

APPENDIX

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DISTRICT II

December 17, 2014

To:

Hon. Kristine E. Drettwan
 Circuit Court Judge
 P.O. Box 1001
 Elkhorn, WI 53121

Sheila Reiff
 Clerk of Circuit Court
 Walworth County Courthouse
 P.O. Box 1001
 Elkhorn, WI 53121-1001

Lee D. Huempfer
 Walworth County Corporation Counsel
 P.O. Box 1001
 Elkhorn, WI 53121-1001

Steven C. Spear
 Pinnacle Legal Services LLC
 109 S. First St.
 Whitewater, WI 53190

Angela M. Kelley
 190 W. Geneva St., #2
 Williams Bay, WI 53191

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

2014AP588

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
 (L.C. #2006FA101)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Raymond L. Franklin appeals an order denying his motion for various requested measures of relief, including vacating a default judgment granted to Angela M. Kelley. Franklin argues that improper service of process deprived the circuit court of personal jurisdiction over him. We conclude Franklin has waived a jurisdictional challenge. Based upon our review of the briefs and the record, we conclude that this case, just any of being frivolous, is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

No. 2014AP588

Franklin fathered two nonmarital children with Kelley. Walworth county case numbers 03FA337 and 03FA801 addressed child support and repayment of birth expenses for the two children.

In February 2006, Kelley filed a summons and petition to commence Walworth county case number 06FA101 regarding legal custody, physical placement, and child support. Service was accomplished by publishing a notice of hearing that listed the parties' names, the case number, the hearing's date, time, and place, and the presiding official. The summons was not published. Franklin did not appear at the hearing or file a WIS. STAT. § 802.06 motion challenging jurisdiction, the summons, process, or service. The court entered an order finding jurisdiction over the parties and resolving the matters Kelley raised.

In September 2006, Franklin signed and the court approved a stipulation modifying the amount of previously ordered child support. Six months later at a hearing on an Order to Show Cause for failure to pay child support, Franklin signed and the court approved two additional stipulations. One allowed Franklin's attorney to withdraw; the other continued the matter for a month. At the continued hearing, Franklin signed and the court adopted a fourth stipulation finding him in contempt for failure to pay child support. In May 2007, the parties presented the court with a fifth written stipulation they both had signed that addressed placement. None of the stipulations challenged jurisdiction or the adequacy of service. Rather, Franklin first raised the objection in December 2013 after being charged with five counts of failure to pay child support.

Whether a court has subject matter jurisdiction is a legal issue on which we do not defer to the trial court. *See Dykema v. Volkswagenwerk AG*, 19 Wis. 2d 206, 210, 525 N.W.2d 754 (Ct. App. 1994). Circuit courts have jurisdiction of all actions affecting the family. WIS. STAT.

No. 2014AP588

§ 767.01(1). Filing a summons and complaint (or, here, a petition) in the court confers subject matter jurisdiction. See *Lak v. Richardson-Merrell, Inc.*, 100 Wis. 2d 641, 649, 302 N.W.2d 483, 487 (1981). There is no issue of subject matter jurisdiction.

This court also independently reviews a circuit court's decision on a motion to dismiss for lack of personal jurisdiction. See *Hoops Enters., III, LLC v. Super W., Inc.*, 2013 WI App 7, ¶6, 345 Wis. 2d 733, 827 N.W.2d 120 (Ct. App. 2012). The purpose of a summons is "mere notice." *Gaddis v. LaCrosse Prods., Inc.*, 198 Wis. 2d 396, 406, 542 N.W.2d 454 (1996). The parties debate whether supplying the hearing information on the notice, rather than by an authenticated summons, voided its service and amounted to a technical or fundamental defect. As our supreme court observed in *American Family Mut. Ins. Co. v. Royal Ins. Co.*, 167 Wis. 2d 524, 533, 481 N.W. 2d 629 (1992):

Defects are either technical or fundamental—where the defect is technical, the court has personal jurisdiction only if the complainant can show the defendant was not prejudiced, and, where the defect is fundamental, no personal jurisdiction attaches regardless of prejudice or lack thereof.

We need not decide which type of defect, if either, occurred or whether prejudice ensued. Even if the deviation constituted a fundamental defect, personal jurisdiction defects can be waived. *Studelska v. Avercamp*, 178 Wis. 2d. 457, 452, 504 N.W.2d. 128 (Ct. App. 1993). Over the years, Franklin appeared in court and signed five stipulations involving child support, physical placement, and contempt of court. Not until December 2013 did he raise a proper objection to personal jurisdiction. "[U]nder 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. Nuve! Credit Corp.*, 2010 WI 50, ¶33, 325 Wis. 2d 135, 785 N.W.2d 302; see Wis. STAT. § 802.06(2). Section 802.06 is "designed to

No. 2014AP588

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.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

STATE OF WISCONSIN

CIRCUIT COURT
FAMILY COURT BRANCH

WALWORTH COUNTY

In re T.R.F. and J.M.F.:

ANGELA M. KELLEY

Case No. 2006FA101

and

RAYMOND L. FRANKLIN

ORDER DENYING MOTION FOR RELIEF

THE ABOVE MATTER having come on before this Court on March 3, 2013 at the Judicial Center in the City of Elkhorn, Walworth County, Wisconsin; and the appearances being:

ANGELA M. KELLEY did not appear.

Walworth County Child Support Agency by Attorney Lee D. Huempfer;

RAYMOND L. FRANKLIN in person and by Attorney Steven C. Spear; and

WHEREFORE, based upon the file, the hearing, the court file, and the record the court issues the following orders:

NOW THEREFORE IT IS HEREWITH ORDERED, THAT

Respondent's Motion For Relief is denied.

BY THE COURT:

 3/5/14

Honorable Kristine E. Drettwan

FILED

MAR 5 2014

CLERK OF COURT
BY: KAY...

STATE OF WISCONSIN FAMILY COURT COUNTY OF WALWORTH

In re the marriage of:

Angela M. Kelley,
Petitioner,

-and-

Raymond L. Franklin,
Respondent.

FILED
COURT
FEB 5 2014

ORDER

WISCONSIN STATE OF COURTS
WALWORTH CO. Case No. 06FA101

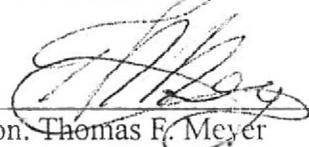
The above matter came on for hearing of Respondent's motion to dismiss for lack of jurisdiction, the appearances being Respondent, Raymond L. Franklin, in person and by his attorney Steven Spear; Angela M. Kelley, in person and attorney Lee Huempfer for the State of Wisconsin.

Based upon the file, proceedings and record herein and upon the arguments of counsel ;

IT IS HEREBY ORDERED that Respondent's motion to dismiss is denied.

Dated this 5 day of February, 2014.

BY THE COURT:


Hon. Thomas F. Meyer
Court Commissioner

STATE OF WISCONSIN

CIRCUIT COURT
FAMILY COURT BRANCH

WALWORTH COUNTY

In re T.R.F. and J.M.F.:

ANGELA M. KELLEY

Case No. 2006FA101

and

RAYMOND L. FRANKLIN

FILED

DEC 18 2013

NOTICE AND MOTION FOR RELIEF

CIRCUIT COURT-WALWORTH CO.
ASHLEY ARNESON, CLERK

TO: ANGELA M. KELLEY
190 W. Geneva Street #2
Williams Bay, WI 53191

WALWORTH COUNTY CHILD SUPPORT
1800 County Road NN
Elkhorn, WI 53121

1. PLEASE TAKE NOTICE that RAYMOND L. FRANKLIN, moves the court pursuant to Wis. Stat. § 806.07 for relief from the July 11, 2006 Findings and Order and all subsequent Orders.

2. This motion will be heard:

KRISTINE DRETTWAN

BEFORE: HONORABLE _____
PLACE: Walworth County Judicial Center
1800 County Highway NN.
Elkhorn, WI 53121-1001

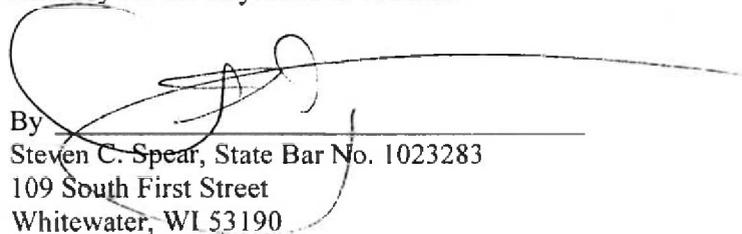
DATE: Feb 4 2014

TIME: 9:10 am

3. This motion is made pursuant to Wis. Stat. § 806.07. The grounds for this motion are the judgment is void and as set forth in the accompanying brief.

Dated this 18th day of December, 2013.

PINNACLE LEGAL SERVICES LLC
Attorney for the Raymond L. Franklin

By 
Steven C. Spear, State Bar No. 1023283
109 South First Street
Whitewater, WI 53190
(262)473-8500

jurisdiction or competency.

III. A fundamental defect cannot be waived.

First, Ms. Kelley did not commence an action pursuant to Wisconsin Statutes, therefore, there was no action pending. The waiver provisions of sec. 802.06, stats. only apply when an action is pending. *Hester v. Williams*, 117 Wis. 2d 634, 643, 345 N.W.2d 426 (1984). Because in this case, there was no action pending and the statutes define the obligations of the defendant when an action is pending, there was no obligation for Mr. Franklin to raise any defense. *Pulchinski v. Strand*, 88 Wis. 2d 423, 429-430, 276 N.W. 2d 781 (1979).

Second, the fundamental Defects in this case go to non-compliance with sec. 801.02(1). Our supreme court in *Grams v. Melrose-Mindoro Joint School Dist. No. 1*, 78 Wis. 2d 569, 254 N.W. 2d 730 (1977), stated that when the legislative will is expressed in preemptory terms of a statute it is paramount and absolute and cannot be varied or waived by the private contentions of the parties. It follows that the legal effects and consequences cannot be avoided by estoppels. *Id.* at 578, 254 N.W. 2d at 735.

Further, given the nature and consequences of

fundamental defects, allowing a fundamental defect to be waived would furnish a complainant with a loophole in which the consequences of failing to follow the structures for commencing an action are removed. In those circumstances, fundamental defects become less significant than even technical defects; they simply become incidental defects. Furnishing a complainant with an escape of this sort is not only inimical to the idea of fundamental defects, it would contravene their consequences. See *Bartels v. Rural Mut. Ins.*, 275 Wis. 2d 730, ¶17, 687 N.W. 2d 84, 89 (Ct. App. 2004).

IV. Mr. Franklin did not submit to the jurisdiction of the court.

Mr. Franklin cannot make an appearance in an action that does not exist in law.

In following the timeline in this case, Ms. Kelley filed her summons and petition on February 14, 2006. (R:1) and (R:2). The court granted Ms. Kelley default on June 20, 2006. (R:26, p. 7). It was then filed as an order on July 11, 2006 (R:4). Mr. Franklin's first appearance in this case was on September 15, 2006 by way of a stipulation to amend the default order. (R:5).

Ms. Kelley's time within which to acquire personal

jurisdiction over Mr. Franklin expired on May 15, 2006, 90 days after her filing. Because Mr. Franklin was never served, Ms. Kelley's action was never commenced. Mr. Franklin simply cannot appear in an action that does not exist in law nor can Mr. Franklin stipulate to amend an order that the court had no jurisdiction to enter in the first instance.

The exercise of jurisdiction over a person without service of a summons is governed by Wis. Stat. §801.06. See also Wis. Stat. §801.04. Mr. Franklin was neither a party to a counterclaim to an action that he commenced nor did he appear in an action and waive person jurisdiction under Wis. Stat. §802.06(8).

Further stipulation papers and appearances in a case do not confer personal jurisdiction where a summons and petition are required. *Useni v. Boudron*, 264 Wis. 2d 783, ¶12, 662 N.W. 2d 672, 676 (Cy. App. 2003).

V. Mr. Franklin cannot be estopped from asserting that the trial court lacked subject matter or personal jurisdiction.

The supreme court has been very clear on the issue of estoppels as it relates to statutes. When the legislative will is expressed in peremptory terms of a statute it is

STATE OF WISCONSIN

CIRCUIT COURT
FAMILY COURT BRANCH

WALWORTH COUNTY

In re the custody and placement of T.R.F. and J.M.F.,

ANGELA M. KELLEY,

Petitioner,

and

RAYMOND L. FRANKLIN,

Respondent.

SUMMONS

FILED
CIRCUIT COURT

FEB 14 2006

CLERK OF COURTS-WALWORTH CO.
BY: SHERIL OLDENBURG

Case No. _____

Case Code 40402

'06 FA 00101

THE STATE OF WISCONSIN

To the person named above as respondent:

You are hereby notified that the petitioner named above has filed a petition against you, which is attached, stating the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in Wis. Stat. ch. 802, to the petition. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to this court, whose address is:

Clerk of Circuit Court
Walworth County Judicial Center
PO Box 1001
Elkhorn, WI 53121

and to Steven R. Wassel, the petitioner's attorney, whose address is:

Wassel, Harvey & Schuk, LLP
1034D Ann Street
PO Box 524
Delavan, WI 53115

You may have an attorney help or represent you.

If you do not provide a proper response within 45 days, the court may grant a judgment against you for the award of money or other legal action requested in the petition, or you may lose your right to object to anything that is or may be incorrect in the petition. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future and may also be enforced by

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garnishment of wages or seizure of property.

You are further notified of the availability of information set forth in Wis. Stat. § 767.081 from the office of family court commissioner, which provides as follows:

767.081 Information from the office of family court commissioner.

(1) Upon the filing of an action affecting the family, the office of family court commissioner shall inform the parties of any services, including referral services, offered by the office of family court commissioner and by the director of family court counseling services under s. 767.11.

(2) Upon request of a party to an action affecting the family, including a revision of judgment or order under s. 767.32 or 767.325:

(a) The office of family court commissioner shall, with or without charge, provide the party with written information on the following, as appropriate to the action commenced:

1. The procedure for obtaining a judgment or order in the action.

2. The major issues usually addressed in such an action.

3. Community resources and family court counseling services available to assist the parties.

4. The procedure for setting, modifying and enforcing child support awards or modifying and enforcing legal custody or physical placement judgments or orders.

(b) The office of family court commissioner shall provide a party, for inspection or purchase, with a copy of the statutory provisions in this chapter generally pertinent to the action.

You are further notified that if you and the petitioner have (a) minor child(ren), violation of the following criminal statute is punishable by a fine not to exceed \$25,000 or imprisonment not to exceed 12 years and 6 months, or both:

948.31 Interference with custody by parent or others.

(1) (a) In this subsection, "legal custodian of a child" means:

1. A parent or other person having legal custody of the child under an order or judgment in an action for divorce, legal separation, annulment, child custody, paternity, guardianship, or habeas corpus.

2. The department of health and social services or the department of corrections or any person, county department under s. 46.215, 46.22 or 46.23 or licensed child welfare agency, if custody of the child has been transferred under ch. 48 or 938 to that department, person or agency.

(b) Except as provided under chs. 48 and 938, whoever intentionally causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period from a legal custodian with intent to deprive the custodian of

his or her custody rights without the consent of the custodian is guilty of a Class F felony. This paragraph is not applicable if the court has entered an order authorizing the person to so take or withhold the child. The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this paragraph.

(2) Whoever causes a child to leave, takes a child away or withholds a child for more than 12 hours from the child's parents or, in the case of a nonmarital child whose parents do not subsequently intermarry under s. 767.60, from the child's mother or, if he has been granted legal custody, the child's father, without the consent of the parents, the mother or the father with legal custody, is guilty of a Class I felony. This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding the child.

(3) Any parent, or any person acting pursuant to directions from the parent, who does any of the following is guilty of a Class F felony:

(a) Intentionally conceals a child from the child's other parent.

(b) After being served with process in an action affecting the family but prior to the issuance of a temporary or final order determining child custody rights, takes the child or causes the child to leave with intent to deprive the other parent of physical custody as defined in s. 822.02(9).

(c) After issuance of a temporary or final order specifying joint legal custody rights and periods of physical placement, takes a child from or causes a child to leave the other parent in violation of the order or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period.

(4) (a) It is an affirmative defense to prosecution for violation of this section if the action:

1. Is taken by a parent or by a person authorized by a parent to protect his or her child in a situation in which the parent or authorized person reasonably believes that there is a threat of physical harm or sexual assault to the child;

2. Is taken by a parent fleeing in a situation in which the parent reasonably believes that there is a threat of physical harm or sexual assault to himself or herself;

3. Is consented to by the other parent or any other person or agency having legal custody of the child; or

4. Is otherwise authorized by law.

(b) A defendant who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

(5) The venue of an action under this section is prescribed in s. 971.19(8).

(6) In addition to any other penalties provided for violation of this section, a court may order a violator to pay restitution, regardless of whether the violator is placed on

probation under s. 973.09, to provide reimbursement for any reasonable expenses incurred by any person or any governmental entity in locating and returning the child. Any such amounts paid by the violator shall be paid to the person or governmental entity which incurred the expense on a prorated basis. Upon the application of any interested party, the court shall hold an evidentiary hearing to determine the amount of reasonable expenses.

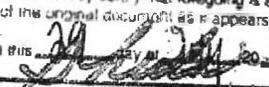
If you and the petitioner have minor children, accompanying this summons will be a document setting forth the percentage standard for child support established by the Department of Workforce Development under Wis. Stat. § 49.22(9) and listing the factors that a court may consider for modification of that standard under Wis. Stat. § 767.25(1m).

Dated this 17th day of January, 2006.



Steven R. Wassel
Attorney for Petitioner
State Bar No. 01003231

WASSEL, HARVEY & SCHUK, LLP
1034D Ann Street
P.O. Box 524
Delavan, WI 53115
(262) 728-0700
(Fax) 728-0300

State of Wisconsin }
County of Walworth }
I, Sheila T. Hart, Clerk of the Circuit Court of Walworth County, Wisconsin, and keeper of the records and files thereof, do hereby certify that foregoing is a true and correct copy of the original document as it appears in the files in my office.
Dated this 17th day of January, 2006.

Deputy Clerk of Courts

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101

STATE OF WISCONSIN

CIRCUIT COURT
FAMILY COURT BRANCH

WALWORTH COUNTY

In re the custody and placement of T.R.F. and J.M.F.,

ANGELA M. KELLEY,

Petitioner,

and

RAYMOND L. FRANKLIN,

Respondent.

PETITION

Case No. _____
Case Code 40402

FILED
CIRCUIT COURT

FEB 14 2006

CLERK OF COURTS-WALWORTH CO.
BY: SHERIL OLDENBURG

'06 FA 00101

1. The Petitioner, Angela Kelley, born 4/23/1975, resides at 63 Oakwood, in the City of Williams Bay, County of Walworth, Wisconsin, 53191; the Petitioner is by occupation a Sales Associate and has Social Security number 396-66-5400.

2. The Respondent, Raymond Franklin, born 12/12/1973, whose last known address is N1206 Cty Rd H, in the city of Pell Lake, County of Walworth, Wisconsin, 53157; the Respondent has an unknown occupation and an unknown Social Security number.

3. The parties were never married.

4. The Petitioner has been a resident of Walworth County for more than 30 days immediately preceding the commencement of this action and of the State of Wisconsin for more than six months immediately preceding the commencement of this action.

5. a. Two children have been born to or adopted by the parties, of which the following are minor children:

<u>Name</u>	<u>Birthdate</u>
Tessa Franklin	2/16/2001
Jakob Franklin	9/26/2003

b. The Petitioner is a fit and proper person to have the legal custody of the minor children.

6. The parties have not entered into any written agreement as to support, legal custody, physical placement, visitation of the children, maintenance, or property division.

7. The following custody information is given in compliance with Wis. Stat. § 822.09:

a. The minor children named above presently reside with the Petitioner.

b. Within the last five years, the minor children have

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MS

lived with the Petitioner.

c. The Petitioner has not previously participated as a party, witness, or in any other capacity in other litigation concerning the custody of the above-named minor children in this or any other state.

d. The Petitioner is unaware of any other custody proceedings concerning the above-named minor children pending in a court of this or any other state. However, there is a child support action pending in Walworth County, Wisconsin, Case No. 03 FA 801.

e. The Petitioner knows of no person not a party to this action who has physical custody of the minor children or claims to have legal custody, physical placement, or visitation rights with respect to the minor children.

f. The Petitioner understands that as a party to this action, she has a continuing duty to inform this court of any custody proceedings brought concerning the children in this or any other state of which the Petitioner obtains information during this proceeding.

THE PETITIONER REQUESTS THE FOLLOWING RELIEF:

- A. Sole custody of the minor children,
- B. Primary placement of the minor children,
- C. Child support,
- D. Court order requiring the Respondent to maintain health insurance on the minor children,
- E. Allocation of dependent and exemption status,
- F. For such other relief as may be just and equitable.

YOU ARE HEREBY NOTIFIED that pursuant to Wis. Stat. § 767.087, during the pendency of this action both parties are prohibited from and may be held in contempt of court for:

1. Harassing, intimidating, physically abusing, or imposing any restraint on the personal liberty of the other party or a minor child of either of the parties;

2. Encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties, without the consent of the other party or an order of the court or circuit court commissioner, except in the usual course of business, in order to secure necessities, or in order to pay reasonable costs and expenses of the action, including attorney fees;

3. Establishing a residence with a minor child of the parties outside the state of Wisconsin or more than 150 miles from the residence of the other party within the state without the consent of the other party or an order of the court or circuit court commissioner;

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[Signature]

4. Removing a minor child of the parties from the state of Wisconsin for more than 90 consecutive days without the consent of the other party or an order of the court or circuit court commissioner; or

5. Concealing a minor child of the parties from the other party without the consent of the other party or an order of the court or circuit court commissioner;

Except that a violation of paragraphs 3., 4., or 5. above is not a contempt of court if the court finds that the action was taken to protect a party or a minor child of the parties from physical abuse by the other party and that there was no reasonable opportunity under the circumstances for the party to obtain an order authorizing the action.

These restraining orders apply until the action is dismissed, a final judgment in the action is entered, or the court orders otherwise.

A VIOLATION OF THE ABOVE RESTRAINING ORDERS MAY RESULT IN PUNISHMENT FOR CONTEMPT, WHICH MAY INCLUDE MONETARY PENALTIES, IMPRISONMENT, AND OTHER SANCTIONS AS PROVIDED FOR IN WIS. STAT. § 785.04.

Angela Kelley

Angela Kelley, Petitioner

SUBSCRIBED AND SWORN TO before me
this 24th day of February

[Signature]

Notary Public, State of Wisconsin
My Commission expires: 5-07-06



Wassel, Harvey & Schuk, LLP
1034D Ann Street
Delavan, WI 53115
(262) 728-0700

State of Wisconsin)ss
County of Walworth
I, Sheila T. Reiff, Clerk of the Circuit Court of Walworth
County, Wisconsin, and keeper of the records and files
thereof, do hereby certify that foregoing is a true and correct
copy of the original document as it appears in the files in my
office.
Dated this 24 day of July, 2013
[Signature] Deputy Clerk of Courts

Invoice Number:

177

FILED
CIRCUIT COURT

Argus Leader AFFIDAVIT OF PUBLICATION

MAY 22 2006

CLERK OF COURTS-WALWORTH CO.
BY: SHERIL OLDENBURG

STATE OF SOUTH DAKOTA

COUNTY OF MINNEHAHA } ss

Betty Jones being duly sworn, says: That The Argus Leader is, and during all the times hereinafter mentioned was, a daily legal newspaper as defined by SDCL 17-2-21, as amended published at Sioux Falls, Minnehaha County, South Dakota; that affiant is and during all of said times, was an employee of the publisher of such newspaper and has personal knowledge of the facts stated in this affidavit; that the notice, order or advertisement, a printed copy of which is hereto attached, was published in said newspaper upon

Monday ,the 1 day of May 2006 ,

Monday the 8 day of May 2006 ,

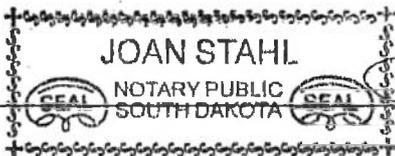
Monday ,the 15 day of May 2006 ,

_____,the _____ day of _____ 2006 ,

and that \$48.17 was charged for publishing the same

Betty Jones
Subscribed and sworn to before me 5/15/2006

JOAN STAHL
NOTARY PUBLIC
SOUTH DAKOTA



Joan Stahl
Notary Public, South Dakota

My Commission expires June 30, 2011

Miscellaneous

Notice of Hearing -
Case No. 06 FA 101
STATE OF WISCONSIN
CIRCUIT COURT
WALWORTH COUNTY
ANGELA M. KELLEY
vs.
RAYMOND L. FRANKLIN
This case is scheduled for a Preliminary Hearing at 2:00 p.m. on June 20, 2006 at Walworth County Judicial Center, Room 2055, 1800 County Road NN, Elkhorn, WI 53121. The Hon. David M. Reddy, Family Court Commissioner, will be presiding.
Dated this 24th day of February, 2006.

Clerk of Courts
Walworth Co.
By: Kay Broihahn, Deputy
933177 May 1, 8 & 15, 2006

State of Wisconsin: 358
County of Walworth: 358
I, Sheila T. Reiff, Clerk of the Circuit Court of Walworth County, Wisconsin, and keeper of the records and files thereof, do hereby certify that foregoing is a true and correct copy of the original document as it appears in the files in my office.
Dated this 29 day of July, 2013
Sheila T. Reiff
Deputy Clerk of Courts

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STATE OF WI

MINUTES

WALWORTH COUNTY - 64

Case Name: Angela Kelley vs. Raymond Franklin

Case Number: 06FA00101

Deputy: Warnecke

Clerk: Brown

Date: 6/20/06

Activity: Hearing

Code

Judge:

Code:

99

Reddv

1666

Appearances

Reporter Eileen Grzenia Other: Janet Schulz

Petitioner: In person No appearance With Attorney Steve Wassel

Respondent: In person No appearance With Attorney _____

Court in session. Appearances given.

Service was done by publication.

Custody, placement and child support.

Atty Wassel states children are on BadgerCare so State has an interest.

FILED
CIRCUIT COURT

JUN 20 2006

CLERK OF COURTS-WALWORTH CO.
BY: LAURIE M. BROWN

Matter was filed on February 14, 2006.

Request in April for extension of time to effect service and matter was rescheduled to today.

Parties last resided together in Summer of 2004.

Petitioner seeking sole legal custody.

Petitioner would like placement limited until respondent petitions Court for specific placement.

Court will order:

Sole legal custody and primary placement with mother. Respondent may petition Court for alternate placement.

Child support to based on percentage standard guidelines utilizing earning capacity resulting in support order of

\$625/mo commencing May 1, 2006.

Tax exemptions awarded to mother.

Atty Wassel to draft order and submit subject to 5 day objection.

State of Wisconsin,) ss
County of Walworth)
I, Sheila T. Reff, Clerk of the Circuit Court of Walworth
County, Wisconsin, and keeper of the records and files
thereof, do hereby certify that foregoing is a true and correct
copy of the original and entered and appears in the file in my
office.
Dated this 20th day of June, 2006.

County Clerk of Courts

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STATE OF WISCONSIN

CIRCUIT COURT
FAMILY COURT BRANCH

WALWORTH COUNTY

In re the custody and placement of T.R.F and J.M.F.,

ANGELA M. KELLEY,

FINDINGS AND ORDER

Petitioner ^{FILED}
CIRCUIT COURT

and

JUL 11 2006

RAYMOND L. FRANKLIN, CLERK OF COURTS-WALWORTH CO Case No. 06 FA 101
BY: LAURIE M. BROWN Case Code 40402

Respondent.

The above captioned matter having come on for hearing before the Hon. David M. Reddy, Walworth County Family Court Commissioner, upon the Petitioner's motion on June 20, 2006, the appearances being the Petitioner in person and by her attorneys, Wassel, Harvey & Schuk, LLP, by Attorney Steven R. Wassel. The Respondent did not appear.

Upon the records, files and proceedings held herein, the Court does hereby make the following findings of fact and order:

1. The Court has jurisdiction over the parties.
2. The Respondent has had limited contact with the minor children.
3. The Petitioner is hereby awarded the sole custody of the minor children.
4. The Petitioner shall have placement at all times. However, the Respondent may petition the Court to establish periods of placement.
5. The Court finds that the Respondent has been employed as a carpenter, and as such, has an earning capacity of \$30,000.00. The Court does hereby order child support consistent

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with DWD 40.04 guidelines, and requires the Respondent to pay to the Petitioner the sum of \$625.00 per month, effective May 1, 2006.

6. All child support payments shall be by income assignment. The Respondent's employer shall be ordered to withhold \$625.00 from money due on a monthly basis and send the payment to the Wisconsin Support Collections Trust Fund, Box 74400, Milwaukee, Wisconsin 53274-0400.

7. Both parties shall notify the Walworth County Child Support Agency and the other party in writing of any change of address within 10 days of such change pursuant to Sec.767.263, Stats. Further, the Respondent shall notify the Walworth County Child Support Agency and the other party within 10 days of any change of employer and of any substantial change in the amount of his income such that his ability to pay child support is affected.

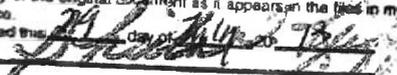
8. The Petitioner shall have the ability to claim the minor children as dependants and exemptions on her state and federal income tax returns.

Dated this 11 day of ~~June~~ ^{JULY}, 2006.



Hon. David M. Reddy
Family Court Commissioner

Wassel, Harvey & Schuk, LLP
1034D Ann Street
PO Box 524
Delavan, WI 53115
(262) 728-0700
(FAX) 728-0300

State of Wisconsin
County of Walworth) ss
I, Sheila T. Redd, Clerk of the Circuit Court of Walworth
County, Wisconsin, and keeper of the records and files
thereof, do hereby certify that foregoing is a true and correct
copy of the original document as it appears in the files in my
office.
Dated this 11 day of JULY, 2006.

Deputy Clerk of Courts

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Maas v. Am. Family Mut. Ins. Co., 2012 WI App 106 (Only 1 of 10) Pages: 5

2012 WI App 106; 344 Wis. 2d 297;
821 N.W.2d 412; 2012 Wisc. App. LEXIS 607, *

JUSTIN M. MAAS, PLAINTIFF-RESPONDENT, TRILOGY HEALTH INSURANCE, INC.,
INVOLUNTARY-PLAINTIFF-RESPONDENT, v. AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
GAGE M. CREIGHBAUM, SHERRY A. LAGIOS, DIMITRIOS D. LAGIOS AND AIG INSURANCE
COMPANY, DEFENDANTS-APPELLANTS.

Appeal No. 2011AP1661

COURT OF APPEALS OF WISCONSIN, DISTRICT TWO

2012 WI App 106; 344 Wis. 2d 297; 821 N.W.2d 412; 2012 Wisc. App. LEXIS 607

August 1, 2012, Decided
August 1, 2012, Filed

NOTICE: SEE RULES OF APPELLATE PROCEDURE, RULE 809.23(3), REGARDING CITATION OF UNPUBLISHED OPINIONS. NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

PRIOR HISTORY: [*1]

APPEAL from an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. Cir. Ct. No. 2010CV790.

DISPOSITION: Reversed.

CASE SUMMARY

OVERVIEW: Defendant driver allegedly crashed his vehicle into plaintiff other motorist's vehicle. Two days before the statute of limitations period expired, the other motorist filed a **summons** and complaint. However, he did not serve any defendant. Months later, he filed an amended **summons** and complaint and served it on defendant alleged responsible parties, including the driver. The trial court denied their motion to dismiss. The appellate court found that Wis. Stat. § 801.02(1) (2010) barred his action because the original **summons** and complaint was not served within that statute's 90-day time limit.

OUTCOME: Judgment reversed.

CORE TERMS: statute of limitations period, summons, original summons, notice of appearance, failed to serve, jurisdictional, personal jurisdiction, serving, waived, prior to filing, personal injury, failure to serve, commence, remedied, nullity, interrogatories

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driver's license and were liable for his actions with a vehicle on the subject accident date." The amended complaint further alleges that American Family insured the vehicle Creighbaum was operating at the time of the incident and that it issued a policy insuring Creighbaum and the Lagioses.

2 All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

BACKGROUND

P2 On August 20, 2007, Creighbaum crashed his vehicle into a vehicle operated by Maas, resulting in personal injury to Maas. On August 18, 2010, two days before the end of the three-year statute of limitations period, Maas filed a **summons** and complaint against the defendants related to his injuries. Maas failed to serve any of the defendants with the **summons** and complaint.

P3 Maas filed an amended **summons** and complaint on February 15, 2011, which he served on the defendants. The amended **summons** and complaint contained the same cause of action and named the same defendants [*3] as the original **summons** and complaint. On March 24, 2011, the defendants served a request for admissions and interrogatories on Maas inquiring about service of the original **summons** and complaint. On March 28, 2011, the defendants filed a notice of **appearance** related to the amended **summons** and complaint. The notice of **appearance** and request for admissions and interrogatories contained no statement about preserving jurisdictional objections.

P4 The defendants filed an answer to Maas's amended **summons** and complaint on April 6, 2011, alleging Maas failed to obtain proper service of process on Creighbaum and the Lagioses and the court therefore lacked personal **jurisdiction** over them and alleging that Maas's claim was barred by the statute of limitations. On May 3, 2011, the defendants filed a notice of motion and motion to dismiss on the grounds that the suit was barred by the statute of limitations.

P5 The trial court denied the motion, concluding that the defendants' failure to raise their jurisdictional objection prior to filing the notice of **appearance** and serving the request for admissions constituted a waiver of their statute of limitations objection. The court further held that Maas's [*4] action was properly commenced and that the amended complaint related back to the original complaint. The defendants petitioned for leave to appeal and we granted the petition.

DISCUSSION

P6 ~~HWZ~~ A motion to dismiss based on a statute of limitations is treated as a motion for summary judgment. See Wis. STAT. § 802.06(2)(b). Upon review, we perform the same function as the trial court, therefore our review is de novo. *Bartels v. Rural Mut. Ins. Co.*, 2004 WI App 166, ¶7, 275 Wis. 2d 730, 687 N.W.2d 84.

P7 On appeal, the defendants argue that even though Maas filed his original **summons** and complaint two days prior to the running of the three-year statute of limitations period, his claim is barred because he failed to serve any of the defendants with the **summons** and complaint within ninety days of the filing as required by Wis. STAT. § 801.02(1). As a result, the defendants assert, Maas's suit was not *commenced* within the three-year period and his claim was thereby extinguished. Additionally, the defendants contend the relation back statute does not apply because the original action was never commenced. The defendants are correct in each respect.

P8 The statutes are clear. ~~HWZ~~ An action to recover damages [*5] for personal injuries "shall be *commenced* within 3 years *or be barred*," Wis. STAT. § 893.54 (emphasis added). An action is "*commenced* as to any defendant when a **summons** and a complaint naming his person as

defendant are filed with the court, provided service of an authentic copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing." Wis. STAT. § 801.02(1) (emphasis added). Thus, if service is not made within ninety days of the filing of the summons and complaint, the action is not commenced. If not commenced within the three-year statute of limitations period, the action is barred. It is undisputed that Maas failed to serve any of the defendants with the original summons and complaint within ninety days of filing. As a result, his action was never commenced prior to the running of the limitation period and is therefore barred.

P9 Maas's failure to serve the defendants with the original summons and complaint within ninety days was a fundamental defect which deprived the trial court of personal jurisdiction over the defendants and rendered the original pleading a legal nullity. See *Sartola*, 175 Wis. 2d 730, ¶16. Maas's argument [*6] that 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 in response to Maas's amended pleading³ is without merit, as there was nothing for the defendants to waive since this fundamental defect could not be remedied with Maas's amended pleading in the first instance. See *id.*, ¶17; see also *Hester v. Williams*, 117 Wis. 2d 634, 643, 345 N.W.2d 426 (1984) (where a plaintiff fails to commence an action before the statute of limitations runs, there is no pending action, and where there is no action pending, waiver does not apply since a defendant has no duty to raise any defenses). Further, the amended complaint could not relate back to the original complaint because the original complaint was nullified when Maas failed to serve any of the defendants within ninety days of its filing. As the defendants correctly point out, Maas "cannot amend an action that was never commenced."

FOOTNOTES

³ Maas also argues that American Family waived its jurisdictional defense by failing to specifically plead lack of personal jurisdiction as to American Family or bring a motion to dismiss on those specific [*7] grounds. However, in its answer to the amended complaint and its motion to dismiss, American Family did specifically assert the defense it has maintained all along, i.e., that Maas's claim is barred by the statute of limitations.

CONCLUSION

P10 Maas's failure to serve the defendants with the original summons and complaint within ninety days resulted in the three-year statute of limitations period expiring without an action having been commenced. The failure was a fundamental defect which rendered the pleading a legal nullity and could not be remedied by the subsequent filing of an amended pleading after the statute of limitations period expired.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

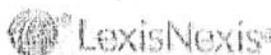
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