COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2211 **Cir. Ct. No. 2010CV2291**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

TAMMY ERNST AND THE ESTATE OF BARRY ERNST,

PLAINTIFFS-APPELLANTS,

V.

JOEL NARLOCK, TERRI NARLOCK, JNT PROPERTY MANAGEMENT, LLC AND STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and orders of the circuit court for Racine County: DENNIS J. BARRY, EMILY MUELLER and DENNIS D. COSTELLO, Judges. *Affirmed and cause remanded for further proceedings*.

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

¶1 PER CURIAM. Tammy Ernst and the Estate of Barry Ernst (collectively, "the Estate") appeal a summary judgment concluding that, because of defective service of process, the court lacked personal jurisdiction over Joel and

Terri Narlock and their company JNT Property Management, LLC,[1] and State Farm Fire & Casualty Company. The Estate also challenges an order granting sanctions against the Estate for filing a frivolous motion. We affirm. We also conclude the appeal is frivolous and remand to award reasonable costs and fees.

¶2 Barry Ernst was found at the bottom of a flight of stairs during the early morning hours on June 17, 2007, in a building that was not his residence. He was taken to the hospital, where laboratory analysis revealed a blood alcohol content of .253%. He died several days later due to injuries sustained in the fall.

¶3 A wrongful death lawsuit was commenced one day before the statute of limitations expired, alleging negligence and safe place violations against the Narlocks and JNT, owners of the building in which Ernst was found. The suit also named "XYZ Insurance Company."[2]

¶4 The Racine County Sheriff's Department attempted unsuccessfully on three separate occasions to serve the summons and complaint on the Narlocks and JNT in Waterford, Wisconsin. The sheriff's department notified the Estate's counsel that service of process could not be completed because "SUBJECT NO LONGER RESIDES AT LISTED ADDRESS. POSSIBLY LIVES IN KEY

[1] The complaint alleged the Narlocks "owned and operated" JNT. JNT declared bankruptcy in 2009.

[2] Other defendants not relevant to this appeal were also named in the lawsuit and voluntarily dismissed.

WEST FL."[3] The Estate subsequently published the summons in the Racine Journal Times for three successive weeks beginning on August 13, 2010.

¶5 An amended summons and complaint was filed on August 20, 2010. Among other things, the amended complaint alleged that "XYZ Insurance Company is now State Farm Fire and Casualty Company, the named insurer of the property …." The amended complaint neither referred to the original complaint nor incorporated it by reference.

¶6 The Narlocks and JNT moved for summary judgment based, in part, upon improper service of process. The circuit court found that the Estate failed to show due diligence in attempting to locate and personally serve the Narlocks and JNT. Rather than attempting to use "directory assistance in the Key West area," or "some mechanisms on the internet and there are a number of them to try to track down the Narlocks," the Estate instead proceeded directly to publication. The court also stated, "And instead of publishing in a newspaper in the Florida region or in Key West, they published in Wisconsin …."

¶7 State Farm also moved for summary judgment on the grounds that it had not been properly served. The circuit court determined that a factual question precluded granting the motion. State Farm then deposed the Estate attorney's legal assistant, who the Estate claimed had served State Farm. The legal assistant testified that she had never previously served legal process and was not instructed on what she was supposed to do. She stated:

[3] It is undisputed the Narlocks moved to Key West and have lived in the same condominium complex since 2009.

> I proceeded up to the second floor through the elevators, located State Farm, went through their doors, approached a glass wall, with a receptionist behind it, with a little opening and inquired as to being able to give something to Mark Gustafson – Gustason.[4]
>
> ….
>
> I asked for Mark Gustafson. She said he was not available, so I asked her if I could leave the letter I was delivering for him with her. She took it and said, "Yes, I can get this to him."

The envelope was sealed and contained a cover letter and the amended summons and complaint. The legal assistant did not inform the receptionist that she was there to serve legal process. The assistant did not prepare an affidavit of service and could not confirm that the envelope she handed the receptionist contained an authenticated copy of the summons and complaint. The assistant testified that she did not know what "authenticated" meant.

¶8 In response to State Farm's motion, the Estate filed a new affidavit from counsel's legal assistant, which contained additional and enhanced details regarding delivery of the envelope to State Farm that were not included in her deposition testimony. The circuit court determined the affidavit was a sham, ordered it stricken from the record, and granted summary judgment. The Estate then filed a motion for reconsideration. State Farm filed a motion for sanctions under WIS. STAT. § 802.05,[5] and sought an order that the Estate's motion for

[4] Mark Gustafson was State Farm's registered agent for service of process.

[5] References to the Wisconsin Statutes are to the 2009-10 version unless noted.

reconsideration was frivolous. The court granted State Farm's motion and this appeal follows.[6]

¶9 The summary judgment methodology is well-established. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarcyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. We apply the standards set forth in WIS. STAT. § 802.08(2) in the same manner as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.***

¶10 In order for a Wisconsin court to exercise personal jurisdiction over a defendant, service of the summons and complaint must be made in the manner provided in WIS. STAT. § 801.11. ***Sacotte v. Ideal-Werk Krug & Priester Machinen-Fabrik***, 121 Wis. 2d 401, 404-05, 359 N.W.2d 393 (1984). Wisconsin requires strict compliance with statutes governing service of process, 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).

The Narlocks and JNT

¶11 Personal service under WIS. STAT. § 801.11 must be attempted with "reasonable diligence" before an alternative method of service may be employed.

[6] We note there are no record citations in the Estate's brief. The Estate cites to the appendix to its brief. Mere citation to an appendix is improper. The rules make clear that a party's brief must make appropriate reference to the record on appeal. ***Siva Truck Leasing, Inc. v. Kurman Distrib.***, 166 Wis. 2d 58, 70 n.32, 479 N.W.2d 542 (Ct. App. 1991); *see also* WIS. STAT. RULE 809.19(1)(d). Moreover, the Estate refers to the parties by party designation rather than by name as required by RULE 809.19(1)(i).

"Reasonable diligence" requires the pursuit of any "leads or information reasonably calculated to make personal jurisdiction possible." ***Loppnow v. Bielik***, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450. Reasonable diligence is treated as a finding of fact to be affirmed unless clearly erroneous. *See* ***Welty v. Heggy***, 124 Wis. 2d 318, 324, 369 N.W.2d 763 (Ct. App. 1985). However, when the underlying facts are undisputed, the legal significance of attempts at service is a question of law to be addressed independently by the reviewing court. *See* ***id.***

¶12 Here, the circuit court correctly determined that service of process fell short and the Estate's diligence was not reasonable. Despite being informed by the deputy sheriff that "subject no longer resides at listed address," and that the Narlocks may reside in Key West, the Estate made no attempt to locate them in Florida or elsewhere.

¶13 In this regard, ***Haselow v. Gauthier***, 212 Wis. 2d 580, 583-84, 569 N.W.2d 97 (Ct. App. 1997), is instructive. The plaintiff in that case hired a private investigator to serve the summons and complaint. The investigator obtained an address from corporate documents filed with the Wisconsin Secretary of State. When the investigator arrived at the address, he served the plaintiff's father, who told the investigator his son was in Hawaii. ***Id.*** at 584. We stated:

> Consistent with due diligence, Haselow was required to reasonably follow up to attempt service. Thus, even if we assume that no further effort to serve Gauthier in Appleton was required, no attempt was made to effect personal service in Hawaii. There is no indication of any attempt to contact the postmaster, or to determine if Gauthier had other relatives, friends, neighbors or business associates who had relevant information.

Id. at 589.

¶14 The requirements of reasonable diligence were further illustrated in ***Loppnow***. Loppnow was injured in a physical altercation with Bielek. Loppnow filed a civil lawsuit and service of process was attempted in Oconomowoc. Bielek's attorney informed Loppnow's attorney that Bielek no longer lived in Oconomowoc, and now lives "in Florida." ***Loppnow***, 324 Wis. 2d 803, ¶¶2, 16.

¶15 When attempts to obtain Bielek's address in Florida from his attorney failed, Loppnow's attorney used a "search device to locate individuals." ***Id.***, ¶5 and n.3. He also attempted unsuccessfully to obtain information from Bielek's parents. He then hired an investigative firm that searched local, state and national databases for information on Bielek's address. ***Id.***, ¶17. Among other things, the firm searched driver's license records, utility records, telephone records and the national student information clearing house. ***Id.***, ¶¶18-19 and n.7.

¶16 We held Loppnow's efforts were consistent with case law on "reasonable diligence," and observed that the guiding principle in the case law is that:

> when pursuing any leads or information reasonably calculated to make personal service possible, the plaintiff must not stop short of pursuing a viable lead – or in other words, stop short "of the place where if [the diligence] were continued might reasonably be expected to uncover an address … of the person on whom service is sought."

Id., ¶¶15, 21 (citation omitted).

¶17 We need not determine what precise steps would constitute reasonable diligence in the present case because, quite simply, the Estate took no steps to pursue the information obtained from the deputy sheriff. The Estate did not question the deputy to determine the basis for his statement that the Narlocks may reside in Key West. The Estate neither attempted to hire an investigative

service in Wisconsin or Key West, nor made any attempt to search databases, telephone, utility or driver's license records. In fact, the Estate gave up on personal service and documented no efforts to track down and personally serve the Narlocks and JNT. Under these circumstances, the Estate's efforts were inconsistent with reasonable diligence.

¶18 Furthermore, the Estate's attempt at substitute service by publication failed to comply with WIS. STAT. § 985.02, which states, in part:

> Except as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected ….

¶19 Publication must be "reasonably calculated" to reach the interested party. *See* ***Loppnow***, 324 Wis. 2d 803, ¶23 n.10. Because the Estate did not pursue any factual investigation whatsoever after obtaining the lead from the deputy sheriff, it cannot be argued that publication in a Racine newspaper was reasonably calculated to reach the Narlocks or JNT.

State Farm

¶20 The circuit court also properly dismissed State Farm. As the court observed, the Estate "never filed an affidavit of service on State Farm nor did the plaintiff file proof [of] service of an authenticated copy." The failure to serve an

authenticated copy of the amended summons and complaint constituted a violation of WIS. STAT. § 801.02(1).[7] *See* ***Dietrich***, 190 Wis. 2d at 827.

¶21 In addition, the Estate may not avail itself of the relation back doctrine. State Farm was not named in the original summons and complaint, filed one day before the expiration of the statute of limitations. State Farm was never served with the original summons and complaint, and publication of the original summons naming "XYZ Insurance Company" did not constitute service upon State Farm.

¶22 The amended summons and complaint was filed after the statute of limitations had expired. The amended documents made no reference to the original summons and complaint, and did not incorporate them by reference. The Estate has not demonstrated that State Farm had notice of the filing of the original summons and complaint within the limitation period, or that State Farm knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against State Farm. *See* WIS. STAT. § 802.09(3). In fact, the record reveals that the Estate did nothing to determine what entity insured the property until after the statute of limitations had expired.

¶23 The Estate also purports to appeal the circuit court's order granting sanctions for frivolousness based upon the Estate's motion for reconsideration. However, the Estate fails to develop an argument in its briefs on appeal, and we

[7] The Estate argues that State Farm acknowledged receipt of a mailed copy of the amended summons and complaint, thereby satisfying the service requirements. However, if service of process is not properly accomplished, the circuit court lacks personal jurisdiction even if the defendant has actual knowledge that a summons and complaint has been initiated. *See* ***American Family Mut. Ins. Co. v. Royal Ins. Co.***, 167 Wis. 2d 524, 534, 481 N.W.2d 629 (1992).

will not abandon our neutrality to develop an argument. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶24 Finally, we conclude the Estate knew or should have known that this entire appeal was without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing laws. *See* ***Larson v. Burmaster***, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134. We therefore grant the respondents' motion for sanctions for a frivolous appeal. Accordingly, we remand with directions to determine the Narlock's, JNT's, and State Farm's costs, fees and attorney fees associated with this appeal.

By the Court.—Judgment and orders affirmed and cause remanded for further proceedings.

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