

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 27, 1998

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. 97-3572

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT II

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MARGRICIO BENITEZ,

PLAINTIFF-RESPONDENT,

v.

WILLIAM FASICK AND TRACY FASICK,

DEFENDANTS-RESPONDENTS,

DERANGO'S,

GARNISHEE-DEFENDANT-  
APPELLANT.

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APPEAL from an order of the circuit court for Racine County:  
STEPHEN A. SIMANEK, Judge. *Reversed and cause remanded with directions.*

BROWN, J. This is an appeal from an order denying a motion to vacate a small claims judgment. The motion claimed that the judgment was void, thus requiring that the court vacate it pursuant to § 806.07, STATS. The

trial court denied the motion on the basis that the exclusive remedy to reopen a small claims default judgment is time barred if brought more than six months after the entry of judgment contrary to § 799.29(1)(c), STATS. Because this case involves a motion to vacate a void judgment, not a motion to reopen a default judgment, this court reverses.

Margricio Benitez obtained a judgment against William and Tracy Fasick. DeRango's is a pizza restaurant business in Racine. Benitez filed a garnishment action naming DeRango's as garnishee-defendant because Fasick was employed there. The "garnishment papers" and a fee were served upon a waitress at DeRango's on October 3, 1995. The check was accepted and deposited in the DeRango's checking account. No answer was forthcoming from DeRango's and default judgment was entered on February 19, 1996.

A year and a half later, on August 19, 1997, a motion was made by DeRango's claiming that it was "more properly identified as Tony Tenuta and Cesare Tenuta, a partnership d/b/a DeRango the Pizza King." The motion was for "relief from the operation of the court's judgment" pursuant to "Wis. Stats. sec. 806.07." The motion alleged, inter alia, that the judgment was void. Affidavits supporting the motion were filed by the Tenutas. Each averred that he was a partner with the other doing business as DeRango the Pizza King. Each further averred that he was not served with either the garnishment form or the motion and notice of motion for default judgment.

At the motion hearing, counsel for DeRango's elaborated by explaining that § 801.11(6), STATS., requires personal service on each partner doing business as a partnership and asserted that neither partner had been personally served pursuant to the statute. The trial court declined to rule on the

question of whether personal jurisdiction existed. Instead, it ruled that the motion before it was not properly a § 806.07, STATS., motion, but was more properly a § 799.29, STATS., motion since it was a motion seeking to reopen a small claims judgment. The trial court then noted that such motions must be brought within six months of judgment. It also alluded to the concept of laches but did not appear to rest its decision on this ground. The trial court concluded that the motion was too late because it should have been made within the six months provided by statute. DeRango's appeals.

Because the trial court determined that § 799.29, STATS., controls and that the six-month limitation is applicable under the facts of this case, the issue before us is one of applying the facts to the law, which is a question of law. An appellate court is not bound by a trial court's conclusions of law and decides these issues de novo. *First Nat'l Leasing Corp. v. City of Madison*, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

It is true that a motion to reopen a small claims default judgment is time barred if made more than six months after the judgment is entered. See § 799.29(1)(c), STATS.; see also *King v. Moore*, 95 Wis.2d 686, 690-91, 291 N.W.2d 304, 307 (Ct. App. 1980). But a motion to vacate a judgment is not a motion to reopen a valid judgment. A motion to vacate a small claims judgment is therefore not controlled by the strictures of § 799.29(1)(c).

Rather, a motion to vacate a claimed void judgment is controlled by § 806.07(1)(d), STATS. In the case of a void small claims action, that statute is applied through the mandate of § 799.04(1), STATS. Section 799.04(1) relates that chs. 801 to 847, STATS., apply if the small claims statute does not otherwise provide. Since ch. 799, STATS., nowhere states how parties should proceed when

the claim is that a judgment is void and should therefore be vacated, § 806.07(1)(d), a statute which specifically deals with the situation, applies.

No statutory time limit applies to a motion to vacate void judgments. A void judgment may be expunged at any time. *See West v. West*, 82 Wis.2d 158, 166, 262 N.W.2d 87, 90 (1978). Laches do not apply to a motion to vacate for voidness either. *See id.* Nor does the reasonable time test of § 806.07(2), STATS., apply to this motion. *See Neylan v. Vorwald*, 121 Wis.2d 481, 497, 360 N.W.2d 537, 545 (Ct. App. 1984).

We remand for further proceedings. The question to be decided is whether the default judgment is void for lack of personal service of the summons and complaint as required under § 801.11(6), STATS. The issue involves factfinding and, once the facts are determined, applying the law.

*By the Court.*—Order reversed and cause remanded with directions.

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

