

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 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. 99-3213-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JUDITH N. NOLAN, AND JAMES J. NOLAN,

PLAINTIFFS-APPELLANTS,

V.

**JOHN R. KNIGHT, AND AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Judith and James Nolan appeal an order dismissing their complaint against John Knight and American Family Mutual Insurance Company. The Nolans sued Knight and American Family, as Knight's insurer, for injuries Judith suffered in an automobile accident. American Family raised the

defense of lack of personal jurisdiction in its pleadings, and subsequently moved to dismiss on that basis. The issue is whether the trial court properly granted American Family's motion. (The dismissal of Knight is not appealed.) We affirm.¹

¶2 To obtain personal jurisdiction over a defendant, WIS. STAT. § 801.02(1) requires service of an authenticated copy of the summons and complaint. A copy is "authenticated" when the clerk of the trial court file stamps it. *See* WIS. STAT. § 801.09(4). Failure to timely serve an authenticated summons and complaint is a fundamental error that "necessarily precludes personal jurisdiction regardless of the presence or absence of prejudice." *American Family Mut. Ins. Co. v. Royal Ins. Co. of America*, 167 Wis. 2d 524, 534, 481 N.W.2d 629 (1992). The plaintiff has the burden of proving service of an authenticated summons and complaint. *See id.* at 533. Serving an unauthenticated photocopy of an authenticated summons and complaint is not sufficient under WIS. STAT. § 801.02(1). *See id.* at 527.

¶3 In this case, the following facts were undisputed. The Nolans obtained an authenticated copy of the six-page summons and complaint and delivered it to the Dane County sheriff's office for service on American Family. A deputy served American Family's agent, Carol Schlimgen, with a summons and complaint at 8:10 a.m. on October 15, 1998.

¶4 Accompanying its motion to dismiss, American Family filed an unauthenticated photocopy of the authenticated summons and complaint, and

¹ This is an expedited appeal. *See* WIS. STAT. RULE 809.17 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

American Family's in-house counsel averred in his accompanying affidavit that this unauthenticated photocopy was the document American Family received on October 15. The back of each page of this summons and complaint contains an American Family legal office stamp consecutively numbering the pages and bearing the date and time of October 15, 1998 at 2:03 p.m. On the last page of the complaint there appears an original deputy sheriff's signature, and a stamp recording the 8:10 a.m., October 15 service date and time. A separate original stamp confirms receipt of service by "cs," (presumably Carol Schlimgen), and also records the same time and date of service.

¶5 A Dane County sheriff's department employee averred that department personnel customarily check documents for authentication, and customarily serve only authenticated copies. The department considers its certificate that a "true copy" was served as certification that it served an authenticated copy. The certificate of service here indicates service of a "true copy."

¶6 In the trial court, the Nolans offered the following to prove they served an authenticated copy: (1) delivery of the authenticated copy to the sheriff's department for service; (2) the department's customary procedures and the inference to be drawn from the certificate stating service of a "true copy"; and (3) American Family's inability to account for the document between 8:10 a.m. and 2:03 p.m., during which time, the Nolans suggest, an unauthenticated photocopy may have been substituted for the originally served copy. The trial court found this proof insufficient, however, and dismissed for lack of personal jurisdiction.

¶7 The Nolans first contend that the trial court should have denied American Family's motion to dismiss as untimely, because it violated a stipulated scheduling order. The Nolans have forfeited this issue, however, because they did not present it to the trial court. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶8 The trial court correctly concluded that the Nolans had failed to meet their burden to prove that the deputy served an authenticated copy of the summons and complaint. The signature and stamps appearing on the last page of the document proffered by American Family in support of its motion raise an inference that an authenticated summons and complaint were not served on it. The Nolans, who had the burden to prove proper service, were thus required to establish that an authenticated summons and complaint were indeed served on American Family. This might have been accomplished by way of an affidavit from the serving deputy that authenticated documents were in fact served, or by way of testimony from the deputy and/or American Family personnel at an evidentiary hearing. However, the Nolans offered only proof of the sheriff's department's customary practices, not that they were followed on this occasion. *See Creamery Package Mfg. Co. v. Industrial Comm'n*, 211 Wis. 326, 331, 248 N.W. 140 (1933) ("It will not do to reach a conclusion in favor of the party on whom the burden of proof rests by merely theorizing and conjecturing. There must at least be sufficient evidence to remove the question from the realm of conjecture.").

By the Court.—Order affirmed.

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

