

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 2008

David R. Schanker
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. 2007AP239

Cir. Ct. No. 2005CV7499

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ELIAS ZARATE,

PLAINTIFF-APPELLANT,

UNITED HEALTHCARE INSURANCE COMPANY AND DELPHI CORPORATION,

INVOLUNTARY-PLAINTIFFS,

v.

CONTINENTAL CASUALTY COMPANY,

DEFENDANT-RESPONDENT,

JACK B. KELLEY, INC. AND CONTINENTAL CASUALTY COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 WEDEMEYER, J. Elias Zarate appeals from the judgment of the circuit court granting the summary judgment motion of defendant Continental Casualty Company. Zarate claims that Continental is a proper party to this case under Wisconsin’s direct action statutes, WIS. STATS. §§ 803.04(2) and 632.24 (2005-06),¹ and that Continental’s insured was doing business in Wisconsin, which defeats the limitation on the direct action statutes set forth in WIS. STAT. § 631.01(1)(b). Because Continental’s insured does less than one-half of one percent of its entire business operation in Wisconsin, which is “incidental or subordinate” to the main business operation, the limitation under § 631.01(1)(b) applies and a direct action is not proper. We therefore affirm the grant of summary judgment for defendant Continental.

BACKGROUND

¶2 On August 20, 2002, Elias Zarate was injured in a motor vehicle accident that occurred in Milwaukee, Wisconsin. He was a passenger in a vehicle that was involved in a collision with a truck owned by Jack B. Kelley, Inc. and driven by Maurice R. Gardner. Jack B. Kelley, Inc. is a transporter of compressed gases and cryogenic liquids. None of its regular customers are located in Wisconsin. The company does not own any property in Wisconsin, and has no

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

employees in Wisconsin. It conducts ninety-nine and one-half percent of its business outside the State of Wisconsin. Continental concedes that Gardner was either making a delivery or picking something up in Wisconsin for an out-of-state customer at the time of the accident.

¶3 Zarate filed suit against Gardner, Jack B. Kelley, Inc. and Continental. Continental insured Gardner and Jack B. Kelley, Inc. for liability purposes at the time of the accident. Continental issued the policy of insurance in Illinois and delivered it to Jack B. Kelley, Inc. in Texas, where the company is incorporated.

¶4 Zarate's claims against Gardner and Jack B. Kelley, Inc. were subsequently dismissed due to Zarate's failure to serve them with the Summons and Complaint. The litigation continued with Continental as the sole defendant.

¶5 Continental filed a motion for summary judgment which requested dismissal of Zarate's claims on the grounds that Continental was not a proper party under Wisconsin's direct action statute. The trial court granted summary judgment in favor of Continental because it found that WIS. STAT. § 631.01(1)(b) excludes application of Wisconsin's direct action statute to Continental in this case because the insured was doing business that was "incidental and subordinate" to the majority of the company's business operations. Zarate now appeals.

DISCUSSION

¶6 Zarate claims that Continental is a proper party to this case pursuant to WIS. STAT. § 803.04(2)² because although the insurance policy was issued and delivered outside of the state, the accident and injury occurred within the state. Zarate claims Continental is a proper party under WIS. STAT. § 632.24³ because the insurance policy includes language indicating an agreement to pay damages caused by the insured's negligence. Zarate also contends WIS. STAT. § 631.01(1),⁴

² WISCONSIN STAT. § 803.04(2)(a) provides:

(2) NEGLIGENCE ACTIONS: INSURERS. (a) In any action for damages caused by negligence, any insurer which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action, or which by its policy agrees to prosecute or defend the action brought by plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured. If the policy of insurance was issued or delivered outside this state, the insurer is by this paragraph made a proper party defendant only if the accident, injury or negligence occurred in this state.

³ WISCONSIN STAT. § 632.24 provides:

Direct action against insurer. Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the bond or policy, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

(continued)

which governs the applicability of WIS. STAT. § 632.24, makes Continental a property party because there is no dispute that Continental’s insured was “doing business” in the state. We disagree.

¶7 We review a denial of a summary judgment motion based on statutory interpretation *de novo*, using the same methodology as the trial court, but without deference to that court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987); *Kluth v. General Cas. Co.*, 178 Wis. 2d 808, 815, 505 N.W.2d 442 (Ct. App. 1993).

¶8 To bring a direct action against an insurer, a plaintiff must comply with Wisconsin’s statutory scheme that includes a substantive and procedural component. *Kenison v. Wellington Ins. Co.*, 218 Wis. 2d 700, 703 n.2, 582 N.W.2d 69 (Ct. App. 1998). The substantive direct liability statute, WIS. STAT. § 632.24, allows a direct action against an insurance company whose policy requires it to pay third parties based on the insured’s negligence. In addition, the

⁴ WISCONSIN STAT. § 631.01(1)(b) provides:

Application of statutes (1) GENERAL. This chapter and ch. 632 apply to all insurance policies and group certificates delivered or issued for delivery in this state, on property ordinarily located in this state, on persons residing in this state when the policy or group certificate is issued, or on business operations in this state, except:

....

(b) On business operations in this state if the contract is negotiated outside this state and if the operations in this state are incidental or subordinate to operations outside this state...

direct action procedural statute, WIS. STAT. § 803.04(2)(a), states that if the insurance policy was issued or delivered outside the state, the insurer is a proper party if the insured is also a party defendant. If the insured is not a party, then the accident or injury must have occurred in the state. *Kenison*, 218 Wis. 2d at 710. It is not disputed that the insurance policy issued by Continental to Jack B. Kelley, Inc. was issued and delivered outside of Wisconsin, and that the insured is not a party to the suit. However, the accident and injury did occur inside Wisconsin.

¶9 In addition to these two statutes, WIS. STAT. § 631.01(1) affects direct action suits by limiting the application of WIS. STAT. § 632.24 to insurance policies delivered or issued for delivery in this state. *Kenison*, 218 Wis. 2d at 710. However, if the policy is on “business operations in this state,” then WIS. STAT. § 632.24 may still apply. Sec. 631.01(1). Its applicability depends on the character of the business operations. If the insured’s operations in this state are “incidental or subordinate” to main business operations outside the state, then no direct action against the insurer is permitted. WIS. STAT. § 631.01(1)(b).

¶10 Zarate contends that the “incidental or subordinate” exception is ambiguous and should be read in his favor—that is, the fact that Continental concedes the insured was doing *some* business in Wisconsin automatically defeats the limitation set forth in WIS. STAT. § 631.01(1)(b). However, a statute is not ambiguous simply because the parties disagree as to its meaning. *State v. Setagord*, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997).

¶11 The purpose of statutory interpretation is to discern the legislative intent. *Kenison*, 218 Wis. 2d at 704. “We begin by examining the plain language of the statute, and if the language is not ambiguous, we apply the plain meaning of the statute to the facts before us.” *Id.* at 704-05 (citation omitted). The trial court found that the language of WIS. STAT. § 631.01(1)(b) modifies the “business operations” liability clause. If paragraph (b) was not present, Zarate would be correct in contending that all he had to do was show that Continental was engaged in some business in Wisconsin. But this is not the case. We agree with the trial court that the language of the statute makes it clear that the business operations covered under the insurance policy must be more than incidental or subordinate to operations outside of the state. If the operations are incidental or subordinate, WIS. STAT. § 632.24 does not apply, and a direct action is not permissible.

¶12 The record shows that Continental put forth evidence that Jack B. Kelley, Inc. owns no property in Wisconsin, has no employees in Wisconsin, and only does one-half of one percent of its business in Wisconsin. Zarate has not established any facts that dispute Continental’s assertions that the business in Wisconsin is merely incidental or subordinate to all of the other activities of the company. Jack B. Kelley, Inc. does no business in Wisconsin other than occasionally passing through it or making deliveries. We find that this one-half percent of its business operations is incidental and subordinate to the main business activities. Therefore, WIS. STAT. § 632.24 does not apply, and Continental is not a proper party to the suit. Accordingly, we affirm the decision of the trial court granting summary judgment for the defendant, Continental.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

