

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP763
STATE OF WISCONSIN**

Cir. Ct. No. 2010CV80

**IN COURT OF APPEALS
DISTRICT III**

KRIST OIL COMPANY,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iron County:
PATRICK J. MADDEN, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Krist Oil Company appeals an order dismissing, with prejudice, its action against the Wisconsin Department of Transportation. Krist argues the circuit court erred by concluding it did not properly serve upon

the State its summons and complaint. We reject this argument and, therefore, affirm that part of the order dismissing Krist's lawsuit.

¶2 Krist alternatively claims the circuit court erroneously exercised its discretion when it dismissed the suit with prejudice. We agree and, therefore, reverse that part of the order indicating the dismissal is "with prejudice." Because the parties' arguments addressing dismissal with prejudice were not fully developed in the circuit court, we remand the matter with directions to determine whether the dismissal should be with prejudice.

BACKGROUND

¶3 The Department of Transportation condemned a portion of Krist's property in 2005. Although the parties settled on an amount of compensation for the taking, they disagreed about how much Krist should receive for relocation expenses pursuant to WIS. STAT. §§ 32.19 and 32.20.¹ On August 25, 2010, Krist filed the underlying action, seeking approximately \$172,000 for relocation expenses. On October 4, 2010, the State filed its answer and alleged, in pertinent part, "[i]nsufficiency of service of summons or process." On February 7, 2011, the State moved to dismiss Krist's lawsuit on the same ground. After a hearing, the court dismissed the underlying action with prejudice. This appeal follows.

DISCUSSION

¶4 A circuit court obtains personal jurisdiction over a defendant when the defendant is served with a summons and complaint in the manner prescribed

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

by the statutes. See *Heaston v. Austin*, 47 Wis. 2d 67, 70-71, 176 N.W.2d 309 (1970). The plaintiff has the burden of establishing that the defendant was properly served and is therefore subject to the court's jurisdiction. *Hagen v. City of Milwaukee*, 2003 WI 56, ¶12, 262 Wis. 2d 113, 663 N.W.2d 268. "Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh." *Dietrich v. Elliott*, 190 Wis. 2d 816, 827, 528 N.W.2d 17 (Ct. App. 1995). Whether undisputed facts satisfy the statutory requirements for proper service is a question of law this court reviews independently. See *Jacobs v. Jacobs*, 138 Wis. 2d 19, 23, 405 N.W.2d 668 (Ct. App. 1987).

¶5 WISCONSIN STAT. § 801.11(3) provides that service upon the State is achieved "by delivering a copy of the summons and complaint to the attorney general or leaving them at the attorney general's office in the capitol with an assistant or clerk." Here, Krist attempted service by certified mail to the Attorney General's office. The parties dispute whether mail service or personal service constitute delivery under the statute. Even assuming mail service constitutes "delivery," Krist failed to comply with § 801.11(3).

¶6 The statute requires service on a particular officer or office. Where a specific officer is designated under the statute, service on other individuals is legally ineffective. See *City of Watertown v. Robinson*, 69 Wis. 230, 236-37, 34 N.W. 139 (1887). In the present case, an employee of the Department of Administration, not the Attorney General's office, signed for receipt of the mailing. Mail signed for by a DOA employee could not effect service upon the State. To the extent Krist argues the State had actual notice of the lawsuit, "[t]he service of a summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction ... notwithstanding actual knowledge by

the defendant.” *Danielson v. Brody Seating Co.*, 71 Wis. 2d 424, 428-29, 238 N.W.2d 531 (1976). Because service was defective under WIS. STAT. § 801.11(3), dismissal of the action was appropriate.

¶7 Krist alternatively claims the circuit court erroneously exercised its discretion when it dismissed the suit with prejudice. Our review of a circuit court’s decision to dismiss a case with prejudice is limited to whether the circuit court erroneously exercised its discretion. See *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). We will uphold a circuit court’s discretionary decision if it “has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.* Because dismissal with prejudice is a drastic sanction, however, a court should dismiss a case only on finding egregious conduct or bad faith. *Trispel v. Haefer*, 89 Wis. 2d 725, 732-33, 279 N.W.2d 242 (1979). Indeed, Wisconsin courts have repeatedly emphasized that dismissals with prejudice are most appropriate in cases of misconduct or inexcusable neglect, or where the claims are unlikely to succeed. *Id.*

¶8 Here, the court dismissed the action with prejudice, noting simply “that Krist is not a mom and pop operation, and that they would have the sophisticated knowledge to know that they have the right to cure the defect, and they chose not to do so.” The court made no finding of egregious conduct or bad faith. On this record, we cannot say that the court reasonably exercised its discretion when it dismissed the matter with prejudice. The State nevertheless contends the action was properly dismissed with prejudice because the statute of limitation has expired, thus barring Krist from refiling suit. Krist argues no statute of limitation applies to this type of action. The parties’ respective arguments, however, were not made to the circuit court. We therefore reverse that part of the

order indicating the dismissal is with prejudice and remand the matter with directions to determine whether the dismissal should be with prejudice.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

