

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2014

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. 2014AP907

Cir. Ct. No. 2013SC8929

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PATRICK FINNEGAN,

PLAINTIFF-APPELLANT,

v.

JOE PARISI AND SCOTT McDONELL,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.¹ Patrick Finnegan, pro se, appeals from an order granting the motion to dismiss filed by Joe Parisi and Scott McDonnell (collectively, Parisi). Finnegan argues that: (1) the circuit court erred in granting

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Parisi's motion to dismiss because Finnegan's failure to name the proper party, Dane County, was a mistake that did not prejudice Dane County; and (2) the circuit court erred in denying his motion to amend his summons and complaint a second time because the second amended complaint was timely under the relation back doctrine. I conclude that the circuit court did not err in granting Parisi's motion to dismiss and in denying Finnegan's motion to amend, and, therefore, I affirm.

BACKGROUND

¶2 Finnegan alleges that he was wrongfully arrested by Madison police officers on November 5 and November 16, 2012. Finnegan states that due to the wrongful arrests, he paid a non-refundable warrant fee of \$40 to the Dane County Sheriff's Office and incurred additional charges on his credit card in the amount of \$22.50. On April 5, 2013, Finnegan sought reimbursement of the costs relating to his wrongful arrests by serving written notice of the circumstances of the claim on the Dane County Clerk, pursuant to WIS. STAT. § 893.80.² On May 6, the Dane County Board of Supervisors denied Finnegan's claim.³

² WISCONSIN STAT. § 893.80 governs claims against governmental bodies, officers, agents, or employees. Subsection (1d)(a) requires that a claimant, prior to bringing action on the claim, serve written notice of the circumstances of the claim on the governmental agency or officer within 120 days after the happening of the event giving rise to the claim. Parisi does not dispute the adequacy or timeliness of Finnegan's notice of claim pursuant to WIS. STAT. § 893.80.

³ WISCONSIN STAT. § 893.80(1g) requires the governmental agency or officer to serve notice of disallowance of the claim, if applicable, on the claimant by registered or certified mail; failure to do so within 120 days after presentation of the written notice of the claim is construed as a disallowance.

(continued)

¶3 On November 6, 2013, Finnegan, proceeding pro se, filed a small claims action (the subject of this appeal) to recover the costs relating to his wrongful arrests.⁴ The summons and complaint named “Joe Parisi” as the defendant.

¶4 On December 2, 2013, Parisi filed a motion to dismiss, stating four grounds for dismissal, including failure to name a proper party.

¶5 On February 4, 2014, Finnegan amended his original complaint, adding “Scott McDonnell, Dane County Clerk” as a defendant and adding Joe Parisi’s title as “Dane County Executive.”

¶6 On February 5, 2014, the court commissioner held a hearing and granted Parisi’s motion to dismiss.

¶7 Finnegan timely filed a demand for trial, requesting de novo review of Parisi’s motion to dismiss. On February 18, 2014, Finnegan filed a motion requesting leave to amend his complaint a second time in order to add “Dane County Sheriff David J. Mahoney” as a defendant.

Both parties cite to the Notice of Disallowance of Claim, which was not included in the record. Additionally, Parisi’s recitation of facts is incomplete and misrepresents several facts contrary to the record. “An appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record.” *State v. Straehler*, 2008 WI App 14, ¶2 n.4, 307 Wis. 2d 360, 745 N.W.2d 431. *See also* WIS. STAT. § 809.19, which requires the parties to provide a “statement of facts relevant to the issues presented for review, with appropriate references to the record.”

⁴ WISCONSIN STAT. § 893.80(1g) allows claimants to bring action on the claim within six months from the date of service of the notice of disallowance.

¶8 At the March 4, 2014 de novo hearing, the circuit court granted Parisi’s motion to dismiss and denied Finnegan’s motion to amend. The circuit court reasoned:

[W]hat happened is you [Finnegan] didn’t sue the legal entity that you needed to sue, which was Dane County. And even your amendment doesn’t satisfy that

DISCUSSION

¶9 On appeal, Finnegan argues that: (1) the circuit court erred in granting Parisi’s motion to dismiss because Finnegan’s failure to name the proper party, Dane County, was a mistake that did not prejudice Dane County; and (2) the circuit court erred in denying Finnegan’s motion to amend his complaint a second time to add Sheriff Mahoney as a defendant because his proposed second amended complaint was timely under the relation back doctrine.

¶10 For the reasons set forth below, I conclude that: (1) the circuit court properly dismissed the first amended complaint because it failed to name the proper defendant; and (2) the circuit court reasonably exercised its discretion in denying Finnegan leave to amend because the proposed second amended complaint also did not name the proper defendant.

A. Dismissal for Failure to Name the Proper Defendant

¶11 Finnegan argues that the circuit court erred in dismissing the first amended complaint on the basis that the complaint did not timely comply with “the notice procedures of §893.80.” However, the court’s dismissal rested on its determination that the proper party, Dane County, was not the named defendant in either the original or the first amended complaint. It was on that basis that the court determined that it lacked personal jurisdiction.

¶12 Finnegan does not dispute that Dane County was the proper defendant.⁵ Finnegan also does not dispute the fact that he did not name Dane County in either his original or his first amended summons and complaint. Thus, the issue on appeal is whether the circuit court erred in dismissing the first amended complaint for lack of personal jurisdiction over Dane County. Finnegan contends that he made a mistake as to the identity of the proper defendant, and that Dane County was not prejudiced by this mistake because it knew or should have known that, but for Finnegan's mistake concerning the identity of the proper party, the action would have been brought against it. Finnegan's argument ignores the legally significant fact that he never named Dane County as a defendant in his original or amended summons and complaint. For the reasons explained below, I conclude that the circuit court did not err in granting the dismissal.

¶13 This court independently reviews a circuit court's decision on a motion to dismiss for lack of personal jurisdiction. *See Hoops Enterprises, III, LLC v. Super Western, Inc.*, 2013 WI App 7, ¶6, 345 Wis. 2d 733, 827 N.W.2d 120 (Ct. App. 2012). Whether failure to name a party deprives the circuit court of personal jurisdiction over that party is a question of law and we owe no deference to the circuit court. *Bulik v. Arrow Realty, Inc. of Racine*, 148 Wis. 2d 441, 444, 434 N.W.2d 853 (Ct. App. 1988).

¶14 “The statutes that establish the procedure for commencing a civil action in which a personal judgment is sought are rules 801.02 and 893.02, Stats.”

⁵ Finnegan asserts, without responsive argument from Parisi, that both Dane County and the Dane County Sheriff's Office were proper defendants. However, Finnegan did not name either of these parties in his original, first amended, or proposed second amended summons or complaint. Therefore, I do not address whether the Dane County Sheriff's Office is also a proper defendant.

Mech v. Borowski, 116 Wis. 2d 683, 684, 342 N.W.2d 759 (Ct. App. 1983). The required procedure includes naming the proper defendant in the summons and complaint. *See* WIS. STAT. § 801.02(1) (“[A] civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint *naming the person as defendant* are filed with the court” (emphasis added)); *see also* WIS. STAT. § 893.02 (“[A]n action is commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant, when the summons *naming the defendant* and the complaint are filed with the court” (emphasis added)).

¶15 “Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh.” *Mech*, 116 Wis. 2d at 686.⁶ “Significantly, a defendant’s actual notice of an action is not alone enough to confer personal jurisdiction upon the court” *Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶25, 339 Wis. 2d 493, 811 N.W.2d 756.

¶16 “In keeping with the above rule, our courts have recognized a distinction between service that is fundamentally defective, such that the court lacks personal jurisdiction over the defendant in the first instance, and service that is merely technically defective.” *Id.*, ¶26. “If the defect is fundamental, then the court lacks personal jurisdiction over the defendant, regardless of whether or not

⁶ Finnegan cites to *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994) for the contention that substantial compliance is the applicable standard. Finnegan confuses the compliance standard for WIS. STAT. § 893.80 with the compliance standard for WIS. STAT. § 893.02. As mentioned above, § 893.80 requires that a claimant provide notice of the claim to the appropriate governmental entity before bringing action on the claim. The Wisconsin Supreme Court in *Waukesha* held that a claimant need only substantially comply with the notice of claim requirements found in § 893.80. 184 Wis. 2d at 198. However, the notice of claim provisions are separate and distinct from the procedural provisions for commencing a civil action. As noted, the latter require strict compliance.

the defect prejudiced the defendant. If the defect is technical, however, then the court has personal jurisdiction over the defendant only if the complainant can show that the defect did not prejudice the defendant. The burden rests on the complainant” *Id.* (citation omitted). As pertinent here, a fundamental defect occurs when a complainant “fails to name the defendant in the summons and complaint.” *Id.*, ¶28. “If a person is not named in a lawsuit, that person is a stranger to the court and cannot be bound by it.” *Bulik*, 148 Wis. 2d at 444.

¶17 Where the proper defendant is not named in the summons and complaint, the service is fundamentally defective, and the circuit court is deprived of personal jurisdiction. *Id.* at 443, 446 (finding a fundamental defect and no personal jurisdiction where the plaintiff failed to name as a defendant the party against which the allegations in the complaint were directed); *see also Hoops Enterprises*, 345 Wis. 2d 733, ¶11 (holding that where the Department of Transportation was the proper party, “service on the State of a summons and complaint that named the State and not the DOT as a party does not constitute service on the DOT necessary to establish personal jurisdiction over the DOT”). Moreover, whether the defendant is prejudiced is irrelevant. *Bulik*, 148 Wis. 2d at 446-47; *see also Johnson*, 339 Wis. 2d 493, ¶40 (“[A] complainant’s failure to name a defendant in the summons and complaint in accordance with Wis. Stat. §§ 801.02(1) and 801.09(1) constitutes a fundamental defect that precludes personal jurisdiction over that defendant, regardless of whether or not the defect prejudiced the defendant.”).

¶18 As noted above, here the original summons and complaint named only “Joe Parisi.” In the first amended summons and complaint, Finnegan added “Scott McDonnell, Dane County Clerk,” as a defendant and added Joe Parisi’s title as “Dane County Executive.” Neither the original nor the first amended summons

and complaint identified Dane County as a defendant. The circuit court accordingly found that Finnegan failed to name the proper party:

[W]hat happened is you [Finnegan] didn't sue the legal entity that you needed to sue, which was Dane County. And even your amendment doesn't satisfy that

¶19 Consistent with the case law discussed above, Finnegan's failure to name the proper party, Dane County, was a fundamental defect, and therefore, the circuit court did not have personal jurisdiction over Dane County. Whether Dane County was prejudiced is irrelevant. Thus, the circuit court properly granted Parisi's motion to dismiss, because Finnegan failed to name Dane County in the original or the first amended summons and complaint.⁷

B. Denial of Motion to Amend

¶20 Finnegan argues that the circuit court erred in not granting his motion to amend a second time to add Sheriff Mahoney as a defendant. Generally, a party may amend its pleading once as a matter of course within six months after the summons and complaint are filed. *See* WIS. STAT. § 802.09(1). Otherwise, a party may request leave from the court to amend. *Id.* "It is within the discretion of the [circuit] court to allow an amendment to the pleadings, and we will not reverse the [circuit] court unless there has been a manifest abuse of discretion." *Stanhope v. Brown County*, 90 Wis. 2d 823, 834, 280 N.W.2d 711 (1979). "We

⁷ Finnegan also argues that the circuit court's decision to dismiss *with prejudice* was improper because "[n]o genuine issues regarding material facts have been tried." Finnegan does not develop any legal support for this contention, and therefore, I decline to review this argument further. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In addition, Finnegan did not raise this argument in the circuit court, and therefore, he has forfeited the argument on appeal. *See Bank of America NA v. Neis*, 2013 WI App 89, ¶53, 349 Wis. 2d 461, 835 N.W.2d 527.

affirm a circuit court’s discretionary decision if it applies the correct legal standard to the facts of record in a reasonable manner.” *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶34, 298 Wis. 2d 468, 727 N.W.2d 546.

¶21 Here, Finnegan amended as a matter of course on February 4, 2014, when he added Scott McDonnell as a defendant. *See* WIS. STAT. § 802.09(1). After the commissioner granted Parisi’s motion to dismiss on February 5, Finnegan requested de novo review of the motion and at the same time filed a motion to amend his pleadings a second time in order to add Sheriff Mahoney as a defendant. The circuit court denied the motion to amend, reasoning that the proposed second amended complaint still did not name the proper defendant. In other words, the proposed second amended complaint, had it been granted, would not have cured the fundamental defect of failure to name a proper party so as to confer personal jurisdiction. Therefore, the circuit court reasonably exercised its discretion in denying Finnegan’s motion to amend.⁸

CONCLUSION

¶22 For the reasons set forth above, I reject Finnegan’s arguments that the circuit court erred in granting Parisi’s motion to dismiss and in denying Finnegan’s motion to amend. Therefore, I affirm.

⁸ Finnegan also argues that the circuit court should have granted his motion to amend because the proposed second amended complaint was made timely by the relation back doctrine. Because the circuit court reasonably exercised its discretion in denying the motion to amend for other reasons, whether the relation back doctrine would have made the proposed amended complaint timely is not relevant. This court need not address non-dispositive issues. *Maryland Arms Ltd. Partnership v. Connell*, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15.

By the Court – Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

