

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 7, 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. 2015AP1475

Cir. Ct. No. 2013CV009231

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MICHAEL PENKALSKI,

PLAINTIFF-RESPONDENT,

v.

DAVID SVOBODA, D/B/A THE LAST STOP,

DEFENDANT-APPELLANT,

REXNORD LLC,

GARNISHEE.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. David Svoboda appeals from a judgment awarding damages to Michael Penkalski for injuries Penkalski sustained after falling down at Svoboda’s bar, The Last Stop. Svoboda presents a single issue on appeal: whether the publication of the summons and complaint in *The Daily Reporter* newspaper was sufficient to confer personal jurisdiction over Svoboda. See WIS. STAT. § 985.02(1) (2013-14).¹ We agree with the trial court that *The Daily Reporter* was a newspaper “likely to give notice” to Svoboda. See *id.* Therefore, we reject Svoboda’s challenge to personal jurisdiction and affirm the judgment.

BACKGROUND

¶2 Penkalski filed his personal injury lawsuit against Svoboda and unsuccessfully attempted to personally serve Svoboda at his home on seven occasions and at his bar on nine occasions. Penkalski then served Svoboda by publication using *The Daily Reporter*, a newspaper frequently used to provide legal notices. Penkalski subsequently filed proof of publication that included an affidavit from the publisher stating that *The Daily Reporter* “is a public newspaper of general circulation, printed and published daily in the English language in the City of Milwaukee, in said county, and fully complying with the laws of Wisconsin, relating to the publication of legal notices.”

¶3 After Svoboda failed to file an answer, Penkalski filed a motion for default judgment, which he mailed to Svoboda. On the day of the motion hearing, Svoboda appeared *pro se* and sought time to obtain counsel. Svoboda

¹ Throughout this decision, whenever we refer to *The Daily Reporter*, we have capitalized the word “the” and added italics where necessary.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

subsequently retained counsel, who filed a motion to dismiss the action on grounds that there was no personal jurisdiction over Svoboda because he had not been personally served and Penkalski had “failed to exercise reasonable diligence” in attempting to serve Svoboda.

¶4 At the hearing on Svoboda’s motion to dismiss, the trial court heard testimony from Svoboda and the woman who lives above his bar concerning Svoboda’s work schedule, the bar’s hours of operation, and other issues. As relevant to this appeal, Svoboda identified: (1) the address where he lives, which is in Franksville in Racine County; (2) the address of The Last Stop bar, which is in South Milwaukee in Milwaukee County; and (3) the address of Svoboda’s employer, which is in West Milwaukee in Milwaukee County.

¶5 Svoboda also testified that at the time Penkalski was attempting to serve him notice of the lawsuit, Svoboda was working from 6:00 a.m. until 2:30 p.m. on weekdays, plus additional hours of overtime, which resulted in Svoboda “working probably almost every day at that time.” Svoboda said his bar was open on Thursdays through Sundays starting at 5:00 p.m., and he implied that he frequently operated the bar himself, although he also said he had employees.

¶6 Svoboda’s trial counsel argued that the attempts at service were insufficient. He also raised an issue that was not addressed in the written motion to dismiss: whether service by publication was adequate in this case. Trial counsel argued:

[T]here's no evidence that *The Daily Reporter* is circulated in South Milwaukee, which is where Mr. Svoboda resides.²

And under [WIS. STAT. §] 985.02 you have to publish in a publication that's going to be calculated to provide notice to the person affected.

The ... proof of publication says the paper's published in the [C]ity of Milwaukee and said county.

There's no ... testimony -- I'm not aware of a single retail location even within the [C]ity of Milwaukee where you could go in and purchase a copy of *The Daily Reporter*. I've never seen it.

¶7 In response, Penkalski's trial counsel said it was his "understanding that *The Daily Reporter* is the commonly-used publication ... when you are attempting to serve an individual or a business by publication."

¶8 The trial court denied the motion to dismiss, finding that Penkalski had exercised due diligence in attempting to personally serve Svoboda, that Svoboda's testimony was not credible, and that Svoboda "was avoiding service." The trial court also rejected Svoboda's challenge to Penkalski's use of *The Daily Reporter* for service by publication. The trial court found that *The Daily Reporter* is "available in the county, not just available in the [C]ity of Milwaukee." The trial court continued: "[*The*] *Daily Reporter* is available everywhere, and it's one of those newspapers [in which] ... notices are published of all kinds of political events [and] other matters."

² It is undisputed that Svoboda's home address is actually in Franksville, which is in Racine County.

¶9 At a subsequent hearing, the trial court granted Penkalski's motion for default judgment and awarded Penkalski \$129,996.04 plus costs and disbursements. This appeal follows.

DISCUSSION

¶10 On appeal, Svoboda has abandoned his claim that Penkalski's original attempts at personal service were inadequate, and he does not challenge the amount of the judgment. He presents a single issue: whether "*The Daily Reporter* is a newspaper that was likely to give notice of the pending action to [Svoboda], a resident of Franksville in Racine County." He argues that "there is no evidence in the record that *The Daily Reporter* is a newspaper that is likely to give notice to a resident of Franksville in Racine County." Therefore, he contends, the service by publication was insufficient and the trial court lacked personal jurisdiction over him.

¶11 "A court gains jurisdiction over the parties only by valid personal and substituted service," and "Wisconsin compels strict compliance with the rules of statutory service." *PHH Mortgage Corp. v. Mattfeld*, 2011 WI App 62, ¶7, 333 Wis. 2d 129, 799 N.W.2d 455 (citing WIS. STAT. § 801.04). If a defendant cannot be served "with reasonable diligence" using the service methods outlined in WIS. STAT. § 801.11(1)(a) and (b), "service may be made by publication of the summons as a class 3 notice, under [WIS. STAT.] ch. 985, and by mailing." *See* § 801.11(1)(c).

¶12 WISCONSIN STAT. § 985.02(1) requires that legal notices "be published in a newspaper likely to give notice in the area or to the person affected." The statute continues: "Whenever the law requires publication in a newspaper published in a designated municipality or area and no newspaper is

published therein publication shall be made in a newspaper likely to give notice.” *See id.* The “[q]ualifications of newspapers” are outlined in WIS. STAT. § 985.03.

¶13 In this case, Svoboda does not challenge *The Daily Reporter* as a qualified newspaper under WIS. STAT. § 985.03. In addition, his opening appellate brief did not challenge the trial court’s finding that *The Daily Reporter* is available throughout Milwaukee County.³ Rather, Svoboda argues that the record does not demonstrate that publication in *The Daily Reporter* would give notice to a resident of Franksville in Racine County.

¶14 We begin our analysis with Penkalski’s request that this court take judicial notice of several facts. *See* WIS. STAT. § 902.01. Svoboda does not object to that request or dispute those facts. Thus, we will take judicial notice of the following facts: (1) *The Daily Reporter* is published at 225 E. Michigan St., Suite 540, Milwaukee, WI, 53202, which is in Milwaukee County; (2) Svoboda’s residence in Franksville is located 20.1 miles from *The Daily Reporter*; (3) The Last Stop is located 11.1 miles from *The Daily Reporter*; and (4) Svoboda’s employer is located 4.9 miles from *The Daily Reporter*.

¶15 Penkalski argues that based on those facts and Svoboda’s testimony, “the record establishes that [Svoboda] was in Milwaukee County, either at his place of employment or at the bar he owned, every day of the week.” Penkalski

³ In Svoboda’s reply brief, he asserts that there is “nothing in the record establishing that *The Daily Reporter* has any circulation in either South Milwaukee or West Milwaukee.” To the extent Svoboda is belatedly attempting to challenge the trial court’s finding that the newspaper is available throughout Milwaukee County, we decline to consider his argument because it is raised for the first time in his reply brief. *See Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (“It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.”).

concludes that the newspaper “clearly was published in an area likely to give [Svoboda] notice of the claim against him.”

¶16 Both parties cite *PHH Mortgage Corp.*, a case that also concerned notice by publication using *The Daily Reporter*. See *id.*, 333 Wis. 2d 129, ¶2. In that case, we concluded that “the undisputed record ... failed to establish that publication in a newspaper ‘printed and published daily ... in the City of Milwaukee, in said county’ would have been likely to provide notice to a resident of Menomonee Falls in Waukesha county.” See *id.*, ¶11 (quoting an affidavit submitted from the publisher).

¶17 Svoboda argues that just as in *PHH Mortgage Corp.*, the record in this case fails to establish that *The Daily Reporter* was a newspaper “likely to give notice” to Svoboda, a resident of Racine County. See WIS. STAT. § 985.02(1).

¶18 In contrast, Penkalski distinguishes *PHH Mortgage Corp.*, arguing that the facts here “are significantly different from the facts” in that case because Svoboda “owned a business and worked in the area where *The Daily Reporter* was likely to give him notice.”

¶19 Penkalski also cites another case, *Loppnow v. Bielik*, 2010 WI App 66, 324 Wis. 2d 803, 783 N.W.2d 450, where we concluded that service by publication was sufficient. In *Loppnow*, the defendant asserted that the Key West, Florida newspaper used to provide notice was insufficient because its publication area included an address in Marathon, Florida, where the defendant was no longer living, but did not cover his new residence in Orlando, Florida. See *id.*, ¶23. We rejected that argument based on evidence that the Marathon address was the defendant’s last known address. See *id.* Although *Loppnow* did not discuss the distance between the Marathon address and the newspaper’s address in Key West,

Penkalski has calculated that distance as forty-seven miles. He asks this court to recognize that the distance from *The Daily Reporter* to Svoboda’s home, bar, and employer is much less than that. He argues that the *Loppnow* court’s approval of a newspaper published forty-seven miles from a particular residence supports approving the use of *The Daily Reporter* in this case, where the newspaper is published in “close proximity” to Svoboda’s home, place of business, and employment.

¶20 While *PHH Mortgage Corp.* and *Loppnow* provide helpful instruction on interpreting WIS. STAT. § 985.02, we do not view those cases as establishing bright-line rules that dictate a particular result in this case. Application of § 985.02 requires a determination of whether publication in a particular newspaper was “likely to give notice” to a particular individual, which is a fact-intensive inquiry. *See id.* Section 985.02 does not require either that the newspaper be published in the same county where the individual resides or that a court consider only an individual’s residential address when applying the statute. *See id.* Applying the statute here, we agree with the trial court that publication in *The Daily Reporter* was sufficient. The trial court found that the newspaper is available throughout Milwaukee County. It is undisputed that at the time notice was given, Svoboda was working in Milwaukee County nearly every day—if not every day—either at his place of employment or at The Last Stop. Based on Svoboda’s nearly daily presence in Milwaukee County, we are satisfied that publication in *The Daily Reporter* was “likely to give notice” to him. *See id.*

By the Court.—Judgment affirmed.

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

