COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP113 **Cir. Ct. No. 2004CV5417**

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

THOMAS W. JOHNSTON,

PLAINTIFF-APPELLANT,

V.

METROPOLITAN PROPERTY & CASUALTY INSURANCE COMPANY, A/K/A METLIFE AUTO & HOME, A/K/A ST. PAUL GUARDIAN INSURANCE COMPANY, AND EDITH B. JOHNSTON,

DEFENDANTS-RESPONDENTS,

TOMMY THOMPSON, IN HIS OFFICIAL CAPACITY AS U.S. SECRETARY OF HEALTH & HUMAN SERVICES, ABC INSURANCE COMPANY AND XYZ COMPANY(S),

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

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

¶1 PETERSON, J. Thomas Johnston appeals a summary judgment in favor of St. Paul Guardian Insurance Company and Johnston's wife, Edith. Johnston argues: (1) the circuit court erred by failing to recognize the tort of spoliation of evidence; (2) either his failure to name Edith as a party is a technical, not fundamental, defect or the circuit court had jurisdiction over Edith because the amended summons and complaint related back to the filing date of the initial summons and complaint; and (3) even if the court did not have jurisdiction over Edith, his claim against St. Paul was proper under Wisconsin's direct action statute, WIS. STAT. § 632.24.[1] We reject Johnston's arguments and affirm the judgment.

BACKGROUND

¶2 Johnston and Edith are Illinois residents. On July 1, 2001, Johnston was injured in a single-car accident. Johnston was a passenger in the vehicle; Edith was the driver. On June 17, 2004, Johnston commenced this suit against the couple's insurer, St. Paul.[2] His complaint alleged Edith's driving was negligent, but did not name her as a defendant. The complaint also alleged St. Paul negligently allowed the vehicle to be destroyed, spoiling the best evidence of possible mechanical failure.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The summons and complaint actually named "Metropolitan Property & Casualty Insurance Company a/k/a Metlife Auto & Home." However, there is no dispute on appeal about the insurer's identity and because the insurer refers to itself in its briefs to this court as "St. Paul," we do the same throughout this opinion.

¶3 St. Paul answered, denied liability and raised a number of affirmative defenses. Relevant to this appeal, it alleged that because Johnston did not plead that the policy was issued or delivered in Wisconsin, Johnston could not bring a direct action against St. Paul. It also asserted that, due to Johnston's failure to name Edith, the statute of limitations had run and barred Johnston's claims.

¶4 On September 7, 2004, Johnston filed an amended summons and complaint and added Edith as a defendant. On October 6, St. Paul moved for summary judgment. The circuit court found that the amended summons and complaint did not relate back to the initial summons and complaint and, therefore, Johnston's naming of Edith as a defendant was untimely. The circuit court also concluded there was no tort in Wisconsin for spoliation of evidence. Accordingly, it granted summary judgment in St. Paul's favor.

STANDARD OF REVIEW

¶5 We review a summary judgment independently, using the same methodology 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. WIS. STAT. § 802.08(2). Summary judgment methodology is well established and need not be repeated here. *See*, *e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

DISCUSSION

Spoliation of Evidence

¶6 Johnston argues the circuit court erred by rejecting his claim for spoliation of evidence. However, he concedes that no Wisconsin court has recognized an independent tort for spoliation of evidence. As we have previously explained:

> Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are pretrial discovery sanctions, the spoliation inference, and recognition of independent tort actions for the intentional and negligent spoliation of evidence. Wisconsin has recognized the first two remedies.

Estate of Neumann ex rel. Rodli v. Neumann, 2001 WI App 61, ¶80, 242 Wis. 2d 205, 626 N.W.2d 821 (citations omitted). Thus, the trial court did not err by failing to acknowledge a tort that does not exist.

¶7 Johnston also urges us to establish a tort in Wisconsin for spoliation of evidence. He relies on cases from several other jurisdictions, which use a number of approaches to allow claims for evidence spoliation. Given the various approaches adopted by different jurisdictions regarding evidence spoliation, creating a claim for evidence spoliation and defining its scope are tasks more appropriately left to the legislature or to our supreme court, the governmental entities charged with policy making. *See* ***Winkelman v. Kraft Foods, Inc.***, 2005 WI App 25, ¶25, 279 Wis. 2d 335, 693 N.W.2d 756. Thus, we decline Johnston's invitation to create a Wisconsin claim for evidence spoliation.

¶8 Alternatively, Johnston argues he stated a claim for negligence based on spoliation of evidence. He contends St. Paul had a duty to preserve the car, that

St. Paul breached that duty by destroying the vehicle, and that he suffered damages of the lost ability to sue the vehicle or tire manufacturers. However, Johnston's argument is merely a restatement of his initial argument that we rejected above: that spoliation of evidence is an actionable tort.

¶9 Alternatively, Johnston argues he stated a claim for breach of contract based on the destruction of the vehicle. However, the only allegation in his complaint or amended complaint regarding the vehicle's destruction is that St. Paul "had possession of the vehicle after the accident, and subsequently had the vehicle destroyed or negligently allowed the vehicle to be destroyed, thereby spoiling the best evidence as to a mechanical issue or defect with the car." Johnston's allegation does not state a claim for breach of contract.

Jurisdiction over Edith

¶10 Johnston argues that his failure to name Edith in the caption of the original summons and complaint is a technical, not fundamental, defect. Because only fundamental defects deprive the court of jurisdiction, he contends the circuit court erred by dismissing his lawsuit on the basis of a technical error.

¶11 We considered and rejected this same argument in ***Bulik v. Arrow Realty, Inc.***, 148 Wis. 2d 441, 434 N.W.2d 853 (Ct. App. 1988). There, the complaint alleged Arrow was negligent in maintaining the property where Bulik fell. The summons and complaint were timely served on Arrow; however, neither pleading named Arrow as a defendant. ***Id.*** at 443-44. We concluded that Bulik's failure to name Arrow as a defendant was a fundamental defect that deprived the court of jurisdiction. ***Id.*** at 446. We reasoned that "failing to recite the name of the person to be sued strikes at the heart of the summons' purposes – to give notice to the person to be sued and to give the court personal jurisdiction over a *named*

party." ***Id.*** Accordingly, Johnston's protestations that he named Edith as the tortfeasor in the body of the complaint and that he timely served Edith with that complaint are unavailing.

¶12 In reply, Johnston attempts to distinguish ***Bulik*** because, unlike Bulik, he did not rest on his original summons and complaint. Instead, Johnston filed an amended summons and complaint, which he contends cured his technical defect of failing to name Edith as a defendant. However, Johnston's amended pleadings were served after the statute of limitations expired. Thus, Johnston obtained jurisdiction over Edith only if his amended pleadings relate back to the filing of his original pleadings.

¶13 Johnston argues that because he amended his pleadings within six months of filing and that amendment merely identified Edith as a defendant, his amended pleadings relate back to the filing of the original pleadings. Wisconsin's relation back doctrine is codified in WIS. STAT. § 802.09(3) and provides:

> If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. *An amendment changing the party* against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, *but for a mistake concerning the identity of the proper party*, the action would have been brought against such party. (Emphasis added).

Johnston quotes the first sentence of § 802.09(3), but ignores the second. "An amendment changing the party" includes the addition of a defendant. ***State v. One 1973 Cadillac***, 95 Wis. 2d 641, 649, 291 N.W.2d 626 (Ct. App. 1980). However,

in order for an amendment changing a party to relate back, "there must have existed a mistake concerning the identity of the proper party now being added when the original pleading was filed …." ***Estate of Hegarty v. Beauchaine***, 2001 WI App 300, ¶26, 249 Wis. 2d 142, 638 N.W.2d 355. Johnston has made no allegation that he was confused about Edith's identity. Therefore, Johnston has failed to establish that his pleadings, amended to add a party, relate back to the filing of his original pleadings. *See* WIS. STAT. § 802.09(3).

¶14 Johnston's original summons and complaint did not give the circuit court jurisdiction over Edith because she was not a named defendant. Johnston's amended summons and complaint was filed after the statute of limitations expired, and the amended pleadings did not relate back to the initial filing. Therefore, the circuit court did not err when it concluded it did not have jurisdiction over Edith.

Direct Action Statute

¶15 Johnston brought his original summons and complaint under Wisconsin's direct action statute, WIS. STAT. § 632.24, which allows a party to proceed directly against the insurer without naming the tortfeasor. However, § 632.24 is limited by WIS. STAT. § 631.01(1). *See* ***Kenison v. Wellington Ins. Co.***, 218 Wis. 2d 700, 710, 582 N.W.2d 69 (Ct. App. 1998). Section 631.01(1) specifies that, subject to certain exceptions not applicable here, WIS. STAT. chs. 631 and 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 …." (Emphasis added.) Thus, in ***Kenison***, we

held that the direct action statute is limited "to insurance policies delivered or issued for delivery in this state." ***Kenison***, 218 Wis. 2d at 710.[3]

¶16 Johnston argues, however, that because the St. Paul policy includes coverage for a residence in Green Lake, Wisconsin, St. Paul subjected itself to Wisconsin's direct action statute. Johnston contends that because the Green Lake residence was "property ordinarily located" in Wisconsin, *see* WIS. STAT. § 631.01(1), the policy had to be approved by the Wisconsin Commissioner of Insurance pursuant to WIS. STAT. § 631.20. Accordingly, Johnston argues that St. Paul's act of delivering the policy for approval in Wisconsin satisfies the "delivered or issued for delivery" requirement of § 631.01(1).

¶17 The problem with Johnston's argument is twofold. First, Johnston relies on WIS. STAT. § 631.20 to demonstrate that the St. Paul policy had to be submitted to the Wisconsin Commissioner of Insurance for approval. However, § 631.20 specifies the approval process for forms "subject to [WIS. STAT.] s. 631.01(1)." *See* WIS. STAT. § 631.20(1)(a). Thus, § 631.20 merely refers back to § 631.01(1), and lends no additional support to Johnston's argument. Second, Johnston has submitted no factual support on summary judgment that the St. Paul policy actually was submitted for approval in Wisconsin. Indeed, the only facts submitted are those included in an affidavit of a St. Paul employee, which states

[3] Accordingly, Johnston's argument that WIS. STAT. § 631.01(1) should be read in the disjunctive, making the direct action statute applicable to policies "delivered or issued for delivery in this state" *or* "on property ordinarily located in this state" *or* "on persons residing in this state when the policy or group certificate is issued" *or* "on business operations in this state" is contrary to our holding in ***Kenison v. Wellington Ins. Co.***, 218 Wis. 2d 700, 582 N.W.2d 69 (Ct. App. 1998). "[O]nly the supreme court … has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

that the policy was not issued or delivered in Wisconsin. Johnston has failed to raise a factual issue that the policy was "delivered or issued for delivery" in Wisconsin.

¶18 Because the undisputed facts establish the policy was not delivered or issued for delivery in Wisconsin and Edith was not timely served, St. Paul is entitled to judgment as a matter of law. *See* ***Kenison***, 218 Wis. 2d at 711.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.