COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1995

No. 95-1536-FT

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

BANK ONE, MILWAUKEE, N.A.,

Plaintiff-Appellant,

v.

LINDA L. HARRIS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Reversed and cause remanded with directions.*

WEDEMEYER, P.J.[1] Bank One, Milwaukee, N.A., appeals from an order entered in small claims court in favor of Linda L. Harris, whereby the trial court granted Harris's motion to vacate a replevin judgment Bank One previously obtained against her. Bank One claims that the trial court erred in granting the motion to vacate on the basis of insufficient service of process.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

Because Bank One complied with the appropriate statutory service of process requirements, this court reverses the order and remands with directions.

I. BACKGROUND

Bank One initiated a small claims action seeking a replevin judgment against Harris because she was in default on her car loan. The action did not seek a personal judgment against Harris; instead, it sought possession of the car. Personal and substituted service attempts were unsuccessful. On September 19, 1994, Bank One mailed the summons and complaint to Harris's last known address. The return date listed in the summons and complaint was September 20, 1994. On September 19, 1994, Bank One also forwarded a publication summons to *The Daily Reporter* for publication once in each of three consecutive weeks. The publication summons indicated that the adjourned return date was October 18, 1994.

It is undisputed that Harris received the mailed summons and complaint on September 21, 1994. Harris did not appear for the October 18 hearing. Accordingly, a replevin judgment for possession of the car was entered in favor of Bank One. Bank One repossessed the car on October 21, 1994.

On October 31, 1994, Harris filed a motion to vacate the judgment. The trial court granted this motion on the grounds that the trial court lacked personal jurisdiction over Harris because of insufficient service of process. Specifically, the trial court concluded that in order to accomplish proper service via publication, Bank One should also have mailed to Harris a summons and complaint that indicated the adjourned return date. Bank One appeals from this order.

II. DISCUSSION

The issue in this case is whether the trial court's analysis of the statutes regarding service of process was correct. The trial court concluded that in order to accomplish effective service, the statutes required not only that the

summons be published, but also that a summons and complaint reflecting the adjourned return date be mailed to Harris's last known address. It is undisputed that the actual publication of the summons was accomplished. The only dispute is whether the statutes also required Bank One to mail to Harris the identical document that was published. This is a question of law that this court reviews *de novo*. *See* ***Bucyrus-Erie Co. v. DILHR***, 90 Wis.2d 408, 417, 280 N.W.2d 142, 146-47 (1979) (the construction of a statute and the application of a statute to a particular set of facts are questions of law). This court's review of the appropriate statutes, under the facts presented in this case, demonstrates that the trial court erred in its conclusion.

Small claims actions are governed by CHAPTER 799, STATS. Section 799.12, STATS., provides guidelines for service of summonses under this chapter. Section 799.16, STATS., however, provides particular instruction regarding service by publication in "[a]ctions in rem or quasi in rem."

Before determining which statute governs this case, it is necessary to determine whether the instant action is an action *in rem* or an action *in personam*. An action *in rem* refers to an action "where the direct object is to reach and dispose of property owned" by an individual. *See* BLACK'S LAW DICTIONARY 404 (5th ed. 1983). An action *in personam*, in contrast, is an action "seeking judgment against a person ... and based on jurisdiction of his person, as distinguished from a judgment against his property." ***Id.*** On this basis, this court concludes that the instant case is an action *in rem*. This particular case constitutes an action *in rem* because Bank One sought only possession of Harris's car.[2] Having concluded that this case involved an action *in rem*, the only issue remaining is whether the statutes require Bank One to mail a copy of the publication summons to Harris in addition to actually publishing it. To resolve this issue, this court looks to the relevant statutes.

[2] Harris argues that the $125 sought in costs transforms this into an *in personam* action. This court disagrees. Section 799.16(4)(b), STATS., specifically contemplates a recovery of costs.

This court also rejects Harris's claim that because the suit papers named Harris as the defendant rather than naming the car as the defendant, this action has to be classified as one *in personam*. Naming the individual owner of the object to be repossessed does not make the action one *in personam*. The determinative factor is whether the complaint demands specific recovery for the chattel (an *in rem* action) or for damages from the person (an *in personam* action). Accordingly, this court rejects both of Harris's contentions.

Section 799.16, STATS., provides in pertinent part:

> **(1)** BASIS. In proceedings in rem or quasi in rem no judgment shall be entered against a defendant for an amount in excess of the value of the property unless based on personal or substituted service as provided in s. 799.12(1), or unless the defendant appears without objecting to the jurisdiction of the court over defendant's person.
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> **(2)** ADJOURNMENT AND PUBLICATION. When the defendant has not been served with personal or substituted service pursuant to s. 799.12(1) and does not waive the defense of lack of jurisdiction over the person under s. 802.06(3) and the court has jurisdiction over the property, service may be made on the defendant by publication. If service is to be made by publication, the proceeding shall be adjourned to a day certain by the court, and a notice in substantial conformity with sub. (4) shall be published as a class 3 notice, under ch. 985.

These statutes are not ambiguous and, therefore, this court's interpretation is limited to the language contained within the statutes. ***In re Jamie L.***, 172 Wis.2d 218, 225, 493 N.W.2d 56, 59 (1992). Subsection (1) requires service in accord with § 799.12(1), STATS., only if a judgment is entered *in excess* of the value of the property. Bank One did not seek a judgment in excess of the value of Harris's car. Therefore, subsection (1), which requires service in compliance with § 799.12(1), does not apply to this case.

This case is governed by § 799.16(2), STATS., which indicates that where service is by publication in an *in rem* action, a party may accomplish service by publication *without* also mailing a copy of the publication summons to the defendant.[3] Accordingly, this court concludes that proper service, via

[3] Although this court agrees that the preferable practice would include mailing a copy of the publication summons to the defendant's last known address, § 799.16(2), STATS., does not require such a mailing.

publication, pursuant to § 799.16(2), STATS., was accomplished by Bank One. As a result, the trial court had jurisdiction to grant the replevin judgment and this judgment should not have been vacated on the grounds that service of process was insufficient.

This court is not persuaded by Harris's argument that § 799.12(1), STATS., governs service of process in *all* small claims cases and because this section requires mailing, a mailing requirement must also be read into § 799.16(2), STATS. Where a general statute conflicts with a specific statute, the specific statute prevails. ***Fred Rueping Leather Co. v. City of Fond du Lac***, 99 Wis.2d 1, 5, 298 N.W.2d 227, 230 (Ct. App. 1980). Section 799.16, STATS., is the more specific statute when the action is *in rem* and when service is by publication. Under the rules governing statutory construction, this court applies § 799.16(2), rather than the more general § 799.12(1) and, therefore, must reject Harris's contention.

This result is also supported by another rule of statutory construction—*expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another. *See* ***Gottlieb v. City of Milwaukee***, 90 Wis.2d 86, 95, 279 N.W.2d 479, 483 (Ct. App. 1979). By specifically stating that a party in an *in rem* action (where the mode of service is by publication) can accomplish service solely by publishing the summons, and by failing to include within that statute that the summons must also be mailed, the legislature's intent not to require a mailing under these circumstances may be presumed. *See* ***Fred Rueping***, 99 Wis.2d at 5, 298 N.W.2d at 230.

III. CONCLUSION

Thus, this court reverses the order entered by the trial court. This court's review of the record, however, revealed that Harris also claimed that the judgment should be vacated because: (1) Bank One did not comply with § 425.104, STATS., which requires a plaintiff to send a notice of right to cure default to a defendant; and (2) additional violations of Wisconsin's Consumer Act justify vacating the replevin judgment. Because the trial court decided the motion to vacate on service of process grounds, these other issues were not addressed. It is the duty of the trial court to determine whether other grounds exist that demand that the replevin judgment be vacated. Accordingly, this

court remands this case to the trial court with directions to conduct a hearing to determine whether the additional grounds alleged in Harris's original motion justify vacating the replevin judgment. If the trial court determines that the additional grounds are insufficient to vacate the replevin judgment, the trial court should reinstate the original replevin judgment. If the trial court determines that the additional grounds justify vacating the replevin judgment, the trial court should enter a new order vacating the replevin judgment.

By the Court.—Order reversed and cause remanded with directions.

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