

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2012

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. 2011AP1661

Cir. Ct. No. 2010CV790

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JUSTIN M. MAAS,

PLAINTIFF-RESPONDENT,

TRILOGY HEALTH INSURANCE, INC.,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

v.

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY, GAGE M.
CREIGHBAUM, SHERRY A. LAGIOS, DIMITRIOS D. LAGIOS AND ABC
INSURANCE COMPANY,**

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Fond du Lac County:
PETER L. GRIMM, Judge. *Reversed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 GUNDRUM, J. Defendants American Family Mutual Insurance Company, Gage Creighbaum, Sherry Lagios, and Dimitrios Lagios¹ appeal from an order denying their motion to dismiss. The trial court held that the defendants waived their statute of limitations defense by not raising it prior to filing their notice of appearance and serving their request for admissions in response to Maas’s amended complaint. The court concluded that, in light of the waiver, the action was properly commenced and that Maas’s amended complaint, filed almost six months after the close of the three-year statute of limitations period, related back to the original complaint filed two days before the expiration of that period. The defendants contend the statute of limitations ran when Maas failed to commence the action by serving them with the original summons and complaint within the ninety-day period permitted by WIS. STAT. § 801.02(1) (2009-10),² and that Maas’s claims are therefore barred. We agree and reverse.

BACKGROUND

¶2 On August 20, 2007, Creighbaum crashed his vehicle into a vehicle operated by Maas, resulting in personal injury to Maas. On August 18, 2010, two days before the end of the three-year statute of limitations period, Maas filed a summons and complaint against the defendants related to his injuries. Maas failed to serve any of the defendants with the summons and complaint.

¹ Maas’s amended complaint alleges that Creighbaum was a minor at the time of the incident at issue in this case and that he operated his vehicle with the permission of Sherry Lagios and/or Dimitrios Lagios, who “upon information and belief sponsored Creighbaum’s driver’s license and were liable for his actions with a vehicle on the subject accident date.” The amended complaint further alleges that American Family insured the vehicle Creighbaum was operating at the time of the incident and that it issued a policy insuring Creighbaum and the Lagioses.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 Maas filed an amended summons and complaint on February 15, 2011, which he served on the defendants. The amended summons and complaint contained the same cause of action and named the same defendants as the original summons and complaint. On March 24, 2011, the defendants served a request for admissions and interrogatories on Maas inquiring about service of the original summons and complaint. On March 28, 2011, the defendants filed a notice of appearance related to the amended summons and complaint. The notice of appearance and request for admissions and interrogatories contained no statement about preserving jurisdictional objections.

¶4 The defendants filed an answer to Maas's amended summons and complaint on April 6, 2011, alleging Maas failed to obtain proper service of process on Creighbaum and the Lagioses and the court therefore lacked personal jurisdiction over them and alleging that Maas's claim was barred by the statute of limitations. On May 3, 2011, the defendants filed a notice of motion and motion to dismiss on the grounds that the suit was barred by the statute of limitations.

¶5 The trial court denied the motion, concluding that the defendants' failure to raise their jurisdictional objection prior to filing the notice of appearance and serving the request for admissions constituted a waiver of their statute of limitations objection. The court further held that Maas's action was properly commenced and that the amended complaint related back to the original complaint. The defendants petitioned for leave to appeal and we granted the petition.

DISCUSSION

¶6 A motion to dismiss based on a statute of limitations is treated as a motion for summary judgment. *See* WIS. STAT. § 802.06(2)(b). Upon review, we

perform the same function as the trial court, therefore our review is *de novo*. *Bartels v. Rural Mut. Ins. Co.*, 2004 WI App 166, ¶7, 275 Wis. 2d 730, 687 N.W.2d 84.

¶7 On appeal, the defendants argue that even though Maas filed his original summons and complaint two days prior to the running of the three-year statute of limitations period, his claim is barred because he failed to serve any of the defendants with the summons and complaint within ninety days of the filing as required by WIS. STAT. § 801.02(1). As a result, the defendants assert, Maas's suit was not *commenced* within the three-year period and his claim was thereby extinguished. Additionally, the defendants contend the relation back statute does not apply because the original action was never commenced. The defendants are correct in each respect.

¶8 The statutes are clear. An action to recover damages for personal injuries “shall be *commenced* within 3 years *or be barred*.” WIS. STAT. § 893.54 (emphasis added). An action is “*commenced* as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, *provided* service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.” WIS. STAT. § 801.02(1) (emphasis added). Thus, if service is not made within ninety days of the filing of the summons and complaint, the action is not commenced. If not commenced within the three-year statute of limitations period, the action is barred. It is undisputed that Maas failed to serve any of the defendants with the original summons and complaint within ninety days of filing. As a result, his action was never commenced prior to the running of the limitation period and is therefore barred.

¶9 Maas’s failure to serve the defendants with the original summons and complaint within ninety days was a fundamental defect which deprived the trial court of personal jurisdiction over the defendants and rendered the original pleading a legal nullity. See *Bartels*, 275 Wis. 2d 730, ¶16. Maas’s argument that the defendants waived their jurisdictional objection by failing to raise the objection when they filed their notice of appearance and served their requests for admissions in response to Maas’s amended pleading³ is without merit, as there was nothing for the defendants to waive since this fundamental defect could not be remedied with Maas’s amended pleading in the first instance. See *id.*, ¶17; see also *Hester v. Williams*, 117 Wis. 2d 634, 643, 345 N.W.2d 426 (1984) (where a plaintiff fails to commence an action before the statute of limitations runs, there is no pending action, and where there is no action pending, waiver does not apply since a defendant has no duty to raise any defenses). Further, the amended complaint could not relate back to the original complaint because the original complaint was nullified when Maas failed to serve any of the defendants within ninety days of its filing. As the defendants correctly point out, Maas “cannot amend an action that was never commenced.”

CONCLUSION

¶10 Maas’s failure to serve the defendants with the original summons and complaint within ninety days resulted in the three-year statute of limitations period expiring without an action having been commenced. The failure was a

³ Maas also argues that American Family waived its jurisdictional defense by failing to specifically plead lack of personal jurisdiction as to American Family or bring a motion to dismiss on those specific grounds. However, in its answer to the amended complaint and its motion to dismiss, American Family did specifically assert the defense it has maintained all along, i.e., that Maas’s claim is barred by the statute of limitations.

fundamental defect which rendered the pleading a legal nullity and could not be remedied by the subsequent filing of an amended pleading after the statute of limitations period expired.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

