

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 2010

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. 2009AP868

Cir. Ct. Nos. 2008CV5676
2008CV5677
2008CV5678

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

KENNETH WEISKOPF AND LAURA WEISKOPF,

PLAINTIFFS-APPELLANTS,

v.

PAUL KENWORTHY AND BRUCE NIMMER,

DEFENDANTS-RESPONDENTS.

ARIEL EDMONDS AND KATRINA EDMONDS,

PLAINTIFFS-APPELLANTS,

v.

PAUL KENWORTHY AND BRUCE NIMMER,

DEFENDANTS-RESPONDENTS.

MATTHEW G. BRUINS AND KARI A. BRUINS,

PLAINTIFFS-APPELLANTS,

v.

PAUL KENWORTHY AND BRUCE NIMMER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
ELSA C. LAMELAS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Kenneth Weiskopf, Laura Weiskopf, Ariel Edmonds, Katrina Edmonds, Matthew G. Bruins and Kari A. Bruins (collectively, “Plaintiffs”) appeal from an order dismissing their consolidated cases against Paul Kenworthy and Bruce Nimmer,¹ based on lack of personal jurisdiction. The Plaintiffs argue that there is personal jurisdiction over both Kenworthy and Nimmer based on WIS. STAT. § 801.05(1)(d), (3) and (4) (2007-08).² We affirm.

¹ Nimmer, who is *pro se* on appeal, filed a notice of appearance but did not file a responsive brief. Although this court may, under some circumstances, summarily reverse for failure to file a responsive brief, *see* WIS. STAT. § 809.83(2), we decline to do so. Rather, we affirm as to both Kenworthy and Nimmer. *See Jezeski v. Jezeski*, 2009 WI App 8, ¶1 n.1, 316 Wis. 2d 178, 763 N.W.2d 176 (Ct. App. 2008) (affirming trial court even though respondent did not file responsive brief).

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶2 The facts relevant to personal jurisdiction are undisputed and are taken from the parties' affidavits and answers to interrogatories. The Plaintiffs all contracted with President Homes, Inc., to provide the design and materials to construct new residential homes in Milwaukee County. President Homes is a Minnesota corporation with its principal place of business in Minnesota.³ President Homes is authorized to conduct business in the State of Wisconsin, as well as other states. President Homes works with sales representatives in numerous states who appear at home shows and serve as the primary contact point between President Homes and customers.

¶3 Kenworthy and Nimmer are Minnesota residents who served on President Homes's board of directors starting in 2000. Nimmer also served as President Homes's Treasurer during his years on the board.

¶4 In 2008, the Plaintiffs filed suit against President Homes, Kenworthy, Nimmer and other defendants.⁴ The Plaintiffs, who began their relationships with President Homes in 2005 and 2006, alleged numerous problems, including being sent the wrong materials and receiving notice that suppliers had not been paid for materials by President Homes, even though the Plaintiffs had given President Homes the money to pay them. The allegations against Kenworthy and Nimmer included theft by contractor, conversion and civil conspiracy.

³ President Homes has declared bankruptcy and is not involved in this appeal.

⁴ Three sets of plaintiffs filed suit against the defendants. These cases were later consolidated at the trial court.

¶5 Kenworthy and Nimmer moved to dismiss the claims against them based on lack of personal jurisdiction.⁵ They submitted affidavits in support of their motion. According to Kenworthy’s affidavits, he never received a salary for his service on the board and never had “involvement in the day-to-day operations” of President Homes. He explained:

I am not involved in advertising or soliciting business for President Homes or for communicating with customers of President Homes. I do not assist customers of President Homes with the decisions they make with respect to their home-building projects.

I have no regular business communication with the State of Wisconsin at all. I do not place phone calls, send mailed correspondence, or send emails into the State of Wisconsin for any regular business purpose. I do not enter the State of Wisconsin, either regularly or irregularly, for any purpose related to President Homes.

Kenworthy’s affidavits also noted that he has no land, bank accounts, offices, mailing address or telephone numbers in Wisconsin. Kenworthy said he did not know any of the Plaintiffs and had not performed any work for them on behalf of President Homes. Finally, he said he did not authorize any person to act as his agent in Wisconsin.

¶6 Nimmer’s affidavits similarly indicated that he did not receive a salary for his service on the board. He stated that during his years of service on the board, he was “rarely involved in the day-to-day operations of President Homes” and did not assist customers with decisions they made for their home-building projects. Nimmer said he did not and does not have regular business

⁵ Kenworthy and Nimmer also moved to dismiss for failure to state a claim. That argument, as well as other defendants’ motions that are not at issue in this appeal, will not be discussed.

communications with Wisconsin for purposes related to President Homes. He indicated that the only property he owned in Wisconsin was purchased ten years earlier and since 2006 had been owned exclusively by his wife. Nimmer stated that he also served as president of an unrelated corporation that developed residential real estate subdivisions in several locations, including Wisconsin. Pursuant to that role, Nimmer traveled into Wisconsin two or three times over a ten-year period.

¶7 Nimmer said he did not “remember talking or communicating with” any of the Plaintiffs, or performing any work on President Homes’s behalf concerning the Plaintiffs’ home projects. Finally, Nimmer indicated that he never authorized anyone to act as his agent in Wisconsin in connection with his business activity with President Homes.

¶8 The trial court received both written and oral arguments on the motion to dismiss and allowed discovery to further develop the issues. The Plaintiffs argued that there was “no dispute that President Homes purposefully availed itself of the privilege of conducting activities in Wisconsin” and that Kenworthy and Nimmer “should also be subject to personal jurisdiction in Wisconsin by virtue of their role[s] as officer, shareholder and/or director at President.” With respect to Kenworthy, they emphasized that he served on the board since 2000 and “admits he received President’s monthly and annual financial reports.”

¶9 With respect to Nimmer, the Plaintiffs noted that he served on the board and as Treasurer through May 2007, and that he received President Homes’s monthly and annual financial reports. They also asserted: “The Court can infer from Mr. Nimmer’s responses [to the interrogatories], that he had some financial

control over President during the period it was requesting funds from the [P]laintiffs' lender[s]. He also had knowledge about the solvency of the company by virtue of receiving the financials.”

¶10 The trial court concluded that there was no personal jurisdiction over Kenworthy and Nimmer under WIS. STAT. § 801.05(1)-(5). In doing so, the trial court noted that none of the Plaintiffs claimed to have had any personal contact with Kenworthy or Nimmer. The trial court also concluded that “[p]ersonal jurisdiction over a corporation cannot be the sole basis for personal jurisdiction over its officers.” This appeal follows.

LEGAL STANDARDS

¶11 At issue is whether there is personal jurisdiction over Kenworthy and Nimmer pursuant to Wisconsin’s long-arm statute, WIS. STAT. § 801.05. “Whether a court has personal jurisdiction is a question of law subject to our independent review.” *FL Hunts, LLC v. Wheeler*, 2010 WI App 10, ¶7, ___ Wis. 2d ___, ___ N.W.2d ___ (Ct. App. 2009). “Every personal jurisdiction issue requires a two-step inquiry. It must first be determined whether defendants are subject to jurisdiction under Wisconsin’s long-arm statute. If the statutory requirements are satisfied, then the court must consider whether the exercise of jurisdiction comports with due process requirements.” *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, ¶8, 245 Wis. 2d 396, 629 N.W.2d 662 (citations omitted).

¶12 In *FL Hunts*, we elaborated on the first step of the inquiry, application of WIS. STAT. § 801.05:

The first step in determining whether a court has personal jurisdiction over a defendant involves analyzing whether Wisconsin’s long-arm statute confers jurisdiction. The interpretation and application of a statute are questions of

law that we review de novo. The plaintiff bears the burden of establishing jurisdiction under the long-arm statute. We construe the statute liberally in favor of exercising jurisdiction.

Our ability to liberally construe the long-arm statute is limited by fundamental principles of statutory construction. If the language of a statute is unambiguous, we will ordinarily stop the inquiry and apply the statute in accordance with its plain meaning. Statutory language will be given its common, ordinary, and accepted meaning. Statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. The court is not at liberty to disregard the plain, clear words of the statute.

FL Hunts, 2010 WI App 10, ¶¶7-8 (citations, quotation marks and bracketing omitted); *see also Lincoln v. Seawright*, 104 Wis. 2d 4, 9, 12, 310 N.W.2d 596 (1981) (“[T]he long-arm statute is to be liberally construed in favor of exercising jurisdiction,” keeping in mind that “[t]o construe a statute liberally does not mean that we should ignore the language of the statute.”). With these standards in mind, we consider the Plaintiffs’ arguments.

DISCUSSION

¶13 On appeal, the Plaintiffs contend that there is personal jurisdiction over Kenworthy and Nimmer pursuant to three subsections of WIS. STAT. § 801.05: (1)(d), (3) and (4).⁶ Section 801.05(1)(d) confers general personal

⁶ WISCONSIN STAT. § 801.05 provides in relevant part:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

(1) LOCAL PRESENCE OR STATUS. In any action whether arising within or without this state, against a defendant who when the action is commenced:

(continued)

jurisdiction, which can be exercised “over a defendant who has ‘continuous and systematic’ contacts with the forum state.” *FL Hunts*, 2010 WI App 10, ¶9 (citation and one set of quotation marks omitted). Section 801.05(1)(d)

is an attempt to define that “presence” of the defendant in a state required as one possible basis for personal jurisdiction consistent with due process under *International Shoe [Co. v. Washington]*, 326 U.S. 310, 316 (1945)]. This subsection is in contrast to the other possible grounds that are based on specific acts within the state out of which the cause of action arises or to which the cause of action relates.

Bushelman v. Bushelman, 2001 WI App 124, ¶16, 246 Wis. 2d 317, 629 N.W.2d 795. The “other possible grounds” referenced in *Bushelman* include § 801.05(3) and (4), which confer specific personal jurisdiction that “focuses on ‘the relationship among the defendant, the forum, and the litigation.’” See *FL Hunts*, 2010 WI App 10, ¶9 (citation and one set of quotation marks omitted).

....

(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

....

(3) LOCAL ACT OR OMISSION. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

(4) LOCAL INJURY; FOREIGN ACT. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

¶14 We conclude that there is no personal jurisdiction over Kenworthy and Nimmer under WIS. STAT. § 801.05(1)(d), (3) or (4), for reasons discussed below. Because the Plaintiffs have not established jurisdiction under any of those subsections, we do not separately consider “whether the exercise of jurisdiction comports with due process requirements.” See *Kopke*, 245 Wis. 2d 396, ¶8.

¶15 In their opening brief, the Plaintiffs assert that they have personal jurisdiction over Kenworthy and Nimmer pursuant to WIS. STAT. § 801.05, without presenting separate arguments for the application of § 801.05(1)(d), (3) and (4).⁷ Relying on *State v. Advance Marketing Consultants, Inc.*, 66 Wis. 2d 706, 225 N.W.2d 887 (1975), they argue that “the acts of a corporation can be imputed to the individual defendant officers and board members if the corporation had sufficient contacts within the State of Wisconsin.” They continue:

In the present case, the corporate officer and director defendants had control over the company finances, and were the parties who failed to hold plaintiffs’ money in trust and who failed to pay material suppliers....

The officers and directors of President Homes were the parties who required the [P]laintiffs’ lenders to transfer funds from the [P]laintiffs’ loans directly to their firm. Defendant Kenworthy, as a corporate director, submitted filings for foreign corporations to the State of Wisconsin, and made representations as to corporate assets.... Further, he received President’s monthly and annual financial reports. Defendant Bruce Nimmer also served on President’s Board of Directors, and was Treasurer of President through May 2007. He also received President’s monthly and annual financial reports.

The role of the corporate defendants as financial advisors was prominent, and clearly sufficient to satisfy Wisconsin’s minimum contacts requirement. There

⁷ In their reply brief, the Plaintiffs indicate that they are asserting personal jurisdiction based on WIS. STAT. § 801.05(1)(d), (3) and (4).

undoubtedly was substantial activity instituted and instigated by the officers and directors in the State of Wisconsin. The only way for President [Homes] to become authorized to do business in Wisconsin and to actually carry on that business in Wisconsin is through the decisions and actions of its corporate directors.

(Record citations omitted.)

¶16 Like the trial court, we are not convinced that Kenworthy's and Nimmer's roles on President Homes's board automatically constitute sufficient contacts to confer general personal jurisdiction under WIS. STAT. § 801.05(1)(d), or specific personal jurisdiction under § 801.05(3) and (4). We have previously recognized that "personal jurisdiction over the corporation cannot be the sole basis for personal jurisdiction over an officer." *Pavlic v. Woodrum*, 169 Wis. 2d 585, 590, 486 N.W.2d 533 (Ct. App. 1992). The Plaintiffs, however, contend that *Advance Marketing* compels a different result. We disagree.

¶17 In *Advance Marketing*, a case involving personal jurisdiction under WIS. STAT. § 262.05(3) (1973-74), which contains the same text as WIS. STAT. § 801.05(3), the Wisconsin Supreme Court held that there was personal jurisdiction over a company's officer who was an Illinois resident. *Advance Marketing*, 66 Wis. 2d at 708, 719. The officer had placed an ad in the Wall Street Journal regarding a marketing business, interviewed the Wisconsin plaintiff in Chicago, entered into a contract with the plaintiff and traveled to Wisconsin to meet with the plaintiff on one occasion. *See id.* at 711. In analyzing whether the plaintiff's alleged injury arose "out of an act or omission within this state by the defendant," *see* § 262.05(3) (1973-74), the court held that "such an act would be the placing of advertisements in newspapers circulated in Wisconsin, the contacting of persons responding to these advertisements and the taking of earnest-money deposits." *Advance Marketing*, 66 Wis. 2d at 715-16.

¶18 The Plaintiffs contend that *Advance Marketing* holds “that personal jurisdiction can exist over a corporate officer where the corporation has sufficient minimum contacts with the State of Wisconsin.” This argument mischaracterizes *Advance Marketing*’s holding by suggesting that simply having personal jurisdiction over a corporation is sufficient to obtain personal jurisdiction over an officer. In discussing the application of Wisconsin’s long-arm statute and deciding whether asserting personal jurisdiction over the officer would violate due process, *Advance Marketing* considered the officer’s personal activities and contacts with the plaintiff. *See id.* at 714-19. *Advance Marketing* did not hold that there is automatic personal jurisdiction over any officer of a corporation that has contacts with Wisconsin.

¶19 The Plaintiffs point to *Advance Marketing*’s discussion of a 1974 South Dakota federal district court case as an approval of the proposition that “acts by a corporation could be imputed to the corporate officers where control is shown and would constitute the minimum contacts with Wisconsin under [WIS. STAT. § 801.05].” *Advance Marketing* stated:

A recent South Dakota federal district court case, *Graber v. Prelin Industries, Inc.*[, 368 F.Supp. 1358, 1365-66 (D.S.D. 1974)], involved an action against a foreign corporation and certain nonresident persons individually and as officers or directors of the corporation based on alleged misrepresentation and tortious breach of contract in relation to a multi-level distribution operated by the defendant corporation. The defendants moved to dismiss on the ground of lack of personal jurisdiction. In finding personal jurisdiction over the individual defendants, the court stated:

“... even though only defendants Starnes and Priest were placed at promotional meetings of Prelin, defendants Brady, Hudson, and Denton, as active officers or directors (indicated by the Certificate of Authority application, the Articles of Incorporation, and the application for registration as a multi-level distributorship) must be

assumed to have sanctioned such activities, and to have been aware that the corporation had not complied with South Dakota law. As officers and directors, they would also have willingly participated in the sums of money received from plaintiffs as checks cashed by Prelin Industries.”

The reasoning of ... [*Graber*] is applicable to the relationship of Mr. Ginsburg to Advance Marketing and leads to the conclusion that he is amenable to the jurisdiction of the court pursuant to sec. 262.05(3), Stats.

Advance Marketing, 66 Wis. 2d at 717-18 (quoting *Graber*, 368 F.Supp. at 1365-66). Again, we are not persuaded by the Plaintiffs’ argument.

¶20 We do not agree that *Advance Marketing*’s discussion of *Graber* constituted a holding that any officer and director would automatically be subject to personal jurisdiction if there was personal jurisdiction over the corporation. The South Dakota court was talking about “active officers and directors” who could be “assumed to have sanctioned” the tortious activities. *See Advanced Marketing*, 66 Wis. 2d at 717-18. *Advanced Marketing* did not state that any officer or director is automatically subject to personal jurisdiction. Moreover, the Wisconsin Supreme Court subsequently rejected that proposition in *Oxmans’ Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 273 N.W.2d 285 (1979).

¶21 *Oxmans’* recognized that the issue of whether “an individual’s activities within the state as corporate agent constitute the corporation’s ‘doing business’ in the state for jurisdictional purposes” is not the same as whether those activities are sufficient to obtain “personal jurisdiction over the individual.” *See id.* at 691. *Oxmans’* affirmatively stated: “Personal jurisdiction over the officer could not be asserted on the basis of jurisdiction over the corporation.” *Id.* Based on our reading of *Oxmans’* and *Advanced Marketing*, we reject the Plaintiffs’ argument, as we have done before. *See Pavlic*, 169 Wis. 2d at 594 (rejecting

argument that *Advanced Marketing* and *Oxmans*’ “stand for the proposition that an officer of a corporation, who allegedly commits the personal tort of fraud or misrepresentation, is always subject to personal jurisdiction in Wisconsin” and holding that “[t]here must be some act or omission by that officer in Wisconsin to justify personal jurisdiction”).

¶22 For the foregoing reasons, we reject the Plaintiffs’ argument that there is personal jurisdiction over Kenworthy and Nimmer based solely on their roles as members of President Homes’s board and, in the case of Nimmer, as an officer. Next, we turn to application of the three subsections of WIS. STAT. § 801.05 that the Plaintiffs assert are applicable.

¶23 WISCONSIN STAT. § 801.05(1)(d) provides that there is general personal jurisdiction over a defendant who, at the time the action is commenced, “[i]s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.” The only activities the Plaintiffs point to in support of general personal jurisdiction are Kenworthy’s and Nimmer’s roles submitting filings for foreign corporations to the State of Wisconsin and receiving monthly and annual financial reports. We are unconvinced that these roles, all performed outside Wisconsin, constitute “substantial and not isolated activities within this state.” *See id.*

¶24 Next, WIS. STAT. § 801.05(3) provides for specific personal jurisdiction over a defendant “[i]n any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.” In their reply brief, Plaintiffs offer the following argument concerning the application of § 801.05(3) to Kenworthy:

Here, Kenworthy's failure to pay the suppliers in Wisconsin constitutes an omission within Wisconsin and, similar to the way the Plaintiffs' injuries arose out of Kenworthy's failure to keep the Plaintiffs' funds in trust in Minnesota, the failure to pay suppliers in Wisconsin also caused injuries to the Plaintiffs. Therefore, the Plaintiffs' substantial additional costs attributed to re-paying suppliers and the liens on their property arose, in part, out of Kenworthy's failure to pay the Wisconsin suppliers.

This argument fails for several reasons. The undisputed facts are that Kenworthy and Nimmer had "virtually no involvement" and "very limited involvement," respectively, in the day-to-day operations of President Homes. Further, neither had the responsibility or the authority to pay the Plaintiffs' suppliers.⁸ Thus, the Plaintiffs have not shown that there was an omission by either Kenworthy or Nimmer that would subject them to personal jurisdiction under § 801.05(3).

¶25 Finally, we consider the potential application of WIS. STAT. § 801.05(4)(a),⁹ which provides that there can be personal jurisdiction over a defendant "[i]n any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant" if, "at the time of the injury ... [s]olicitation or service activities were carried on within this state by or on behalf of the defendant." In their reply brief, the Plaintiffs argue the following with respect to whether Kenworthy carried on solicitation or service activities in Wisconsin: "[T]he paying of material suppliers in Wisconsin

⁸ Nimmer's answer to the Plaintiffs' interrogatories indicates that he was never an authorized signatory to any of President Homes's bank accounts. Kenworthy's answer to the Plaintiffs' interrogatories states that he did not become an authorized signatory until May 2008, when President Homes filed for bankruptcy protection.

⁹ The Plaintiffs do not argue that "[p]roducts, materials or things processed, serviced or manufactured by the defendant[s] were used or consumed within this state in the ordinary course of trade." *See* WIS. STAT. § 801.05(4)(b).

constitutes service activities carried on by Kenworthy in Wisconsin.” We reject this argument. There is no evidence that either Kenworthy or Nimmer paid suppliers in Wisconsin. Further, we are not convinced that payments made by President Homes to suppliers in Wisconsin constitute solicitation or service activities by either Kenworthy or Nimmer. As we stated when rejecting a similar argument for the application of § 801.05(4):

There must be some act or omission by that officer in Wisconsin to justify personal jurisdiction. In *Advance Marketing*, advertisements were circulated in Wisconsin by virtue of the officer’s control; the officer came to Wisconsin to negotiate the contract; and as a result of that negotiation, the officer was a cosigner of the contract. In *Oxmans’* ... the officer came to Wisconsin a number of times over a substantial time period, the misrepresentations allegedly took place while he was physically present in the state, and the cause of action arose from the misrepresentation. In addition to the rationale that an officer should not be able to avoid liability for his or her personal acts, the officers in each case had acted in Wisconsin during their alleged fraudulent activity.

Pavlic, 169 Wis. 2d at 594-95 (citations omitted). Here, there is no evidence that Kenworthy or Nimmer personally engaged in solicitation or service activities in Wisconsin, or that they directed anyone else to engage in such services. Therefore, there is no basis to assert personal jurisdiction under § 801.05(4)(a).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

