



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT IV

February 27, 2025

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
Electronic Notice

Kelly Enright
Clerk of Circuit Court
Dodge County Justice Facility
Electronic Notice

Jennah Marie Curtin
Electronic Notice

Brandon A. Morgan 707207
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

Stanley Correctional Institution
Business Office
100 Corrections Drive
Stanley, WI 54768-6500

You are hereby notified that the Court has entered the following opinion and order:

2024AP1495

Brandon A. Morgan v. Preston Paul Breitenbach
(L.C. # 2024SC499)

Before Nashold, J.¹

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brandon Morgan appeals an order dismissing his complaint against Preston Breitenbach based on improper service. On this court's own motion, this appeal is disposed of summarily pursuant to WIS. STAT. RULE 809.21(1).² I reverse.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

² WISCONSIN STAT. RULE 809.21(1) provides that, "upon its own motion or upon the motion of a party," this court "may dispose of an appeal summarily."

On April 9, 2024, Morgan filed an action against Breitenbach in small claims court. Morgan alleged that Breitenbach told a Watertown police officer on May 16, 2021, that Morgan had “killed over 500 people” and that Breitenbach was requesting witness protection to protect himself from Morgan. Morgan alleged that these statements were defamatory.

On May 2, 2024, Breitenbach filed an answer to Morgan’s complaint, denying the allegations and requesting dismissal on the merits. No affirmative defenses were raised in Breitenbach’s initial answer. On June 4, 2024, Breitenbach filed an amended answer, in which he alleged various affirmative defenses, including, as pertinent here, that he had not been properly served, depriving the circuit court of personal jurisdiction over him, and that venue in Dodge County was improper. The following day, Breitenbach filed a motion to dismiss, which again alleged defective service and improper venue.

On June 18, 2024, Morgan filed a motion for summary judgment and objection to Breitenbach’s motion for dismissal.³ Relevant here, Morgan argued that Breitenbach was required to raise his affirmative defenses regarding service and venue in his initial pleading rather than waiting to raise these defenses in his amended pleading and his motion to dismiss. Morgan argued that, by failing to raise the affirmative defenses in his original answer, Breitenbach forfeited such defenses.

³ It appears from the record that Morgan filed an identical submission on June 14, 2024. However, because both parties state in their briefing that the submission was filed on June 18, 2024, and do not refer to the June 14 filing, I do the same.

A hearing was held on the motions on June 18, 2024, at which Breitenbach was permitted to file a response to Morgan's motion.⁴ Breitenbach filed a response on June 24, 2024, in which he generally asserted that his amended answer and motion to dismiss were not untimely.

On June 28, 2024, the circuit court issued a written opinion dismissing Morgan's complaint on the basis that Morgan failed to effectuate proper service. The court did not address Morgan's argument that Breitenbach forfeited his affirmative defenses by failing to raise them in his original answer.

On appeal, Morgan renews his argument that Breitenbach was required to raise his affirmative defenses in his initial pleading and that the circuit court therefore erred in dismissing Morgan's complaint based on improper service. In support, Morgan relies on WIS. STAT. § 802.06(2), which addresses when and how defenses and objections are made:

(2) HOW PRESENTED.

(a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

....

3. Lack of jurisdiction over the person or property.
4. Insufficiency of summons or process.

⁴ Breitenbach correctly notes that Morgan failed to request a transcript of the June 18, 2024 hearing or include the transcript in the appellate record and that, as a result, this court may assume that every fact necessary to sustain the circuit court's ruling is supported by the record. See *Haack v. Haack*, 149 Wis. 2d 243, 247, 440 N.W.2d 794 (Ct. App. 1989). However, Breitenbach does not point to any information from the June 18 hearing that would cut against Morgan's forfeiture argument or that would assist Breitenbach in light of his failure to respond to this argument.

5. Untimeliness or insufficiency of service of summons or process.

....

(b) A motion making any of the defenses in par. (a)1. to 10. shall be made before pleading if a further pleading is permitted....

Morgan also references § 802.06(8), which provides, in pertinent part:

(8) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

(a) A defense of lack of jurisdiction over the person or the property, insufficiency of process, untimeliness or insufficiency of service of process or another action pending between the same parties for the same cause is waived only if any of the following conditions is met:

1. The defense is omitted from a motion in the circumstances described in [a provision not applicable here].

2. The defense is neither made by motion under this section nor included in a responsive pleading.

Morgan argues that interpretation of these statutes is guided by Judicial Council Committee Note, 1976, WIS. STAT. § 802.06, which provides that “[d]efenses under [§ 802.06](8) cannot be raised by an amendment to a responsive pleading permitted by [WIS. STAT. §] 802.09(1).”⁵ Based on the statutory language and the Judicial Council Committee’s Note, Morgan argues that Breitenbach forfeited his affirmative defenses by failing to raise them in his original answer, and that the circuit court therefore erred in dismissing Morgan’s complaint based on defective service.

⁵ WISCONSIN STAT. § 802.09(1) addresses amendments to pleadings.

Breitenbach fails to respond to this argument in his respondent's brief. Based on this failure, Morgan argues in reply that this court should deem Breitenbach to have conceded this argument. I agree.

“Unrefuted arguments are deemed conceded.” *State v. Verhagen*, 2013 WI App 16, ¶38, 346 Wis. 2d 196, 827 N.W.2d 891. “This court has held that respondents cannot complain if propositions of appellants are taken as confessed which respondents do not undertake to refute.” *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). “[T]he Court of Appeals of Wisconsin is a fast-paced, high-volume court” and “cannot serve as both advocate and judge.” *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992); *see also Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (“[W]e will not abandon our neutrality to develop arguments.”).

Moreover, Morgan's argument finds support in precedent. For example, in *Honeycrest Farms, Inc. v. Brave Harvestore Systems, Inc.*, 200 Wis. 2d 256, 546 N.W.2d 192 (Ct. App. 1996), the plaintiff relied on the same Judicial Council Committee Note quoted above to argue that an answer filed by one of the defendant's two insurers after the other insurer had filed an answer “was an amended answer and that the personal jurisdiction objection cannot be raised by an amendment.” *Id.* at 265. The *Honeycrest* court concluded that “[w]hile we agree that the personal jurisdiction objection cannot be raised in an amended pleading,” the second answer filed by the insurer was not an amendment to the answer filed by the other insurer. *Id.* (emphasis added). The court also observed that WIS. STAT. § 802.06 is “designed to require the defendant to bring personal jurisdiction objections to the court's attention at the earliest possible moment.” *Id.* at 266.

Similarly, our supreme court has concluded that “under Wisconsin’s rules of civil procedure, certain affirmative defenses are waived unless raised in the first responsive pleading or raised by motion made prior to answering.” *Brunton v. Nuvelt Credit Corp.*, 2010 WI 50, ¶33, 325 Wis. 2d 135, 785 N.W.2d 302. To the extent that there may be case law contrary to Morgan’s argument, Breitenbach does not provide it, nor has my nonexhaustive research uncovered it.

In sum, Breitenbach has conceded that, by failing to raise the affirmative defense of deficient service in his original complaint, he forfeited this defense and the circuit court therefore erred in dismissing Morgan’s complaint.⁶

Accordingly,

⁶ Breitenbach mistakenly asserts at various points in his respondent’s brief that the circuit court dismissed Morgan’s complaint based on improper venue, although he also acknowledges at one point that the dismissal was based on defective service. Breitenbach then argues, among other things, that the court properly concluded that Morgan brought his action in the wrong venue, Dodge County, and that the proper venue was Jefferson County. However, the basis for the court’s dismissal was clearly not improper venue but rather improper service. To the extent that Breitenbach may mean to suggest that this court should uphold the circuit court’s decision based on lack of venue, I decline to address this issue for at least the following reasons. First, the circuit court did not address this issue nor did it make any findings pertinent to such a determination. Second, Morgan argues that Breitenbach was also required to raise in his original answer the affirmative defense of improper venue, and Breitenbach does not respond to this argument.

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals