

STATE OF WISCONSIN

SUPREME COURT

FILED

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CLERK OF SUPREME COURT
OF WISCONSIN

IN RE THE CUSTODY AND PLACEMENT
OF TESSA R.F. AND JAKOB M.F.:

STATE OF WISCONSIN AND
ANGELA M. KELLEY,

Petitioners-Respondents, Appeal No. 14 AP 588

v.

RAYMOND L. FRANKLIN,
Respondent-Appellant.

STATE OF WISCONSIN'S RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Raymond L. Franklin has filed a Petition for Review of the decision of the Court of Appeals affirming the decision of the trial court denying his motion to dismiss this action for lack of personal jurisdiction. (R. 39). The Court of Appeals found that Mr. Franklin waived any defense to lack of personal jurisdiction based on his participation in the litigation, through both the signing of stipulations and appearances in court over a period of several years. The State of Wisconsin urges the Supreme Court to deny the Petition for Review as this case does not meet the criteria of Wis. Stats. § 809.62(1r).

I. A REAL AND SIGNFICANT QUESTION OF FEDERAL OR STATE CONSTITUTIONAL LAW IS NOT PRESENT IN THIS ACTION.

Mr. Franklin appealed the trial court's denial of his motion to dismiss this action for lack of personal jurisdiction. His argument was predicated on Ms. Kelley's attorney publishing a court date notice rather than a summons. The motion to dismiss was filed over seven years after the filing of the action. (R. 1, 2, 30). Between the filing of the summons and petition and the filing of Mr. Franklin's Motion for Relief, Mr. Franklin appeared in court and filed five stipulations involving child support,

physical placement, and contempt of court. (Ct. of App. Slip Op. p. 3).

The Court of Appeals, relying on Wis. Stats. § 802.06 and *Honeycrest Farms, Inc. v. Brave Harvestore, Inc.*, 200 Wis. 2d 256, 546 N.W.2d 192 (Ct. App. 1996), stated that § 802.06 is designed to require a defendant to bring personal jurisdiction objections to the court's attention at the earliest possible moment. Mr. Franklin failed to do so, instead participating in the litigation. Therefore, he waived any objection to lack of personal jurisdiction. Rather than raising a significant constitutional question, the Court of Appeals found that this case is "just shy of being frivolous." (Ct. of App. Slip Op., p. 1). The case involves a matter of statutory and case law, not constitutional interpretation.

II. THIS CASE DOES NOT DEMONSTRATE A NEED FOR THE SUPREME COURT TO CONSIDER ESTABLISHING, IMPLEMENTING OR CHANGING POLICY.

The issues raised before the Court of Appeals were whether Mr. Franklin had been properly served with a summons, if not, whether this constituted a fundamental or technical defect, and whether Mr. Franklin was prejudiced by or waived any defect that may have occurred.

The Court of Appeals, relying on Wis. Stats. § 802.06 and established case law, found that Mr. Franklin, through

his participation in this litigation and failure to file a motion challenging jurisdiction until seven years after the filing of the summons and petition, waived any defect.

As noted by the Court of Appeals, even fundamental defects in procedure that call into question issues of personal jurisdiction may be waived. ***Studelska v. Avercamp***, 178 Wis. 2d. 457, 504 N.W.2d. 128 (Ct. App. 1993). It is well established that a party who appears in an action and fails to object to the court's jurisdiction over his person submits to the jurisdiction of the court. Where an appearance is made and relief is sought on other matters, an objection to lack of personal jurisdiction is waived. ***Lees v. Department of Industry, Labor and Human Relations***, 49 Wis. 2d 491, 182 N.W.2d 491 (1971).

The term "appearance" is generally used to signify an overt act by which one against whom a suit has been commenced submits himself to the court's jurisdiction. ***Artiswergin v. Artis-Wergin***, 151 Wis. 2d 445, 444 N.W.2d 750 (Ct. App. 1989).

Mr. Franklin appeared before the trial court several times without raising a defense of lack of personal jurisdiction. He was present for hearings on March 26, 2007, April 27, 2007, and May 8, 2007. At two of these hearings he was represented by counsel. There is no

indication in the record that Mr. Franklin made any attempt at any of these hearings to raise the issue of whether the court lacked jurisdiction over his person. Mr. Franklin signed a stipulation in 2006 which reduced his court-ordered child support and a stipulation in 2007 establishing placement rights.

This Court has held that "[i]n order to preserve his status as not having been properly served with the summons, the defendant must abstain from making any appearance in the action other than to raise the question of jurisdiction over his person." *State ex. rel. Engle v. Hilgendorf*, 136 Wis. 21, 116 N.W. 848 (1908). This has been the status of the law in Wisconsin for over 100 years, and the logic of this decision has been followed in cases such as *Lees*, *Artiswergin*, and *Honeycrest Farms*. As the Court noted in *Artiswergin*, "a party cannot enter an appearance, request affirmative relief from the court and later argue that the court was without personal jurisdiction." *Artiswergin* at 453.

The principle of waiver upon which the Court of Appeals relied is well grounded in over 100 years of case law. There is no need demonstrated by this case for the Supreme Court to establish, implement or change any policy.

III. THE PRECEDENTS ON PERSONAL JURISDICTION AND WAIVER ARE WELL ESTABLISHED AND A DECISION FROM THE SUPREME COURT IS NOT NEEDED TO DEVELOP, CLARIFY OR HARMONIZE THE LAW.

A. This Case Does Not Call for the Application of a New Doctrine.

Mr. Franklin raised four issues in his brief to the Court of Appeals:

1. Did the court have both subject matter and personal jurisdiction?
2. Whether a default judgment was void?
3. Whether Mr. Franklin waived his right to raise defenses?
4. Whether Mr. Franklin was estopped from raising a defense of lack of jurisdiction or lack of service process?

The Court of Appeals, applying existing case law, determined that Mr. Franklin waived any objection he may have had to lack of personal jurisdiction by participating in the case through court appearances and the filing of stipulations. The appellate courts in Wisconsin have enunciated principles on how to answer all of the issues posed by Mr. Franklin on appeal. A new doctrine is not necessary to address questions of service, jurisdiction, waiver or estoppel.

In *State v. Petty*, 201 Wis. 2d 337, 548 N.W.2d 817 (1996), the Court stated that the doctrine of judicial estoppel is intended to prevent a litigant from playing

"fast and loose with the courts" by asserting inconsistent positions. **Petty** at 347 (internal citations omitted).

Mr. Franklin's position on appeal is inconsistent with the positions he took through the first seven years of this litigation. Mr. Franklin signed five stipulations involving child support, physical placement, and contempt of court, along with making personal appearances in court. It was not until December 2013 that he raised an objection to personal jurisdiction. (Ct. App. Slip Op., p. 3). This is a classic case of "playing fast and loose with the rules" in Mr. Franklin using the court system to his advantage to obtain a reduction in his child support order and placement rights, only to later argue that the court lacked jurisdiction over him after being charged with five counts of failure to pay support. (Ct. App. Slip Op., p. 2). The issues of jurisdiction, waiver, and estoppel were all addressed by the application of existing statutory and case law. There is nothing unique about this case that calls for a new legal doctrine to be established by this Court.

B. The Questions Presented are Not Novel.

The issues raised in this appeal, as noted earlier, involved service, personal jurisdiction, and waiver. As discussed in the previous section, these issues were

addressed by the Court of Appeals by applying existing case law.

In *Studelska v. Avercamp*, 178 Wis. 2d 457, 504 N.W.2d 125 (Ct. App. 1993), the court held that "fundamental procedural errors running to personal jurisdiction can be waived if not properly raised by motion or responsive pleading."

In *Studelska*, one defendant was served with an unauthenticated summons and complaint with a photocopied authentication stamp. Another defendant was served with an unauthenticated summons.

The Court of Appeals held that even fundamental defects in service can be waived. Wis. Stats. § 802.06(8) governs the method for objecting to lack of personal jurisdiction. Therefore, waiver of personal jurisdiction defects occurs when defects are not raised by proper pleading or motion, whether the defect is technical or fundamental. *Studelska* at 462.

In this case, the Court of Appeals relied on *Studelska* in ruling that Mr. Franklin waived any objection to lack of personal jurisdiction. In the instant case and in *Studelska*, the issue involved a defendant who was not served with an authenticated summons, but who did not file a motion under Wis. Stats. § 802.06(8) challenging

jurisdiction. This case does not present a novel issue that needs to be addressed by the Supreme Court.

C. The Questions Presented can be Answered by the Application of Existing Law.

It is not possible to state that a particular fact scenario will not repeat. However, existing case law was applied by the Court of Appeals to resolve the issues in this case. Therefore, it is not necessary for the Supreme Court to resolve any issue presented in this appeal in order to prevent a similar situation from recurring. In fact, existing precedent was so persuasive that the Court of Appeals stated that "this case, just shy of being frivolous, is appropriate for summary disposition." (Ct. App. Slip Op., p. 1).

IV. THE COURT OF APPEALS' DECISION DID NOT CONFLICT WITH CONTROLLING OPINIONS.

The Court of Appeals held that there was no issue of subject matter jurisdiction. This is consistent with the opinion of the Supreme Court in *Lak v. Richardson-Merrell, Inc.*, 100 Wis. 2d 641, 302 N.W.2d 483 (1981), that the filing of a summons and complaint (or in the instance of an action under Chapter 767, a petition), confers subject matter jurisdiction.

The opinion of the Court of Appeals regarding Mr. Franklin's waiver of any objection he may have had to

lack of personal jurisdiction is also consistent with prior decisions.

As noted earlier, the Court of Appeals cited to **Studelska v. Avercamp** to support its decision that even a fundamental defect can be waived by the conduct of the defendant. The Court of Appeals also relied on **Brunton v. Nuvel Credit Corp.**, 2010 WI 50, 325 Wis. 2d 135, 785 N.W.2d 302, for the proposition 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." It is undisputed that Mr. Franklin did not raise a defense of lack of personal jurisdiction prior to answering. As noted by the Court of Appeals, "Section 802.06 'is designed to require the defendant to bring personal jurisdiction objections to the court's attention at the earliest possible moment.' **Honeycrest Farms v. Brave Harvestore Sys.**, 200 Wis. 2d 256, 266, 546, N.W.2d 192 (Ct. App. 1996). By failing to do, Franklin waived any objection." (Ct. App. Slip Op., p. 3-4).

Mr. Franklin relies on **Hester v. Williams**, 117 Wis. 2d 634, 345 N.W. 2d 426 (1984) in arguing that where a plaintiff fails to "commence an action pursuant to Wis. Statutes, there is no pending action." (Petition for

Review, p. 10). This misses a critical distinction between the facts of *Hester* and the present action.

The defect in the instant action was the failure to serve an authenticated summons. As noted by the Court of Appeals, however, the court had subject matter jurisdiction upon the filing of the summons and petition, pursuant to *Lak v. Richardson-Merrell, Inc.* In *Hester*, the summons and complaint were not filed in the circuit court, resulting in no action being commenced and the court lacking subject matter jurisdiction. This is a critical distinction that is unaddressed by Mr. Franklin.

There is no conflict between the opinion of the Court of Appeals and precedent on the issues of subject matter jurisdiction, personal jurisdiction, service or waiver that justify the Supreme Court granting the petition for review.

V. PRIOR OPINIONS OF THE SUPREME COURT AND COURT OF APPEALS ARE NOT RIPE FOR REEXAMINATION DUE TO THE PASSAGE OF TIME.

The opinions relied upon by the Court of Appeals are relatively recent. *Studelska v. Avercamp* regarding the waiver of fundamental defects was decided in 1993. *Brunton v. Nuvel Credit Corp.* on the issue of waiving defenses not raised in the first responsive pleading or by motion is from 2010. *Honeycrest Farms, Inc. v. Brave Harvestore, Inc.*, which states that a defendant is required to bring an

objection to the attention of the court at the earliest possible moment, was decided in 1996. There is nothing about these principles that would be affected by the passage of time, such that they should be reexamined.

VI. ALTERNATE GROUNDS SUPPORTING THE COURT OF APPEALS' DECISION EXIST AS MR. FRANKLIN'S SUBSTANTIAL RIGHTS WERE NOT VIOLATED BY THE FAILURE TO SERVE THE SUMMONS, AND THEREFORE THE ERROR SHOULD BE DISREGARDED.

Wis. Stats. § 805.18(1) provides "[t]he court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." An examination of the record shows that the substantial rights of Mr. Franklin were not affected by the failure to publish the summons.

Mr. Franklin and Ms. Kelley were parties to two prior actions involving these children. Mr. Franklin was personally served a summons and petition in each of these actions. (R. 51,86). Ms. Kelley's attorney, rather than filing a new court case, could have filed motions within these existing cases to request an order regarding child support. Pursuant to Wis. Stats. § 801.14(2), those motions could have been mailed to Mr. Franklin at his last known address. The information that would have been contained in a notice of motion, the date, time, and place

of the hearing, was contained in the notice that was published by Ms. Kelley's attorney. Mr. Franklin received all of the notice to which he was entitled in order to obtain orders, and in a manner that was more restrictive: publication as opposed to simply mailing. Mr. Franklin's substantial rights were not affected by this publication.

This matter has been ongoing since 2006. The first two matters have been pending since 2003. Mr. Franklin was well aware of these children and his obligation to support them. He has made numerous court appearances and entered into stipulations regarding placement, child support, and contempt of court. During the contempt proceedings he was represented by counsel. He obtained the benefit of a reduction in his child support order through the execution of another stipulation. Granting review and reversing the trial court would have the effect of vacating a stipulation and order signed by Mr. Franklin and presented to the court for approval. The original child support order was not entered because Mr. Franklin failed to file an answer in response to a summons: it was entered because he failed to appear for a hearing of which he was given notice through the publication of a notice of hearing. Based on Mr. Franklin's long history of participation in these three consolidated cases, it cannot be said that his substantial

rights were violated by the publication of a court hearing notice rather than a summons eight years ago. As such, pursuant to Wis. Stats. § 805.18(1), the Court should disregard the error in the proceedings and deny the Petition for Review.

CONCLUSION

The decision of the Court of Appeals that Mr. Franklin waived any objection he may have had to lack of personal jurisdiction through his participation in this litigation, by court appearances and signing several stipulations over the course of several years, is well supported by existing case law on personal jurisdiction and waiver.

There is no underlying policy that needs to be addressed by the Supreme Court. Prior precedents are not in conflict with the decision of the Court of Appeals. The issues presented in this appeal regarding service, personal jurisdiction and waiver are not novel, and the precedents in these areas are not ripe for reconsideration.

The Court of Appeals, in the alternative, could have determined that Mr. Franklin's substantial rights were not violated based on his participation in this case over many years, and affirmed the trial court pursuant to Wis. Stats. § 805.18(1). Therefore, the Petition for Review should be denied.

Dated this 26th day of February, 2015.

Respectfully submitted,



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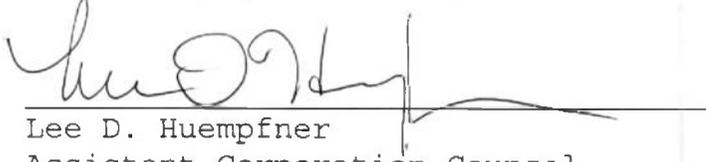
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this Response to Petition for Review conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced with a monospaced font. The length of this brief is 15 pages.

Dated this 26th day of February, 2015.

Respectfully submitted,



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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

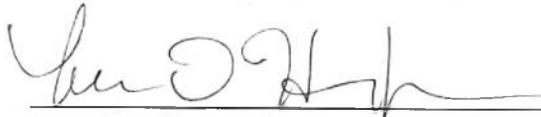
I hereby certify that I have submitted an electronic copy of this Response to Petition for Review, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that this electronic Response to Petition for Review is identical in content and format to the printed form of the Response to Petition for Review filed as of this date.

A copy of this certificate has been served with the paper copies of this Response to Petition for Review filed with the court and served on all opposing parties.

Dated this 26th day of February, 2015.

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