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Civil Procedure: Personal Jurisdiction

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RECENT DECISIONS

Civil Procedure: Personal Jurisdiction: Waiver Doctrine: In *Milwaukee County v. Schmidt, Garden and Erikson,*[1] the plaintiff-respondent caused a summons to be personally served in Chicago on one of the defendant-appellants. In response, the defendant, a layman, wrote a letter, captioned with the venue of the action, to the plaintiff's attorney requesting a copy of the complaint. The complaint was verified and served on the defendant fifteen days later. All of the defendants, doing business as a partnership, were individual residents of the state of Illinois.

The issue raised on appeal to the Wisconsin Supreme Court was whether or not the service of a summons on a nonresident outside the state without a copy of the verified complaint confers personal jurisdiction over the defendant, in view of the defendant's letter request for a copy of the complaint and subsequent service thereof. The defendant raised the issue by motion pursuant to section 262.16 of the Wisconsin statutes.[2] The ground for the motion was section 262.12 (1) (b) which provides: "When personal service is made without this state upon the defendant, a copy of the verified complaint shall accompany the summons."

The defendant's motion was dismissed primarily on two grounds. The first was that the defendant was deemed to have waived his objection to any jurisdictional defects by his prior conduct. The second ground was that the apparent statutory procedural mandate, requiring foreign summons be accompanied by a complaint, must be read in the light of the explicit legislative intent that Chapter 262 "be liberally construed to the end that actions be speedily and finally determined on their merits."[3]

In the instant case, personal jurisdiction was deemed conferred because the letter demand for a copy of the complaint was considered a waiver of the defect in the service. On the other hand, the court determined that, had the defendants done nothing, the service of the summons alone would have been totally ineffective; and, had the defendants then proceeded as directed in section 262.16 (2) (a), rather than requesting a copy of the complaint in the first instance, the motion to dismiss would have been granted.

There is an express statutory alternative to due and proper service,

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[1] 35 Wis.2d 33, 150 N.W.2d 354 (1967).

[2] Subsection (2) of WIS. STAT. 262.16 (1965) provides in part: "An objection to the court's jurisdiction over the person is not waived because it is joined with other defenses or motions which, without such objection to jurisdiction, would constitute a general appearance. Such objection shall be raised as follows:
(a) By motion when a defect is claimed in the service of the summons without a complaint; . . . .

[3] WIS. STAT. §262.01 (1965).

for the purposes of acquiring personal jurisdiction over a defendant. Even though service of process is not attempted or is defective, "An appearance of a defendant who does not object to the jurisdiction of the court over his person . . ."[4] confers jurisdiction. This case introduces yet a third alternative, waiver of defective service without a general appearance, by conduct prior to special appearance. It is submitted that the waiver doctrine in this case is distinguishable from that expressly provided for in section 262.16, which appears to relate to the failure to use the procedural remedies of motion, demurrer or answer. Section 262.16(6) provides that "Except as provided in Sub. (5),[5] an objection . . . is waived if not made as provided in this section.

The only statutory remedy dealing with a defect in the service of a summons without a complaint is to raise the objection by motion.[6] The defendant here attempted to avail himself of that remedy. Literally, the sending of the letter could not have waived a defect in the acquisition of jurisdiction because the only way the defendants can waive jurisdiction under the express provisions of the present statute is by appearance without interposing a formal motion. Therefore, in order to void the defendant's jurisdictional objections, the letter request for a copy of the complaint must have been considered to be tantamount to a general appearance. Nevertheless, the court stated, "In view of the specific language of the statutes involved, we do not deem the matter of whether or not the defendants made a general appearance to be a controlling factor."[7]

In *McLaughlin v. Chicago, M., St. P. & P. R. Co.*,[8] wherein a jurisdictional objection was determined to be overcome under the principle of general appearance, the court held that written notice of retainer and *appearance* sent by defendant's counsel would constitute a general appearance, but suggested that the sending of the notice of retainer alone (without specifying "appearance") would not suffice. Wherein does the difference lie between a bare notice of retainer and a letter-request for a copy of a complaint, such that one is and the other is not tantamount to general appearance? If a notice of retainer[9] sent by an attorney

[4] WIS. STAT. §262.16(1) (1965).
[5] Sub. (5) deals generally with objections to jurisdiction over persons under disability and does not apply in the instant case.
[6] WIS. STAT. §262.16(2)(a) (1965).
[7] Milwaukee County v. Schmidt, Garden & Erikson, 35 Wis.2d 33, 36, 150 N.W.2d 354, 356 (1967).
[8] 23 Wis.2d 592, 127 N.W.2d 813 (1963).
[9] The following format for a Notice of Retainer is suggested by 2 NICHOLS, CYCLOPEDIA OF LEGAL FORMS ANNOTATED, §2.281 (1956):

> You will please take notice that I have been *retained by* and *appear for* _____, one of the defendants in the above entitled action, and *demand a copy of the complaint therein,* which may *be served on me* at my office in the city of _____, county of _____, state of _____. (Emphasis added.)

The following format is suggested by 2 BRYANT, WISCONSIN PLEADING AND PRACTICES WITH FORMS, §16.07 (3d ed. 1954):

versed in the procedural refinements of the law is not considered tantamount to a general appearance, then why should a request sent by a layman be considered an act to which so important a procedural significance attaches? The term "appearance" is generally used to signify the overt act by which one against whom a suit has been commenced submits himself to the court's jurisdiction and constitutes the first act of a defendant in court"[10] and "the classical act involves seeking some action by the court."[11] Clearly, using this test, the court could not have obtained jurisdiction over the defendants as provided in section 262.16 (1) because the defendant's letter had nothing to do with in-court action; and hence, no "classical act," seeking court action, was performed. Thus, if the statutory waiver provisions do not apply, and if the jurisdiction could not have been invoked through general appearance doctrines, it is submitted that the plaintiff should have been required to start over.

The only alternative to denying the defendant's motion was through the expedient of creating a non-statutory waiver under the doctrine of "liberal construction."[12] Such an application of the doctrine leaves unanswered the question of the effect of other forms of pre-pleading and pre-motion recognition of a potential action, as to which jurisdiction has not attached. Precisely what acts, at precisely what times, will satisfy the criteria used in the general appearance doctrine of *McLaughlin,* or the waiver doctrine as announced in *Schmidt?* The question is plainly implicit in the court's statement, "[H]ad the defendants done nothing, the service of the summons alone would have been totally ineffective."[13] Does it follow that to do anything will constitute either a waiver or general appearance? Will a letter response to the plaintiff in which liability is disclaimed do so? Will consulting an attorney do so? Will investigating law or facts do so? Will the proposal of a basis of settlement do so? The only clearly "safe" solution, doing nothing, could have undesirable policy effects; for, rather than encouraging nonresidents to honor out-of-state process by some responsive action, it appears to en-

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Sir: Please take notice that I am *retained by* and *appear for* the above-named defendants _____, in this action; and *demand that a copy of the complaint* and all notices and other papers herein *be served on me* at my office _____. (Emphasis added.)

[10] McLaughlin v. Chicago, M., St. P. & P. R. Co., 23 Wis.2d 592, 594, 127 N.W.2d 813, 814 (1963); See also: Dauphin v. Landrigan, 187 Wis. 633, 205 N.W. 557 (1925); 5 Am. Jur. 2d *Appearance,* §1 (1962).

[11] McLaughlin v. Chicago, M., St. P. & P. R. Co., 23 Wis.2d 592, 594, 127 N.W.2d 813, 814 (1963); See also: Bestor v. Inter-County Fair, 135 Wis. 339, 115 N.W. 809 (1908); Rock County Savings & Trust Co. v. Hamilton, 257 Wis. 116, 42 N.W.2d 447 (1950); Ashmus v. Donohoe, 272 Wis. 234, 75 N.W.2d 303 (1956).

[12] "This court is disposed to give statutes regulating procedure a liberal construction." Huck v. Chicago, St. P., M. & O. R. Co., 4 Wis.2d 132, 137, 90 N.W.2d 154, 157 (1958).

[13] Milwaukee County v. Schmidt, Garden & Erikson, 35 Wis.2d 33, 36, 150 N.W.2d 354, 356 (1967).

courage them not to do so, for fear that any recognition of the action may jeopardize valid, though technical, attacks on jurisdiction.

Another potential effect of the decision is that the prospective defendant unwittingly deprives himself of his option of joining in the answer his objection to jurisdiction, as authorized by section 262.16(2). The import assigned to the layman's letter has the practical effect of defeating a procedure designed, not only to encourage the speedy and final determination of actions on their merits, but, at the same time, to preserve the defendant's legitimate attacks on jurisdictional defects. There is no question that a defendant may waive his right to be served as required by statute, as he may waive any other procedure or accommodation. Statutes, by conferring jurisdiction upon the basis of general appearance, so provide. But there are both legal and policy reasons why the principle of "harmless error" should not be too freely applied to clearly-prescribed jurisdictional formalities. The court's liberal interpretation of statutes requiring that its jurisdiction be acquired in a prescribed way is something of a "bootstrap operation," and introduces the unfortunate aspects of unpredictability into rules whose whole function is, like traffic signs, to designate the path which a litigant shall follow.

In the final analysis, this case represents only a small incursion on the rules of jurisdictional procedure, and on that account should perhaps evoke no strong objection. It is abundantly clear, however, that the substantive impact of the decision is to enlarge the period of the applicable statute of limitations, for otherwise the case could not sensibly have provoked an appeal, in lieu of the easy process of reservice. The "liberal construction" which the court invokes, therefore, is effectively a construction which weakens the force of statutes of repose. The decision would have perhaps been more meaningful had it been addressed directly to that policy issue.

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Corporations: Securities: Private v. Public Offering: Section 4(1) of the Securities Act of 1933 exempts "transactions by an issuer not involving any public offering"[1] from the registration requirements of section 5.[2] Because the term "public offering" is not defined in the Securities Act and the commission has not attempted by rule or regula-

[1] 15 U.S.C. §77d (1964).

[2] §5. "(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or
(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale . . ."
15 U.S.C. §77e (1964).