COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1379 **Cir. Ct. No. 2014CV1091**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ANUNPAMA WAHAL,

PLAINTIFF-APPELLANT,

SANJAY WAHAL AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

STEPHANIE J. WEISS AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed and cause remanded with directions.*

Before Higginbotham, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Anunpama Wahal appeals a judgment of the circuit court dismissing with prejudice Wahal's personal injury action against Stephanie Weiss and State Farm Mutual Automobile Insurance Company. The court concluded that Wahal's failure to timely serve the original summons and complaint on Weiss and State Farm constituted a fundamental defect that deprived the court of personal jurisdiction over the defendants. We agree, based on controlling case law, and accordingly affirm. We also grant the motion for costs and attorney's fees based on a frivolous appeal.

BACKGROUND

¶2 There is no dispute regarding the following pertinent facts. In 2014, Wahal filed a summons and complaint alleging that she suffered damages as a result of a car accident with Weiss that had occurred nearly three years earlier. Wahal subsequently filed an amended summons and complaint, adding her husband as a party to the action, and including an additional claim by the husband. The *amended* summons and complaint, but not the *original* summons and complaint, were timely served on Weiss and her insurer, State Farm. Wahal concedes that she never served the original summons and complaint on Weiss and State Farm, even though Weiss and State Farm raised insufficiency of service as an affirmative defense in their answer to the amended summons and complaint.

¶3 After 90 days passed without Wahal serving the original summons and complaint, which was after the three-year statute of limitations for personal injury actions had run, Weiss and State Farm brought a motion to dismiss. The circuit court granted the motion, and rejected a motion for reconsideration,

characterizing the motion as having been "brought and continued without a reasonable basis in law or equity."[1] Wahal appeals.

DISCUSSION

¶4 WISCONSIN STAT. ch. 801, which governs the commencement of actions, provides, in pertinent part, that "[a] civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court," *provided that* the defendant is served with "an authenticated copy of the summons and of the complaint ... within 90 days after filing." WIS. STAT. § 801.02(1) (2013-14).[2] The same terminology is used in addressing the application of statutes of limitations. *See* WIS. STAT. § 893.02 (for statute of limitations purposes "an action is commenced ... as to each defendant, when the summons naming the defendant and the complaint are filed with the court, but no action shall be deemed commenced as to any defendant upon whom service of authenticated copies of the summons and complaint has not been made within 90 days after filing.").

¶5 "'Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh.'" ***American Family Mut. Ins. Co. v. Royal Ins. Co. of Am.***, 167 Wis. 2d 524, 531, 481

[1] Explaining more fully, after Wahal filed her notice of appeal, the circuit court issued a decision and order denying the motion for reconsideration that Wahal had filed (which raised the same issues she now raises on appeal), and granting as sanctions Weiss and State Farm's motion for costs related to the reconsideration motion. Wahal does not appeal the order denying reconsideration and therefore we do not discuss further any issues related to the order in this opinion.

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

N.W.2d 629 (1992) (quoting ***Mech v. Borowski***, 116 Wis. 2d 683, 686, 342 N.W.2d 759 (Ct. App. 1983)).

> "[T]he service of a summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction" .... Significantly, a defendant's actual notice of an action is not alone enough to confer personal jurisdiction upon the court; rather, "[s]ervice must be made in accordance with the manner prescribed by statute."

Johnson v. Cintas Corp. No. 2, 2012 WI 31, ¶25, 339 Wis. 2d 493, 811 N.W.2d 756 (quoting ***Danielson v. Brody Seating Co.***, 71 Wis. 2d 424, 429, 238 N.W.2d 531 (1976)).

¶6 In ***Johnson***, our supreme court observed that "our courts have recognized a distinction between service that is fundamentally defective, such that the court lacks personal jurisdiction over the defendant in the first instance, and service that is merely technically defective." ***Johnson***, 339 Wis. 2d 493, ¶26. If the defect is fundamental, rather than merely technical, then the court lacks personal jurisdiction over the defendant, regardless of whether the defect resulted in prejudice to the defendant. ***American Family***, 167 Wis. 2d at 533.

¶7 Wahal argues that, in light of the fact that she served the amended summons and complaint within 90 days of filing of the original summons and complaint, her failure to serve the original summons and complaint within 90 days of filing the original summons and complaint is merely a technical defect that does not deprive the court of personal jurisdiction over Weiss and State Farm. That is, she contends that her service of "an authenticated amended summons and complaint comports with the purpose and intent" of WIS. STAT. § 801.02(1). In support, Wahal relies on older precedent that stands for the following general proposition: personal jurisdiction can be established despite an error in service, as

long as a defendant is on notice of the action and did not suffer prejudice from the error in service. *See, e.g.,* ***Lak v. Richardson-Merrell, Inc.***, 100 Wis. 2d 641, 302 N.W.2d 483 (1981); ***Schlumpf v. Yellick***, 94 Wis. 2d 504, 288 N.W.2d 834 (1980).

¶8 Wahal's arguments are entirely without merit. They rely on legal authority that pre-dates ***American Family***, cited above, in which our supreme court established the distinction between "fundamental" versus "technical" defects in this context, specifically concluding that "[f]ailure to comply with sec. 801.02(1) Stats., constitutes a fundamental error which necessarily precludes personal jurisdiction regardless of the presence or absence of prejudice." *See* ***American Family***, 167 Wis. 2d at 533-35. Moreover, the authority on which Wahal relies also pre-dates controlling precedent from this court that specifically relies on ***American Family***. *See* ***Bartels v. Rural Mut. Ins. Co.***, 2004 WI App 166, ¶¶15-17, 275 Wis. 2d 730, 687 N.W.2d 84 (affirming circuit court's dismissal of action as untimely where amended summons and complaint were timely served on defendant, but original summons and complaint were never served on defendant).

¶9 Like Wahal here, the plaintiffs in ***Bartels*** filed an original summons and complaint but never served them on the defendant. ***Id.***, ¶4. Like Wahal, the plaintiffs in ***Bartels*** also subsequently filed and timely served on the defendant an amended summons and complaint. ***Id.***, ¶5. Like the circuit court here, the circuit court in ***Bartels*** granted defendant's motion to dismiss on the ground that the plaintiffs' failure to serve the original summons and complaint resulted in the action never having been commenced and, like Wahal, the plaintiffs in ***Bartels*** appealed the dismissal to this court. ***Id.***, ¶6.

¶10 In ***Bartels***, we upheld the circuit court's dismissal of the plaintiffs' action. Relying on ***American Family***, we concluded that the plaintiffs' "failure to serve [the defendant] with the original summons and complaint within ninety days of their filing" "constituted a fundamental defect." ***Id.***, ¶16 (citing ***American Family***, 167 Wis. 2d at 534-35). We further explained that "[a] fundamental defect deprives the circuit court of personal jurisdiction over the defendant," ***id.*** (citations omitted), and that "a fundamental defect cannot be remedied with an amended pleading," ***id.***, ¶17. We conclude that here, as in ***Bartels***, Wahal's failure to serve Weiss and State Farm with the original summons and complaint within 90 days resulted in the three-year statute of limitations period expiring without an action having been commenced, leaving the court without personal jurisdiction over Weiss and State Farm. Under ***American Family*** and ***Bartels***, the failure was a fundamental defect that could not be remedied by Wahal's subsequent filing of an amended pleading.

¶11 By separate motion, Weiss and State Farm ask us to deem Wahal's appeal frivolous and remand the action to the circuit court so that it may determine costs. We grant the motion, because we conclude that this appeal was brought "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *See* WIS. STAT. § 809.25(3)(c)2. For the following reasons, we view Wahal's counsel's approach here to be frivolous.

¶12 First, as discussed above, ***American Family*** and ***Bartels*** are not ambiguous when applied to the undisputed facts here and Wahal heavily relies on pre-***American Family*** and ***Bartels*** authority, which is an obvious nonstarter. *See* ***American Family***, 167 Wis. 2d at 531; ***Bartels***, 275 Wis. 2d 730, ¶¶15-17.

¶13 Second, Wahal does not provide any basis to extend, modify, or reverse existing law. *See* WIS. STAT. § 809.25(3)(c)2.

¶14 Third, Wahal invites us to distinguish ***Bartels*** based on an inaccurate summary of that case. Wahal states, "Bartels failed to serve any complaint within the ninety (90) days allowed by statute" and also states that the court in ***Bartels*** "concluded that plaintiffs attempted to resurrect actions that were never commenced prior to the statute of limitations deadline because *no* summons and complaint were served within 90 days." (Emphasis in original.) In fact, the court in ***Bartels*** specifically noted that the plaintiffs "filed an amended summons and timely served [the defendant] with the amended summons and complaint" and that the defendant "was never served with the *original* summons and complaint" and that "[b]ecause [the defendant] did not have timely notice of the *original* action, to allow the *amended* suit to proceed would deprive [the defendant] of the statute of limitations protections." ***Bartels***, 275 Wis. 2d 730, ¶¶5, 15 (emphasis added).

¶15 Fourth, in a further pretense at distinguishing her case from ***Bartels***, Wahal inaccurately characterizes the contents of one of her pleadings in the instant case. Wahal repeatedly asserts that the amended complaint was "nearly identical" to the original complaint and that the only difference was that the amended complaint added Wahal's husband as a party. Wahal represents that "the amended complaint did not change in substance, nor did it add additional language, rather it was simply filed to add Sanjay Wahal, Wahal's husband." We are especially troubled by the fact that, even after Weiss and State Farm point out that the amended complaint expanded the claims, Wahal persists in her position that "[t]he two pleadings are nearly identical. The amended pleadings merely added Wahal's husband to the action." The pleadings reveal that Wahal's amended complaint not

only added her husband as a party, but added "a claim for loss of society and companionship in this matter as a direct result of the actions of [Weiss.]"

CONCLUSION

¶16 For the foregoing reasons, we conclude that the circuit court properly dismissed the action. We also grant Weiss and State Farm's motion to find the appeal frivolous, remanding to the circuit court for a determination of costs and reasonable attorney fees incurred by Weiss and State Farm in defending the appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

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