

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 2002

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.

**Appeal No. 01-3198
STATE OF WISCONSIN**

Cir. Ct. No. 01CV3442

**IN COURT OF APPEALS
DISTRICT I**

JOHN C. HAGEN,

PLAINTIFF-APPELLANT,

v.

**CITY OF MILWAUKEE EMPLOYEE'S RETIREMENT
SYSTEM ANNUITY AND PENSION BOARD,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. John C. Hagen appeals from the trial court's order granting summary judgment and dismissing his claims against the City of Milwaukee Employees' Retirement System Annuity and Pension Board. Hagen contends that the trial court erred in concluding that he failed to properly serve the

defendant pursuant to WIS. STAT. § 801.11(4) (1999-2000).¹ Because Hagen did not comply with § 801.11(4), we affirm.

I. BACKGROUND.

¶2 On April 19, 2001, Hagen filed a summons and complaint against the City of Milwaukee Employees' Retirement System Annuity and Pension Board (MERS) pursuant to WIS. STAT. § 68.13 seeking review of the MERS's decision to remove him from duty disability and terminate his disability pay. The MERS was established by Chapter 396 of the Laws of 1937, the provisions of which have been codified in Chapter 36 of the Milwaukee City Charter, and provides retirement benefits to its members, who include employees of the City of Milwaukee (City).²

¶3 Hagen hired a private process firm, Badger Process Service, Inc. (Badger), to serve MERS with legal process. On April 27, 2001, a process server from Badger named Fred Meier entered City Hall to serve MERS with the summons and complaint. Meier first proceeded to Room 603 of City Hall, which contains offices for MERS. After the process server entered Room 603, a secretary informed him that the summons and complaint had to be served at the City Clerk's Office, which is located in Room 205 of City Hall.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² Hagen had been employed with the City in various positions within the Forestry Department and the Department of Public Works since 1968. He injured his elbow in a work-related accident in April of 1989 and was placed on disability. After a periodic medical examination revealed that he was no longer permanently disabled as a result of the injury, the MERS informed Hagen that his disability status was under review. After Hagen appeared before the medical council, the MERS removed him from duty disability.

¶4 The process server proceeded to the City Clerk's Office where he served the papers. Service was accepted by a staff assistant for the City Clerk's Office, Kathleen Marquardt. Marquardt was not an employee or agent of MERS and was only authorized to accept service for the City. MERS was never served with the summons and complaint.

¶5 On September 10, 2001, MERS moved for summary judgment on the grounds that the court lacked personal jurisdiction due to Hagen's improper service. On October 15, 2001, the trial court granted the defendant's motion concluding that it lacked jurisdiction because MERS, who was a separate and distinct corporate body from the City, was never served in accordance with WIS. STAT. § 801.11(4).

II. ANALYSIS.

¶6 This appeal involves issues decided pursuant to summary judgment. Our review of the circuit court's decision to grant summary judgment is *de novo*. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment must only be granted if the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. RULE 802.08(2).

¶7 Hagen contends that the trial court obtained personal jurisdiction over MERS by service of the summons and complaint upon the City. Hagen claims that, based on the supreme court's holdings in the cases of *Horrigan v. State Farm Ins., Co.*, 106 Wis. 2d 675, 317 N.W.2d 474 (1982), and *Keske v. Square D Co.*, 58 Wis. 2d 307, 206 N.W.2d 189 (1973), service of process on the City was adequate because the process server was reasonably confused and the

fundamentals of process, namely notice and knowledge, had been accomplished. We disagree.

¶8 WISCONSIN STAT. § 801.02 governs the commencement of civil actions. Section 801.02(1) states:

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 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.

¶9 WISCONSIN STAT. § 801.11 prescribes the manner of serving the summons and complaint in order to obtain personal jurisdiction over a defendant. Section 801.11(4) outlines the manner of serving political corporations and other political bodies:

801.11 Personal jurisdiction, manner of serving summons for. A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:

....

(4) OTHER POLITICAL CORPORATIONS OR BODIES POLITIC.
(a) Upon a political corporation or other body politic, by personally serving any of the specified officers, directors, or agents:

1. If the action is against a county, the chairperson of the county board or the county clerk;
2. If against a town, the chairperson or clerk thereof;
3. If against a city, the mayor, city manager or clerk thereof;
4. If against a village, the president or clerk thereof;
5. If against a technical college district, the district board chairperson or secretary thereof;

6. If against a school district or school board, the president or clerk thereof; and

7. If against any other body politic, an officer, director, or managing agent thereof.

(b) In lieu of delivering the copy of the summons to the person specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

¶10 In *Watkins v. Milwaukee County Civil Serv. Comm'n*, 88 Wis. 2d 411, 276 N.W.2d 775 (1979), our supreme court interpreted WIS. STAT. § 801.11(4) (1975).³ In *Watkins*, the plaintiff, Claude Watkins, filed a petition for

³ The 1999-2000 version of WIS. STAT. § 801.11(4) is nearly identical to the 1975 version interpreted in *Watkins v. Milwaukee County Civil Serv. Comm'n*, 88 Wis. 2d 411, 416, 276 N.W.2d 775 (1979). WISCONSIN STAT. § 801.11(4) (1975) states:

(4) OTHER POLITICAL CORPORATIONS OR BODIES POLITIC. (a) Upon a political corporation or other body politic, by personally serving any of the specified officers, directors, or agents:

1. If the action is against a county, the chairman of the county board or the county clerk;

2. If against a town, the chairman or clerk thereof;

3. If against a city, the mayor, city manager or clerk thereof;

4. If against a village, the president or clerk thereof;

5. If against a vocational, technical and adult education district, the district board chairman or secretary thereof;

6. If against a school district, school board, the president, secretary or clerk thereof; and

7. If against any other body politic, an officer, director, or managing agent thereof.

(b) In lieu of delivering the copy of the summons to the person specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

an alternative writ of mandamus in the circuit court naming the Milwaukee County Civil Service Commission and Edwin A. Mundy, the Director of the Milwaukee County Institutions, as respondents. *Watkins*, 88 Wis. 2d at 414. The writ was served on both Mundy and Anthony P. Romano, who was the Chief Examiner of the Milwaukee County Civil Service Commission. *Id.* The respondents then filed a motion to quash the writ on the grounds that the service of process was insufficient. *Id.* The trial court granted the motion determining that it had no personal jurisdiction over the respondents because of insufficient service of process. *Id.* at 415.

¶11 In overturning the trial court's decision, our supreme court interpreted WIS. STAT. § 801.11(4) (1975) in the following manner:

[T]he Commission [consists] of appointed members who perform statutorily defined, important governmental functions entirely independent of the governmental entity which appoints members. This independence is of primary importance. To limit the aggrieved party to an action against the governmental unit which appointed the Commission membership would be ineffectual because a judgment or order directed against the county could not be enforced by the county or the court against the Commission.

... In extending recognition of arms of the state as bodies politic, the legislature recognizes that various arms of government exercise independent governmental functions. By statutorily providing that there shall be a civil service commission in Milwaukee County and defining the duties and scope of authority, the legislature has directed the commission to act independently of the county board. Therefore, the commission must be subject to direct judicial proceedings in order to afford a forum to those persons allegedly aggrieved by unlawful acts of the commission.... We conclude that the Commission is a "body politic" within the meaning of sec. 801.11(4)(a)(7), Stats.

There is no question that the Chief Examiner ... is "an officer, director, or managing agent" of the Commission

under sec. 801.11(4)(a)(7), Stats. Thus adequate service was effected when the alternative writ was served on the Chief Examiner the day the petition was filed.

Id. at 417-18.

¶12 Similarly, MERS is a political body separate from the City, which is independently responsible for the administration and operation of the retirement system and is comprised of various governmental agencies. *See* Milwaukee City Charter §§ 36-09-6 (“The retirement system shall have all of the powers and privileges of a corporation, as enumerated in chs. 180 and 182, Wis. Stats....”), 36-15-1 (“The general administration and responsibility for the proper operation of the retirement system and for making effective the provisions of this act are hereby vested in an annuity and pension board....”), 36-01 (“The retirement system provided for herein shall be maintained by the city *and* by such agencies as are included specifically within the provisions of this chapter....”) (emphasis added). Thus, MERS fits within the definition of a “body politic” as used in WIS. STAT. § 801.11(4)(a)7 and interpreted by the supreme court in *Watkins*.

¶13 A threshold requirement for adequate service of process is compliance with the appropriate statutory procedures. *See Heaston v. Austin*, 47 Wis. 2d 67, 70-71, 176 N.W.2d 309 (1970) (“In order for a court to obtain jurisdiction over a person, a summons must be served in a manner prescribed by the statutes.”) (footnote omitted). Therefore, “when a statute prescribes how service is to be made, the statute determines the matter.” *Punke v. Brody*, 17 Wis. 2d 9, 13, 115 N.W.2d 601 (1962). Because Hagen did not serve “an officer, director, or managing agent” of MERS in accordance with WIS. STAT.

§ 801.11(4)(a)7 or “[a] person who [wa]s apparently in charge of the office” in accordance with § 801.11(4)(b), we conclude that service was inadequate.⁴

¶14 Hagen relies on *Horrigan* and *Keske* in an attempt to prove that he did comply with WIS. STAT. § 801.11. However, both cases are distinguishable from the instant case. In *Keske*, a process server went to the general offices of the defendant corporation, Square D, where he requested to see the person in charge of the office in order to deliver a summons and notice. *Keske*, 58 Wis. 2d at 308, 313. The process server was directed by the receptionist to a man named James Vetta, who was the Director of Industrial Relations. *Id.* at 308-09. Vetta accepted the service, but the plaintiff later discovered that Vetta was not the director in charge of the specific department of Square D that was the subject of the lawsuit.⁵ *Id.* at 310. In interpreting WIS. STAT. § 262.06(5)(a) (1969), the supreme court concluded that the process server’s conclusion that Vetta was “apparently in charge of the office” was reasonable under the facts. *Id.* at 315.

¶15 *Horrigan* also dealt with the issue of whether a plaintiff’s service of process was made upon someone “apparently in charge of the office.” In *Horrigan*, the plaintiff’s process server went to the offices of State Farm Insurance in Milwaukee. *Horrigan*, 106 Wis. 2d at 678. The process server informed the receptionist that he had a summons and complaint to serve upon the corporation and that he would need to see an officer or agent of the corporation.

⁴ Although approximately forty-one days before the ninety days for service expired MERS informed Hagen that it was not properly served with the summons and complaint, Hagen chose not to correct his mistake and serve MERS.

⁵ Square D was comprised of five separate departments with five separate department heads and directors. *Keske v. Square D Co.*, 58 Wis. 2d 307, 310-11, 206 N.W.2d 189 (1973).

Id. The receptionist told the process server to “take a seat” and that she would get someone to receive the papers. *Id.* at 679. Moments later a man entered the waiting area. *Id.* The process server handed the summons and complaint to this unidentified individual who did not question the service or deny that he was the appropriate person to receive it. *Id.* Although the plaintiff later discovered that the unidentified individual was not an officer, director or managing agent of the office, in applying WIS. STAT. § 801.11(5)(a) (1979-80), the supreme court concluded that the perception of the process server that he had served a person “apparently in charge of the office” was reasonable. *Id.* at 683.

¶16 The key to both of these cases is that the process server was in the correct office, but was reasonably confused as to who was in charge of that office. Thus, *Keske* and *Horrigan* stand for the proposition that even though service is made on a person who is not actually in charge of the office, service may be effective if the process server is reasonably confused as to who is in charge of the office. See WIS. STAT. § 801.11(4)(b) (“[T]he copy may be left *in the office* of such officer, director or managing agent *with the person who is apparently in charge of the office.*”) (emphasis added).

¶17 Here, the process server was not reasonably confused as to who was in charge of MERS’s office. Rather, he was in the wrong office all together. This situation would be analogous to the process server in *Horrigan* going to the offices of American Family Insurance Company and attempting service. In order for service to be effective by leaving a copy of the summons with someone “apparently in charge of the office” in accordance with WIS. STAT. § 801.11(4)(b), the process server must be in the correct office. Because the process server in the instant case was not in the correct office when service was effectuated, *Keske* and *Horrigan* are inapplicable.

¶18 Based upon the foregoing, we conclude that the trial court properly granted summary judgment. Accordingly, the trial court is affirmed.

By the Court.—Judgment affirmed.

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

