

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2013

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. 2012AP349

Cir. Ct. No. 2011CV2924

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

HENRY J. TILIDETZKE AND DANIEL A. TILIDETZKE,

PLAINTIFFS-APPELLANTS,

FRANKENMUTH MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

SARAH J. CIANCIOLO,

DEFENDANT-RESPONDENT,

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA,

DEFENDANT,

**HUMANA INSURANCE COMPANY AND WEST BEND MUTUAL INSURANCE
COMPANY,**

NOMINAL-DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 GUNDRUM, J. Plaintiffs Henry J. Tilidetzke and Daniel A. Tilidetzke appeal from a judgment dismissing their claims against Sarah J. Cianciolo. The circuit court granted Cianciolo's motion to dismiss the Tilidetzkes' complaint against her on the ground the Tilidetzkes failed to exercise reasonable diligence in attempting to personally serve her with the summons prior to serving by publication, as required by WIS. STAT. § 801.11(1) (2011-12).¹ The Tilidetzkes contend they did exercise reasonable diligence. We disagree and affirm.

BACKGROUND

¶2 The relevant facts are undisputed. The Tilidetzkes filed a complaint seeking recovery for damages allegedly resulting from a collision between their vehicle and Cianciolo's occurring when Cianciolo attempted to turn into the driveway of her home. The Tilidetzkes hired a process service agency to serve the summons and complaint on Cianciolo. A process server went to Cianciolo's last known address, which was the address supplied by the Tilidetzkes' counsel and the location of the collision, in an attempt to personally serve her.

¶3 At a hearing on the motion to dismiss, the process server testified that he found no one at the residence, so he left a card which included his first

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

name, phone number, and Cianciolo's name. An hour later, the server received a call from a person who stated he was the owner of the home and that Cianciolo did not live there, and also inquired if the contact related to "a car accident ... at the end of the driveway." The server "never did get [the caller's] name."

¶4 According to affidavits of the process server and another agency employee that were submitted in opposition to the motion to dismiss, the agency subsequently sought another address for Cianciolo through the U.S. Postal Service and the White Pages,² but found none. The White Pages search, however, indicated that a "John Cianciolo" resided at the home where the server had attempted service, Cianciolo's last known residence. The employee averred that she then called the White Pages phone number for this residence approximately three times a day for five consecutive days "in hopes of verifying if Sarah Cianciolo did or did not reside there."³ The process server averred that "several messages" were left at the number, but no response was received. The record does not indicate what information may have been communicated in these messages.

¶5 The process server never returned to the residence and never attempted to contact any neighbors, but returned "the paperwork" to the Tilidetzkes' counsel. A paralegal for counsel averred that she then checked the

² Both the process server's and agency employee's affidavits identified the directory searched as the "White Pages." The process server's original affidavit of attempted service identified the directory searched as "AT&T." As neither party suggests more than one directory was searched by the agency, we use "White Pages" when referring to this search.

³ In their brief in opposition to Cianciolo's motion to dismiss, the Tilidetzkes represented to the circuit court that the process server first "obtained the telephone number of Sarah J. Cianciolo," but "later learned that the telephone number was assigned to John Cianciolo." This representation was not addressed at the motion hearing below nor has any party addressed it on appeal.

Wisconsin Circuit Court Access Program, Milwaukee Municipal Court records, and Whitepages.com but found no new address information for Cianciolo. Counsel then served the summons by publication.

¶6 Cianciolo moved for dismissal of the complaint against her based on insufficient service. After the hearing, the circuit court granted the motion, concluding the Tilidetzkes had failed to exercise reasonable diligence in attempting to personally serve Cianciolo. The Tilidetzkes appeal. Additional facts are presented below as necessary.

DISCUSSION

¶7 Due process requires that a court have personal jurisdiction over a defendant in a civil suit. *Loppnow v. Bielik*, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450. “Fundamental to that due process requirement is the provision of notice ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Id.* WISCONSIN STAT. § 801.11⁴ governs the circuit

⁴ WISCONSIN STAT. § 801.11 provides, in relevant part:

A court of this state ... may exercise personal jurisdiction over a defendant by service of a summons as follows:

(1)

(a) By personally serving the summons upon the defendant
....

(b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant’s usual place of abode:

1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof;

(continued)

court's jurisdiction over and service of process upon a defendant. It requires that personal service be attempted with "reasonable diligence" before an alternative method of service is utilized. See *Loppnow*, 324 Wis. 2d 803, ¶10. Reasonable diligence is that diligence "which is reasonable under the circumstances and not all possible diligence which may be conceived." *Haselow v. Gauthier*, 212 Wis. 2d 580, 589, 569 N.W.2d 97 (Ct. App. 1997) (citation omitted).

The guiding principle ... is that, when pursuing any leads or information reasonably calculated to make personal service possible, the plaintiff must not stop short of pursuing a viable lead—or in other words, stop short "of the place where if [the diligence] were continued might reasonably be expected to uncover an address ... of the person on whom service is sought."

Loppnow, 324 Wis. 2d 803, ¶15 (quoting *Haselow*, 212 Wis. 2d at 589). Where, as here, the relevant facts regarding the Tilidetzkes' attempt at personal service are undisputed, the legal significance of those facts is an issue of law we review independently of the circuit court. See *Loppnow*, 324 Wis. 2d 803, ¶9.

¶8 *West v. West*, 82 Wis. 2d 158, 262 N.W.2d 87 (1978), and *Beneficial Finance Co. of Wisconsin v. Lee*, 37 Wis. 2d 263, 155 N.W.2d 153 (1967), provide guidance regarding personal service attempts that fall short of the reasonable diligence requirement. In *West*, our supreme court concluded that an

1m. In the presence of a competent adult, currently residing in the abode of the defendant, who shall be informed of the contents of the summons; or

....

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice, under [WIS. STAT.] ch. 985

....

unsuccessful effort by the sheriff to serve the defendant at her last known address did not constitute reasonable diligence because the plaintiff, who was the defendant's husband, failed to "exhaust with due diligence ... leads or information reasonably calculated to make personal service possible." *West*, 82 Wis. 2d at 166-67. Specifically, the court criticized the plaintiff's failure to "ascertain[] the actual whereabouts of his wife by contacting any one of several members of his immediate family or of her immediate family, with whom he had remained in contact" and who lived in the same state as his wife. *Id.*

¶9 While the supreme court's decision in *Beneficial Finance Co.* provides little analysis for us to draw upon, similarities to this case are noteworthy. In *Beneficial Finance Co.*, the process server went to the address for the defendant which had been given to him by plaintiff's counsel. *Beneficial Fin. Co.*, 37 Wis. 2d at 268. At the residence, the server encountered the defendant's wife, who informed the server that the defendant lived there but was not home at the time. *Id.* Similar to this case, the server in *Beneficial Finance Co.* neglected to ask basic questions regarding the whereabouts of the defendant which may well have made personal service possible. Specifically, the server in that case "did not inquire as to where the defendant could be located and he apparently did not inquire as to when the defendant would be home," but instead merely served the wife. *Id.* at 267. The court summarily concluded that the "reasonable diligence" mandate for personal service "requires the use of a greater degree of diligence than has been demonstrated in this case," emphasizing that "[s]lipshod and haphazard attempts to serve are not sufficient." *Id.* at 268-69 (citation omitted).

¶10 The Tilidetzkes contend they exercised reasonable diligence in attempting to personally serve Cianciolo prior to serving by publication. They argue that their single visit to Cianciolo's last known address, their post office

inquiry and searches of various directories and databases for an alternative address for Cianciolo, and their attempts to reach someone by phone at Cianciolo's last known residence constituted reasonable diligence. We disagree. Because the Tilidetzkes failed to pursue a viable lead which might reasonably have been expected to lead to personal service upon Cianciolo, they did not exercise reasonable diligence.

¶11 On appeal, the Tilidetzkes place much emphasis on their contention that it was not reasonable to expect the process server to visit Cianciolo's last known residence a second time after he received the phone call from someone identifying himself as the homeowner and stating that Cianciolo did not live there. They do not dispute, however, that the server "never did get" the name of the person who called. And, significantly, despite the caller demonstrating likely familiarity with Cianciolo by expressing an awareness of "a car accident at the end of the driveway," neither the record nor the Tilidetzkes suggest the server ever asked the caller if he knew where Cianciolo *did* reside or could otherwise be located. Further, following this phone call, the agency's White Pages search indicated that a "John Cianciolo" resided at this last known address for Cianciolo, which was the address supplied by the Tilidetzkes' counsel, the address identified in the complaint as the location of the collision, and the only address the Tilidetzkes apparently had for Cianciolo. Information indicating a man named "Cianciolo" resided at this residence was, quite obviously, a viable lead for the

Tilidetzkes to pursue regarding Cianciolo's current whereabouts, and was a lead "reasonably calculated to make personal service" possible.⁵

¶12 Regardless of the identity of the caller who stated that Cianciolo did not reside at her last known address, it is noteworthy that, despite that phone call, the agency itself apparently understood the importance of the subsequently obtained White Pages information showing a man named "Cianciolo" residing at Cianciolo's last known residence, in that an employee called the phone number for this home approximately fifteen times over five days "in hopes of verifying if Sarah Cianciolo did or did not reside there." Having received no helpful response from the phone call attempts and finding no other information indicating alternative whereabouts for Cianciolo, reasonable diligence required that greater efforts be made to locate her. There was a reasonable likelihood, for example, that an additional visit to the property would have resulted in contact with John Cianciolo, contact with another resident of the property with relevant information, or perhaps contact with Cianciolo herself. A return to the area also would have provided another opportunity to contact neighbors to inquire about Cianciolo's whereabouts, something the process server did not attempt to do on his only visit to the property. By neglecting to make any such efforts, the Tilidetzkes failed to

⁵ Our holding does not depend upon whether a John Cianciolo did in fact reside at the home or know of Cianciolo's whereabouts at the time of attempted service, nor whether Cianciolo herself resided at the home. We note, however, that the Tilidetzkes contend Cianciolo was married to John Cianciolo and that he resided at the home at the time, but that she did not. Cianciolo does not dispute the Tilidetzkes' contentions regarding John Cianciolo, but averred in her affidavit in support of the motion to dismiss that she did live at the residence at the time of attempted service. Further, unhelpful to their position, the Tilidetzkes contend on appeal that John Cianciolo was the person who called the process server an hour after the server left his card at the home. If all of the Tilidetzkes' contentions regarding John Cianciolo are correct, then the process server apparently failed during the phone call to ask Cianciolo's husband, a person quite likely to know Cianciolo's whereabouts, how the server could contact Cianciolo.

exercise reasonable diligence in attempting to personally serve Cianciolo prior to serving by publication.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

