

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0977

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

FRANCIS J. BRADAC AND ELIZABETH M. BRADAC,

PLAINTIFFS-APPELLANTS,

v.

TOWN OF FARMINGTON AND DONALD C. GETSCHEL,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Polk County:
JAMES R. ERICKSON, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Francis and Elizabeth Bradac appeal an order dismissing their complaint against the Town of Farmington. The Bradacs argue that the circuit court erred by determining that the defect in their summons was a fundamental error requiring dismissal of their action. We conclude that the defect

in the Bradacs' summons was technical and did not prejudice the Town. We therefore reverse.

BACKGROUND

¶2 The Bradacs filed a claim against the Town challenging the 1998 assessment of their real estate and a denial of a hearing regarding that assessment. The summons was served on the Town on October 26, 1999. The summons required a response within twenty days rather than the forty-five days allowed by WIS. STAT. § 801.09.¹ The Town filed its answer on November 15. In its answer, the Town raised the defect in the summons as one of its affirmative defenses. The circuit court dismissed the Bradacs' claim for lack of personal jurisdiction. This appeal followed.

STANDARD OF REVIEW

¶3 Whether a summons is sufficient to obtain personal jurisdiction over a defendant involves interpretation and application of a statute to undisputed facts and is reviewed as a question of law. See *Brandt v. LIRC*, 160 Wis. 2d 353, 361, 466 N.W.2d 673 (Ct. App. 1991). We review questions of law independently. See *American Family Mut. Ins. Co. v. Royal Ins. Co.*, 167 Wis. 2d 524, 529, 481 N.W.2d 629 (1992).

DISCUSSION

¶4 The content requirements of a summons are specified in WIS. STAT. § 801.09. Subsection (2) of that section provides in part:

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

The summons shall further direct the defendant to serve the answer or demand for a copy of the complaint: (a) Within 45 days, exclusive of the day of service, after the summons has been served personally upon the defendant

Because the Bradacs' summons required an answer within twenty days rather than forty-five days, it was defective.

¶5 However, whether a defect is fatal to jurisdiction depends upon whether the defect is fundamental or technical. *See American Family*, 167 Wis. 2d at 532-33. If the defect is fundamental, the circuit court has no jurisdiction and it must dismiss the summons and complaint. However, if the defect is technical, the error will not defeat personal jurisdiction unless the defendant was prejudiced by the defect. *See id.*

¶6 The circuit court, relying on *Bendimez v. Neidermire*, 222 Wis. 2d 356, 588 N.W.2d 55 (Ct. App. 1998), ruled that “non-conformity with a legislative mandate is fundamental rather than technical.” It concluded it did “not have any discretion to decide that a particular legislative mandate is ‘technical’ and thus may be ignored”

¶7 The circuit court interpreted *Bendimez* too broadly. In that case, we recognized the *American Family* distinction between fundamental and technical distinctions. *See id.* at 359. We concluded that service of a summons by an out-of-state resident was a fundamental defect because parties must comply with statutory service requirements. *See id.* at 357-58. We did not, however, suggest that failure to comply with all statutory requirements is a fundamental defect. In fact, we quoted *Gaddis v. LaCrosse Prods.*, 198 Wis. 2d 396, 406, 542 N.W.2d 454 (1996): “Under that rationale, all defects that fall short of the express statutory language would be considered fundamental defects.” That would ignore

the *American Family* distinction between technical and fundamental defects. *See id.*

¶8 Therefore, the appropriate analysis requires us to determine whether a failure to comply with the summons requirements of WIS. STAT. § 809.01 constitutes a fundamental or a technical defect. In *Dungan v. County of Pierce*, 170 Wis. 2d 89, 95-96, 486 N.W.2d 579 (Ct. App. 1992), we discerned a pattern in the cases. We concluded that failure to strictly comply with service requirements in WIS. STAT. § 801.02 constitutes a fundamental defect. *See id.* at 95. “On the other hand, those cases allowing for nonprejudicial technical defects involved errors in content and form governed by sec. 801.09 and 801.095, Stats.” *Id.* at 96.

¶9 The defect in this case involves WIS. STAT. § 801.09. Under *Dungan*, it is a technical defect allowing for nonprejudicial errors. As a result, the question becomes whether the Town was prejudiced by the defect in the Bradacs’ summons.

¶10 The Town received the summons on October 26. It answered on November 15, within the erroneous time limit of twenty days and obviously within the statutorily allowed forty-five days. The Town has not claimed it was prejudiced in any way. Because the Town was not prejudiced, the technical defect in the summons does not deprive the court of personal jurisdiction, and the court erred by dismissing the action.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(10)(b)5.

