsection.” The necessity of “mailing” the summons under § 799.12(6) depends on whether the defendant’s post-office address can be ascertained with reasonable diligence. *Compare* § 799.12(6)(b) *with* § 799.12(6)(c). If the defendant’s address can be so ascertained, the plaintiff may elect to publish either the summons *or* a notice under § 799.12(6)(c) as a class 1 notice. Para. 799.12(6)(b). If the defendant’s address cannot be ascertained, the plaintiff is required to publish a class 1 notice in “substantially” the format designated by § 799.12(6)(c).⁴ Para. 799.12(6)(c).

¶12 WISCONSIN STAT. § 801.11(1)(c)’s requirements are more demanding than those established by WIS. STAT. § 799.12(6)(c). Kennedy is correct that service by publication under WIS. STAT. ch. 801 contemplates publication of the summons, and requires authentication of that document prior to its publication and mailing. *See Burnett v. Hill*, 207 Wis.2d 110, 120, 557 N.W.2d 800 (1997). By contrast, § 799.12(6) clearly does not require publication of the summons. Instead, it is sufficient for the plaintiff to publish a summary

⁴ The form provided under WIS. STAT. § 799.12(6)(c) is as follows:

SMALL CLAIMS SUMMONS NUMBER ...

...(Defendant’s Name)

...(Defendant’s Address, if known)

You are being sued by ... (plaintiff’s name) in the small claims court for ... County, ... (room number, address and telephone number of the court). A hearing will be held at ... o’clock (a.m.) (p.m.), on ..., ... (year). If you do not appear, a judgment may be given to the person suing you. [A copy of the claim has been mailed to you at the address above.]

A class 1 notice requires one “insertion.” WIS. STAT. §§ 985.01(1m), 985.07(1).

notice that merely identifies the small claims case number, the names of the parties, and the date, time and location of the hearing.⁵ There is nothing in § 799.12(6)(c) suggesting such a notice itself must be authenticated prior to its publication, and there is no other basis in the law to require as such. Rather, Kennedy's entire argument for imposing such an authentication requirement for the summary notice relies on cases that were prosecuted as large claims and governed by WIS. STAT. ch. 801, which does not contemplate use of such notices.

¶13 The publication notice in this case substantially complied with—indeed, went well beyond—the notice form template set forth in WIS. STAT. § 799.12(6)(c). It read, in full:

(One Week, 8/7/13)
PUBLICATION IN CIVIL ACTION
Case No. 13SC635
State of Wisconsin Circuit Court,
Oneida County
Small Claims Division
Ripco Credit Union—vs—Valerie Kennedy
PO Box 206 2545 Columbus Rd Eagle River WI 54521,
Defendant.

You are hereby notified that a Summons and Complaint has been filed (for 2 counts) in a Small Claims Action by the Plaintiff listed above. A copy of the complaint has been mailed to your last known address and is on file in the Oneida County Clerk of Courts office which states the nature of the legal action.

You are being requested to appear in the Circuit Court, Small Claims Division Oneida County, located One Courthouse Square, Rhinelander WI 54501 Third floor Courtroom, before Judge Patrick Omelia [sic] of said court

⁵ As previously stated, *see supra* ¶11, in some instances the summons may be published as an alternative to a notice under WIS. STAT. § 799.12(6)(c), but this is not required. *See* WIS. STAT. § 799.12(6)(b).

to whom the said action may be assigned for trial according to law, on August 21, 2013 10:00 a.m.

Failure to contact the court in this matter in writing or appear in person may result in the court granting a Replevin Judgment (1st count) against you for property in the form of a 2000 Allegro M-31 VIN [omitted], 2001 Chevrolet Silverado VIN [omitted], 2003 Pontiac Bonneville VIN [omitted] and a Money Judgment (2nd count) in the amount of \$10,000 plus costs. Failure to respond may result in the court granting Judgment and cost of the legal action against you as stated in the Complaint and you may lose your right to object to statements made in the Complaint that may be incorrect.

Ripco Credit Union
P O Box 278
Rhineland WI 54501
Phone 715-365-4800
5243

(Formatting altered.) Thus, the notice included the small claims case number, the plaintiff's name and address, the defendant's name and last known addresses, the date, time and location of the hearing, and—although not required—a significant amount of detail about the nature of the claims. The notice also stated that a copy of the complaint had been mailed to Kennedy's last-known address, which statement is supported by the record. The notice warned about the consequences of failing to respond. It appears to have omitted the circuit court's telephone number, but we do not regard this as a significant omission rendering the notice inadequate.

¶14 Upon notification of the failed personal service attempts, the clerk arguably should have issued a new return date under WIS. STAT. § 799.12(4), but this requirement is simply to allow “timely publication” of the notice. The circuit court concluded Kennedy had adequate notice by virtue of the fourteen days between publication and the hearing, and Kennedy has not argued otherwise on appeal.

¶15 In sum, we conclude that even if Kennedy’s motion to vacate the default small claims judgment was timely filed, the judgment was not void for improper service. Our conclusion that the published notice was adequate under WIS. STAT. § 799.12(6) provides a sufficient basis to affirm the circuit court.⁶ *See State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (circuit court may be affirmed on any ground sufficient to support the result it reached).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

⁶ Ripco argues that its service by publication also was proper under WIS. STAT. § 799.16(4), which relates to in rem actions in which the court has jurisdiction over the property. Because we conclude the circuit court obtained personal jurisdiction over Kennedy by virtue of WIS. STAT. § 799.12(6), which jurisdiction was needed to award the \$10,000 money judgment in excess of the value of the replevin property sought, *see* WIS. STAT. § 799.16(1), we need not address this alternative argument. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

