

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 15, 2001**

Cornelia G. Clark  
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.

**No. 01-0162**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JOHN F. HERNANDEZ AND GAIL A. HERNANDEZ,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**PATRICK E. BEHRNDT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County:  
KATHRYN W. FOSTER, Judge. *Affirmed in part and reversed in part.*

¶1 SNYDER, J.<sup>1</sup> Patrick Behrndt appeals from a judgment of the circuit court dismissing his demand for a trial de novo and awarding John and Gail Hernandez (the Hernandezes) attorney's fees. Behrndt argues that the circuit court erred in dismissing his demand for trial because his Notice of Demand for Trial

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

was timely filed. Furthermore, Behrndt argues that the circuit court erred when it refused to allow his nonlawyer employee to represent him in court and that the Hernandezes failed to establish a necessary element of their claim and failed to offer proof of the reasonableness of the attorney's fees. We affirm that portion of the judgment dismissing Behrndt's demand for trial, but reverse that portion of the judgment awarding attorney's fees, and reinstate the court commissioner's decision in its entirety.

### **FACTS**

¶2 The Hernandezes filed a complaint against Behrndt in small claims court on June 16, 1999, to rescind a timeshare contract and to recover \$951 already paid to Behrndt under this contract. A trial was held before a small claims court commissioner on March 14, 2000. The court commissioner rendered an oral decision against Behrndt that same day in which he rescinded the contract and awarded the Hernandezes \$951, plus costs and reasonable attorney's fees for a total of \$4,700.20.

¶3 On March 23, 2000, Behrndt filed a Notice of Demand for Trial seeking a trial de novo. Behrndt mailed the Demand for Trial to the Hernandezes on March 28, 2000. The Hernandezes filed a motion to dismiss the Demand for Trial, arguing that the demand had not been mailed within the statutorily required time period. The circuit court agreed that the demand was untimely, affirmed the court commissioner's decision and dismissed the action.

¶4 A hearing was then held on Behrndt's motion concerning the reasonableness of the award of attorney's fees. At this hearing, Behrndt attempted to have an employee appear on his behalf; the court refused to allow the employee to appear for Behrndt and required Behrndt, who was present in the courtroom, to

appear pro se. After considering the arguments presented by both parties, the court awarded the Hernandezes costs and attorney's fees in the amount of \$5,749.15. Behrndt appeals the judgment dismissing his action and awarding the Hernandezes attorney's fees in excess of \$100.

## DISCUSSION

¶5 In essence, Behrndt's arguments ask us to interpret provisions of WIS. STAT. ch. 799 and WIS. STAT. §§ 707.57 and 814.04. Statutory interpretation and the application of those statutes to a set of facts are questions of law we review de novo. *State v. Hughes*, 218 Wis. 2d 538, 543, 582 N.W.2d 49 (Ct. App. 1998).

¶6 Behrndt essentially makes four arguments in support of his appeal: (1) his Notice of Demand was timely because it was filed within fifteen days of the court commissioner's written decision; (2) parties to small claims actions may be represented by nonlawyer employees; (3) the Hernandezes failed to prove that his was a material misrepresentation; and (4) the Hernandezes failed to offer proof of the reasonableness of the attorney's fees. We reject Behrndt's first argument and need not address his remaining ones.

¶7 The law is clear regarding how a losing party in a small claims case may demand a de novo trial in the circuit court. WISCONSIN STAT. § 799.207 states, in relevant part:

(3) (a) There is an absolute right to have the matter heard before the court *if the requirements of this section are complied with.*

(b) The court commissioner shall give each of the parties a form and instructions which shall be used for giving notice of an election to have the matter heard by the court.

(c) The demand for trial must be filed with the court *and mailed to the other parties within 10 days from the date of an oral decision* or 15 days from the date of mailing of a written decision. Mailing of the notice and proof of such mailing is the responsibility of the party seeking review. (Emphasis added.)

¶8 Behrndt argues that his Notice of Demand for Trial was timely because he filed it within eight days of the court commissioner's written decision. We are puzzled by this assertion for there is no written decision from the court commissioner in the record. Behrndt supplies no copy of a written decision and provides no reference to the record where a written decision by the court commissioner can be found. We agree with the Hernandezes that it appears Behrndt mistakes the clerk's minutes for a written decision. A clerk's notations of a proceeding do not qualify as a written decision. In any event, the record contains no written decision from the court commissioner.

¶9 The only evidence surrounding the court commissioner's decision is the clerk's minutes from the small claims trial, which are not a part of the record, but were attached as Exhibit A to Behrndt's September 8, 2000 Memorandum in Opposition to Motion to Dismiss. The minutes are dated March 14, 2000, and indicate that the court commissioner issued an oral decision on that date after trial.

¶10 Because only an oral decision was issued in this matter, under WIS. STAT. § 799.207(3)(c), Behrndt needed to both file with the court *and* mail his demand for trial to the Hernandezes within ten days of the date of the oral decision. The oral decision was issued March 14, 2000. While Behrndt filed his Notice of Demand for Trial on March 23, 2000, nine days after the oral decision, by his own admission he did not mail his demand for trial to the Hernandezes until

March 28, 2000, fourteen days after the oral decision.<sup>2</sup> Thus, he did not comply with the mandates of § 799.207(3)(c) and his demand was untimely.

¶11 While a circuit court may have subject matter jurisdiction to consider and determine any type of action, failure to comply with a statutory mandate results in a loss of competency which prevents a court from adjudicating the specific case before it. *State v. Bollig*, 222 Wis. 2d 558, 565, 587 N.W.2d 908 (Ct. App. 1998).

Competency is a narrower concept than subject matter jurisdiction and is grounded in the court's power to exercise its subject matter jurisdiction.... Although a court is vested with subject matter jurisdiction by the constitution, the legislature may enact statutes which limit a court's power to exercise subject matter jurisdiction. Such legislative measures affect a court's competency rather than its jurisdiction.

*Id.* at 565-66 (citation omitted). Failure to comply with a statutory directive may result in a loss of competency to proceed. *Id.* at 566.

¶12 Here, the legislature has specifically dictated what events must occur as a prerequisite to the circuit court obtaining competence over a small claims matter that has been previously heard by a court commissioner. The circuit court lacked the competence to proceed with this case because the demand for trial was untimely and the clear mandates of the statute were not followed.

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<sup>2</sup> In fact, it appears that Behrndt needed to be reminded that he was required to contemporaneously provide the Hernandezes with a copy of the Notice of Demand for Trial. On March 24, 2000, the Hernandezes' attorney wrote Behrndt, informing him that while the Hernandezes had received a notice of hearing from the court, they had not yet received a copy of the Notice of Demand for Trial.

¶13 Behrndt's remaining arguments, that his nonlawyer employee could represent him before the circuit court and that the Hernandezes failed to establish a material misrepresentation and failed to offer proof of the reasonableness of the attorney's fees, however meritless they may be, are moot. Behrndt failed to file a timely demand for trial; thus, the court commissioner's decision is unappealable, the circuit court was without competence to act and any activity at the circuit court level was inappropriate.

¶14 This logically leads us to the next issue: attorney's fees. The court commissioner found that Behrndt violated WIS. STAT. § 707.55(1) and entered judgment against him in the amount of \$951, plus incidental damages of \$70, the \$59 filing fee, an unspecified \$35.20, and attorney's fees of \$3,585, for a judgment totaling \$4,700.20. However, while the circuit court dismissed Behrndt's appeal as untimely, the court inexplicably retained the issue of reasonableness of attorney's fees and awarded the Hernandezes \$5,749.15 in attorney's fees. This cannot be. The circuit court cannot lose competence on one issue yet retain competence on another. If the circuit court lacked competence to proceed on the merits of Behrndt's appeal, it lacked competence to proceed on all issues, including the issue of attorney's fees. *See Eau Claire Leader-Telegram v. Barrett*, 146 Wis. 2d 647, 651, 431 N.W.2d 741 (Ct. App. 1988) (court of appeals affirmed trial court conclusion that because it lacked jurisdiction in mandamus action it consequently lacked authority in the same action to order recovery of attorney fees). Thus, the circuit court's \$5,749.15 award of attorney's fees was improper. The court commissioner's decision on all issues, including the award of attorney's fees, must be reinstated in its entirety.

## CONCLUSION

¶15 The circuit court did not have competence to proceed on this matter because Behrndt failed to mail his demand for trial in a timely manner. We therefore affirm the circuit court's decision to dismiss this matter. However, because the court lacked competence to hear the merits of Behrndt's appeal, it also lacked competence to address the issue of attorney's fees. We therefore reverse that portion of the judgment addressing attorney's fees and reinstate the court commissioner's decision in its entirety.

*By the Court.*—Judgment affirmed in part and reversed in part.

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

