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STATE OF WISCONSIN

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SUPREME COURT

In Re the Custody and Placement of Tessa R.F. and Jakob M.F.

State of Wisconsin and Angela M. Kelley,
Petitioners - Respondents

v.

Appeal No. 2014AP000588
Circuit Court Case No.
2006FA1000101

Raymond L. Franklin
Respondent - Appellant - Petitioner

PETITION FOR REVIEW OF COURT OF APPEALS ORDER/DECISION

Respondent - Appellant -Petitioner
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PETITION FOR REVIEW

Raymond L. Franklin, appellant petitioner, appearing Pro Se, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wis. Stats. § 808.10 and Wis. Stat. § (rule) 809.62 to review the decision or order of the Court of Appeals, District II. In Re the custody and placement of Tessa R.F. and Jakob M.F.. State of Wisconsin and Angela M. Kelley v. Raymond L. Franklin, Case No. 2014AP000588, filed on December 17, 2014.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Do Appearances in court ex post facto of a default judgment and order without raising a defense as provided in Wis. Stat. §802.06 (2006) constitute a valid waiver of those defenses?

On appeal, it was argued that Mr. Franklin did not submit his person to the jurisdiction of the court because there was no action pending for Mr. Franklin to appear in and waive his defense of lack of personal jurisdiction as provided in Wis. Stat. §801.06(2006). See appellant - petitioners reply brief pages 8-10. Appendix 109-111.

2. Is the default judgment and order as well as the judgments and orders founded upon them in this case void?

On appeal, it was argued that because Ms. Kelley failed to serve Mr. Franklin with authenticated copies of her summons (Appendix 112-115) (R:1) and petition (Appendix 116-118) (R:2) within 90 days of her filing as prescribed by Wis. Stat. §801.02 (2006) that the court never acquired personal jurisdiction and that as a result the judgments and orders are void for lack of personal jurisdiction. See appellant - petitioners initial and reply briefs.

The Court of Appeals decided the issues as follows:

1. That Mr. Franklin waived jurisdictional defenses by failing to raise the defense in a timely manner. See Court of Appeals decision/order and Opinion Appendix.
2. The court of Appeals did not answer this issue.

REASONS FOR GRANTING REVIEW

This court should grant review because the issues presented are purely legal and present a real and significant issue of constitutional law running to due process and because the court of appeals decision in this case is in conflict with the prior opinions of this court in *Hester v. Williams*, 117 Wis. 2d 634, 345 N.W. 2d 426 (1984); *Pulchinski v. Strand*, 88 Wis. 2d 423, 276 N.W. 2d 781 (1979); *Brunton v. Nuvel Credit Corp.*, 2010 WI 50, 325 Wis. 2d 135, 785 N.W. 2d 302, as well as the opinion of its own court in *Maas v. American Fam. Ins. Co.*, 2012 WI App 106, 344 Wis. 2d 297, 821 N.W. 2d

412 (see Appendix 123-126), as well as Wis Stat. §801.06 (2006).

As the court of appeals has opined at least four times in *Studklska v. Avercamp*, 178 Wis. 2d 457, 504 N.W. 2d 125 (Ct. App. 1993); *Honeycrest Farms Inc. v. Bravestore Systems Inc.*, 200 Wis. 2d 256, 546 N.W. 2d 192 (Ct. App. 1996); *Useni v. Boudron*, 2003 WI. App. 98, 264 Wis. 2d 783, 662 N.W. 2d 672; and *Maas v. American Fam. Mut. Ins. Co.*, 2012 WI App 106, 344 Wis. 2d 297, 821 N.W. 2d 412, with regard to waiver of defenses with neither consistency or clarity; a resolution of this issue by the supreme court would clarify the law and have statewide impact on the recurrence of this issue by providing guidance to the lower courts and would-be litigants as to what conduct constitutes a valid waiver of defenses in Civil actions under Wis. Stat §801.06.

This court should also grant review because, if correct, the judgments and orders in this case are void and must be vacated (see *Halbach v. Halbach*, 259 Wis. 329, 331, 48 N.W. 2d 617(1951)) to prevent a continued violation of Mr. Franklin's right to due process by the enforcement of the same.

The reasons are consistent with the criteria for review set forth under Wis. Stat. §809.62(1R)(a), (c) (2), (c) (3) and (d) (2015).

STATEMENT OF THE CASE

Description of the case:

This case arises out of Walworth county case No. 2006 FA 101 for the custody and placement of T.R.F. and J.M.F. Mr. Franklin seeks relief from the entirety of the case pursuant to Wis. Stat. §806.07(1)(d) on the grounds that the court lacks personal jurisdiction.

Facts of the case:

The facts of the case are undisputed and are contained in the court of appeals opinion Appendix 101-104.

Procedural Status leading to Review:

The general procedural status can be gleaned from the Court of Appeals decision at Appendix 101-104. However, specific dates of occurrences at the commencement of this action must be noted in order for the argument to make sense.

On February 14, 2006 Ms. Kelley filed her summons (Appendix 112-115) and petition (Appendix 116-118). Then, on May 22, 2006 Ms. Kelley filed an affidavit of publication (Appendix 119) as proof of service.

The hearing on Ms. Kelley's pleading was held on June 20, 2006 (Appendix 120) where without appearance by Mr. Franklin granted Ms. Kelley her requested relief by default. Judgment was entered as an order (Appendix 121-122) on July, 2006.

From Mr. Franklin's first appearance in this action in September 2006 through May 2007 he participated in proceedings in this case that were all founded upon the default judgment.

On December 13, 2014 Mr. Franklin filed a motion for relief pursuant to Wis. Stat. §806.07(1)(d)(2014). On February 4, 2014 it was argued by Attorney for Franklin that the notice published by Ms. Kelley was not a summons as required by Wis. Stat. §801.02(1) and §801.11, and that as a result Mr. Franklin was never served. That this failure was a fundamental defect that deprived the court of personal jurisdiction over Mr. Franklin and that the action was never commenced. It was further argued that Mr. Franklin made no appearances prior to or on the date of the hearing therefore no defenses were waived under Wis. Stat. §802.06.

Corporation Counsel of Walworth County as party in interest argued that Franklin's appearances and active litigation after the default judgment without raising the

defense was a waiver of defenses under Wis. Stat. §802.06 and a submission to the court's jurisdiction.

Court Commissioner Thomas F. Meyer, after argument said that he would take the argument of the parties under advisement and notify parties of his decision as soon as possible. The following day, February 5, 2014 an order was entered denying Mr. Franklin's motion for relief.(R:35; Appendix 106).

Following the February 5 order denying relief, Mr. Franklin filed for a De Novo Hearing. (R:36)

At the De Novo Hearing on March 3, 2014, parties reiterated their previous arguments before the Hon. Kristine E. Drettwan who found that proper notice was given, Mr. Franklin waived personal jurisdiction and that the default judgment and order (R:4; Appendix 121-122) was not void. See transcript (R:42).

Mr. Franklin appealed. Appeal was on brief without oral argument.

On December 17, 2004 the court of appeals issued their order affirming the circuit court. In opinion, the court found the service in this case was by publication and that no summons was published. However, the court went no further, finding that Mr. Franklin waived his defense by not timely raising it. (See Appendix 101-104).

Bringing us now to this petition for review.

TABLE OF AUTHORITIES

<i>American Family Mut. Ins. Co. v. Royal Ins. Co.</i> , 167 Wis. 2d 524, 481 N.W. 2d 629 (1992).	9
<i>Brunton v. Nuvell Credit Corp.</i> , 2010 WI 50, 325 Wis. 2d 135, 785 N.W. 2d 302.	1, 9
<i>Haselow v. Gauthier</i> , 212 Wis. 2d 580, 569 N.W. 2d 97 (Ct. App. 1997).	15
<i>Halbach v. Halbach</i> , 259 Wis. 329, 331, 48 N.W. 2d 617(1951).	3
<i>Hester v. Williams</i> , 117 Wis. 2d 634, 345 N.W. 2d 426 (1984).	1, 10, 13
<i>Honeycrest Farms Inc. v. Bravestore Systems Inc.</i> , 200 Wis. 2d 256, 546 N.W. 2d 192 (Ct. App. 1996).	3, 12
<i>McLaughlin v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.</i> , 23 Wis. 2d 592, 594, 127 N.W. 2d 813 (1964).	9
<i>Neylan v. Vorwald</i> , 121 Wis. 2d 481, 360 N.W. 2d 537(Ct. App. 1984).	13
<i>Pulchinski v. Strand</i> , 88 Wis. 2d 423, 276 N.W. 2d 781 (1979).	1, 10
<i>Studelska v. Avercamp</i> , 178 Wis. 2d 457, 504 N.W. 2d 125 (1993).	11, 12
<i>Useni v. Boudron</i> , 2003 WI App. 98, 264 Wis. 2d 783, 662 N.W. 2d 672.	3, 13

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Wisconsin Statutes:

§801.02	2, 5, 9, 10, 11, 12, 16
§801.06	1, 3, 8, 9, 11, 12, 13, 16, 17
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ARGUMENT

I. Waiver of Jurisdiction of the Person

A review of this issue will clarify the law with regard to the waiver of personal jurisdiction that will have statewide impact and assist in the prevention of future recurrences by providing guidance to the lower courts as to what conduct constitutes a valid waiver.

The specific question is when is personal jurisdiction waived and how. First, personal jurisdiction is obtained by the court in either one of two ways. 1) By service of a summons in a manner prescribed under Wis. Stat. §801.11 (2006), or 2) if service of a summons is dispensed with under the conditions of Wis. Stat. § 801.06(2006). See Wis. Stat. § 801.04(2) (2006). Under Wis. Stat. §801.06 (2006) where pertinent to this case, service of a summons is dispensed with if the person appears in the action and waives the defense of lack of jurisdiction over his or her person as provided in Wis. Stat. §802.06(8) (2006).

This raises the question as to what conduct constitutes an appearance in an action and a waiver. This court discusses

this question at length in *Brunton v. Nuvel Credit Corp.*, 2010 WI 50, 325 Wis. 2d 135, 785 N.W. 2d 302. In its discussion, this court found that when the terms "appears" and "waives" are joined by the conjunction "and", it creates two distinct statutory requirements that must both be fulfilled. *Id.* at ¶28.

"The term "appearance" is generally used to signify the overt act by which one against whom a suit has been commenced submits himself to the courts' jurisdiction and constitutes the first act of a defendant in court." *McLaughlin v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 23 Wis. 2d 592, 594, 127 N.W. 2d 813 (1964).

A waiver of a defense of lack of jurisdiction is specifically set forth in Wis. Stat. §802.06 (8) (2006).

Wis. Stat. §801.06 functionally advises as to what statutory requirements must be met before there is a valid waiver. However, §801.06 raises the question as to when an action is commenced.

The requirements and limitations in the commencement of an action are set forth in Wis. Stat. §801.02(1) and §893.02 (2006) that when read together state that:

"A Civil Action in which a personal judgment is sought is commenced for the purpose of tolling statutes of limitations when the summons and complaint are filed with the court. However, no action shall be deemed commenced as to any

defendant upon whom service of authenticated copies of the summons and complaint is not made within 90 days of filing."

Therefore, under these provisions a person must both appear "and" waive the defense as provided in Wis. Stat. §802.06 (8) (2006) within 90 days of the filing of the summons and complaint if not served in order to constitute a valid waiver.

This is supported by this court in *Hester v. Williams*, 117 Wis. 2d 634, 643, 345 N.W. 2d 426, 430-31 (1984) (citing *Pulchinski v. Strand*, 88 Wis. 2d 423, 429-30, 276 N.W. 2d 781 (1979)), where this court said that where a plaintiff fails to commence an action pursuant to Wis. Statutes, there is no pending action. As the waiver provisions of Sec. 802.06, Stats., define the obligations of a defendant when an action is pending, if there is no pending action there is no waiver, *Id.*

Recourse to the Judicial Council Committee's note, 1976 for Wis. Stats. §802.06 may also be made where the council stated that:

"Subs. 2(e) and (8) make clear that, unless waived, a motion can be made to claim as a defense lack of timely service within the 60 day period that is required by §801.02 to properly commence an action."

Given the law above, it is the petitioners' contention that a court gains personal jurisdiction over a person only

if that person is served pursuant to Wis. Stat. §801.11 or if that person appears in the action "and" waives jurisdiction as provided in Wis. Stat. §802.06 within the time prescribed by Wis. Stat. §801.02(1).

Further, where default judgments are concerned; a default judgment may be entered when a party fails to plead or otherwise appear in an action. See Wis. Stat. §806.02(3). Accordingly, such a defendant necessarily cannot fulfill the appearance requirement of §801.06. As both "appear" and "waive" requirements must be fulfilled to constitute a valid waiver, there can be no waiver without an appearance.

Through research, at least for cases discussing a waiver of defenses under Wis. Stat. §802.06 have presented themselves. In none of the cases were the statutory requirements of "appearance" and "waiver" (Wis. Stat. §801.06) discussed.

In *Studelska v. Avercamp*, 178 Wis. 2d 457, 504 N.W. 2d 125 (Ct. App 1993), neither of the parties argued as to whether or not fundamental defects traveling to personal jurisdiction could be waived. However, the court of appeals decided to reach the issue as if found it to be a condition precedent as to whether there was a proper waiver in the case.

In its reading of *American Fam. Ins. Co. v. Royal Ins. Co.*, 167 Wis. 2d 524, 481 N.W. 2d 629 (1992), the court of

appeals stated that "the supreme court did not reach whether waiver is an appropriate concept when fundamental errors are present. We know of no reason why fundamental errors cannot be waived." Section §802.06 (8) (a) specifically prescribes the method of objection to personal jurisdiction. *Studelska*, 178 Wis. 2d at 462.

However, the court of appeals misses the import of Section 801.06. As stated above, in order to have a valid waiver, the defendant must both appear and waive the defense under §801.02(1), stats.

Fundamental defects in service may not be waived after the time specified in §801.02(1), stats.

Next, in *Honeycrest Farms, Inc. v. Bravestore Systems, Inc.*, 200 Wis. 2d 256, 546 N.W. 2d 192 (Ct. App. 1996), the complainant failed to serve the defendant with authenticated copies of the summons and complaint within 60 days of filing as prescribed by Wis. Stat. §801.02 (1) (1992). However, the court found that since Travelers Insurance raised jurisdictional objections in its answer, there was no waiver. *Id.* At 260.

Again, the conditions of Wis. Stat. §801.06 were not met. Thus, even if defenses had not been raised they would not have been waived.

Now we examine *Useni v. Boudron*, 2003 WI App. 98, 264 Wis. 2d 783, 662 N.W. 2d 672. Here, while *Boudron* was named and served with the original complaint, he was not named in an amended complaint naming his restaurant. Neither *Boudron* nor his restaurant (Fairview) filed any responsive pleading. *Useni* filed for and the Court entered a default judgment. Following the default judgment, *Boudron* filed two motions to vacate without raising the issue of service of process and participated in the hearing for damages.

The third time, *Boudron* moved to vacate the default judgment he alleged that he was not properly served. The court vacated the default judgment. Both parties appealed for different reasons.

On appeal, *Useni* argued that *Boudron* waived his defense of lack of personal jurisdiction.

Here the court again missed the import of §801.06, Stats. As no action was commenced against *Boudron* he could not appear in the action. Because both appearance in the action and a waiver are needed there is no waiver.

Finally, we look at *Maas v. American Fam. Mut. Ins. Co.*, 2012 WI App. 106, 344 Wis. 2d 297, 821 N.W. 2d 412 (Appendix 123-126). Here the court of appeals followed this court in *Hester v. Williams*, 117 Wis. 2d 634, 643, 345 N.W. 2d 426, 430-31 (1984).

Here, *Maas* filed two days before the statute of limitations period for his claim expired but never served the other motorists. Months later, he filed an amended summons and complaint and served it on defendant parties.

On appeal the defendants argued that *Maas* never served them and as a result his action was never commenced. The Court of Appeals agreed.

Also on appeal, *Maas* argued 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, the court held that because *Maas* failed to commence his action there was nothing to waive. *Maas*, 2012 WI App 106 at ¶ 8- 10 (Appendix 123-126).

As this court can see, the decision of the court of appeals in the case presented for review is not only in conflict with the Supreme Court and of its own court, but is also in conflict with Wisconsin statutes.

A decision by this court would bring harmony to the law and between the courts by providing a bright-line rule with regard to what constitutes a valid waiver.

II. Voidness of Default Judgment

The default judgment "Findings and order" (R:4) (Appendix 121-122) entered by the court and all other orders and judgments are void for lack of personal jurisdiction and inadequate notice.

"When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time." *Kohler v. D.I.L.H.R.*, 81 Wis. 2d 11, 25, 259 N.W. 2d 695 (1977).

"Void judgments or orders are required to be vacated." *Neylan v. Vorwald*, 124 Wis. 2d 85, 98, 368 N.W. 2d 97, 100 (Ct. App. 1997).

Where a claim is made that an order or judgment is void for lack of personal jurisdiction, all that is needed is the determination that, in fact, jurisdiction was not acquired in the proceedings that led up to the entry of the judgment. *Haselow v. Gauthier*, 212 Wis. 2d 580, 588, 569 N.W. 2d 97, 100 (Ct. App. 1997).

The facts of this case are undisputed. Ms. Kelley filed her summons (R:1) and petition (R:2) on February 14, 2006. Service in this case was by publication (R:3). However, no summons was published. See Court of Appeals opinion Appendix 102. No other evidence in the record shows service of any kind.

On June 20, 2006 Mr. Franklin having not made any appearance, the court granted Ms. Kelley's relief by default. (Appendix 120). On July 11, 2006 the courts "Findings and Order" were entered (R:4; Appendix 122).

In Wisconsin Civil Actions, personal jurisdiction over a defendant (Here, Respondent) is acquired by service of the Summons and Complaint (Here, a petition) in a manner specified by Wis. Stat. § 801.11 (2006) or by Waiver of the Summons under the conditions in Wis. Stat. § 801.06 (2006) within 90 days of filing. See Wis. Stats. §801.02(1), §801.04(2), §801.06(2) and §801.06 (2006).

Under Wis. Stat. §801.13(2)(2006), a Summons is deemed to have been served on the first day of publication. Here, it is undisputed that a Summons was not published, thus, not served.

For the court to acquire personal jurisdiction over Mr. Franklin in the absence of proper service, Mr. Franklin must have both appeared and waived his defense of lack of personal jurisdiction pursuant to Wis. Stat. §801.06(2006) within 90 days of filing.

As noted by the default order "findings and order" entered July 11, 2006 (R:4;appendix 121-122), Mr. Franklin made no appearance by answer, pleading or otherwise.

Therefore, Mr. Franklin cannot satisfy the statutory requirement of appearing in the action.

In fact, Mr. Franklin's first "appearance" in this case was not until September of 2006. The time within which the court could acquire personal jurisdiction over Mr. Franklin either by service or appearance and waiver expired May 15, 2006, ninety days from the day Ms. Kelley filed her action.

It is clear by the evidence provided that the court never acquired personal jurisdiction over Mr. Franklin either by service of process or by appearance and waiver.

As a result, the orders and judgments in this case are void. Because void orders are legal nullities that cannot be validated by consent, ratification, waiver or estoppels, see *Kohler v. Dilhr*, 81 Wis. 2d 11, 25, 259 N.W. 2d 695 (1977), they must be vacated.

CONCLUSION

For the reasons set forth in this petition, there was no waiver under the conditions in Wis. Stat. §801.06 and the orders and judgments in this case are void for want of personal jurisdiction.

Therefore, it is prayed that this court grant review, reverse the court Of Appeals decision and remand with instructions or grant relief requested.

Signed this date

2-5-15



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s§809.19(8)(b) and (c) for a brief and Appendix produced with a monospaced font.

The length of this brief 20 pages 3670 words.

Dated this

2-5-15



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