Appeal No. 2006AP918 **Cir. Ct. No. 2004CV496**

WISCONSIN COURT OF APPEALS
DISTRICT IV

CARRIE A. FINDER,

PLAINTIFF-APPELLANT,

ALLIANCE HEALTH INSURANCE,

INVOLUNTARY-PLAINTIFF,

V.

AMERICAN HEARTLAND INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

MICHAEL T. ALM,

DEFENDANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2005-06),[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

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

ISSUE

Does WIS. STAT. § 632.24, Wisconsin's direct action statute, subject an insurance company to direct liability in Wisconsin for an insured's negligent conduct in Wisconsin, where the insurance policy was not delivered or issued in Wisconsin?

BACKGROUND

The following facts are undisputed. On October 4, 2001, Carrie Finder was in Wisconsin when Michael Alm rear-ended her vehicle. Alm had purchased an automobile liability insurance policy from American Heartland Insurance Company which insured against his negligence. The policy was delivered to Alm, then an Illinois resident, in Illinois. Finder sued Alm and American Heartland in negligence. Though she timely served the summons and complaint on American Heartland, she did not timely serve Alm. After the statute of limitations had run, American Heartland moved for summary judgment, alleging that the trial court did not have jurisdiction over it because its liability insurance policy was not issued or delivered in Wisconsin. The court granted summary judgment to American Heartland, and Finder appeals.

DISCUSSION

WISCONSIN STAT. § 632.24, Wisconsin's direct action statute,[2]

[2] 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

(continued)

subjects an insurance company to direct liability in Wisconsin for the negligence of its insured. WISCONSIN STAT. § 631.01(1)(c)[3] provides that WIS. STATS. chs. 631 and 632 apply to insurance policies delivered or issued for delivery in Wisconsin, except "[a]s otherwise provided in the statutes." Section 632.24, therefore, allows direct action against an insurer that did not deliver or issue for delivery a policy in Wisconsin only if the exception "[a]s otherwise provided in the statutes" in § 631.01(1)(c) expands rather than limits the application of chs. 631 and 632, and if § 632.24 is such an exception. The resolution of this issue will determine whether insurance companies that do not deliver or issue their policies in Wisconsin will be subject to direct liability for negligence that occurs in Wisconsin.

> whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

[3] WISCONSIN STAT. § 631.01(1) 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:
>
> (a) As provided in ss. 600.01 and 618.42;
>
> (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, unless the contract is for a policy of insurance to cover a warranty, as defined in s. 100.205 (1) (g), in which case the provisions set forth in sub. (4m) apply; and
>
> (c) As otherwise provided in the statutes.

In ***Kenison v. Wellington Insurance Co.***, 218 Wis. 2d 700, 582 N.W.2d 69 (Ct. App. 1998), we considered this question under facts indistinguishable from the facts in this case. We concluded that the unambiguous language of WIS. STAT. § 631.01 limited direct actions under § 632.24 to actions against insurance companies that delivered or issued policies in Wisconsin.[4] ***Kenison***, 218 Wis. 2d at 710. We said that a plaintiff cannot maintain a direct action against an insurer that did not deliver or issue its policy in Wisconsin without first naming the insured as a defendant and then joining the insurer under WIS. STAT. § 803.04(2)(a).[5] ***Kenison***, 218 Wis. 2d at 710. However, after

[4] In reaching this conclusion, we rejected Kenison's arguments to the contrary as based on cases decided prior to the enactment of WIS. STAT. § 631.01(1), and reasoned that even if an injured party could not sue an insurance company directly under WIS. STAT. § 632.24, the injured party could still join the insurance company under WIS. STAT. § 803.04(2)(a), if the insured was first made a party. ***Kenison v. Wellington Ins. Co.***, 218 Wis. 2d 700, 709-10, 582 N.W.2d 69 (Ct. App. 1998). On review, we do not find this analysis persuasive. First, a lack of controlling case law does not mandate a particular result. Additionally, the purpose of the direct action statute is to allow an injured party to sue an insurance company directly, without requiring joinder of the insured. *See* ***Stoppleworth v. Refuse Hideaway, Inc.***, 200 Wis. 2d 512, 521, 546 N.W.2d 870 (1996) (supreme court has "recognized that the core functions of [direct action] statutes are to expedite the litigation process and to facilitate a successful claimant's access to compensation").

[5] 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.

reviewing WIS. STAT. § 631.01(1), WIS. STAT. § 632.24, and WIS. STAT. § 803.04(2)(a), we conclude that ***Kenison*** probably was wrongly decided.

Our review of the plain language of WIS. STAT. § 631.01(1), WIS. STAT. § 632.24, and WIS. STAT. § 803.04(2)(a) suggests that a plaintiff may bring a direct action against an insurer who neither delivers nor issues a policy in Wisconsin. We conclude that § 632.24 is a provision that is "otherwise provided in the statutes," and provides an exception under which WIS. STAT. chs. 631 and 632 apply even though the policy was not delivered or issued in Wisconsin. Section 632.24 is without a doubt a statute, is not a part of § 631.01(1), and does not differentiate between policies issued or delivered in or outside Wisconsin. Thus, § 632.24 appears to permit direct actions against a liability insurer without any limitation because it provides for a remedy in conflict with § 631.01(1).

We then turn to WIS. STAT. § 803.04(2)(a), a part of Wisconsin's permissive joinder statute, which limits WIS. STAT. § 632.24. Its first sentence, like § 632.24, makes negligence insurers proper party defendants in an action alleging a claim against the insurance company's insured. But its last sentence states that a negligence insurer that issued or delivered its policy outside of Wisconsin is a proper party defendant only if the accident, injury or negligence occurred in Wisconsin. Neither § 632.24 nor § 803.04(2)(a) directly state that an insured must be a party to the lawsuit to hold the insurer liable. Thus, one might argue that a plaintiff may directly sue an insurance company whose insured negligently caused injury in Wisconsin under either statute, without limitation as to whether the policy was delivered or issued in Wisconsin.

There are, however, conflicting arguments. First, in ***Kenison***, 218 Wis. 2d at 706, we concluded that the plain language of WIS. STAT. § 631.01(1)

provides that WIS. STAT. chs. 631 and 632 apply to policies delivered or issued in Wisconsin, and that its exceptions provide specific instances under which the chapters do not apply, despite the policies being delivered or issued in Wisconsin. Subsections 631.01(a) and (b) provide instances under which chs. 631 and 632 will not apply despite the policy's meeting the criteria of § 631.01(1). One might argue, therefore, that under the doctrine of *ejusdem generis*,[6] the phrase "[a]s otherwise provided in the statutes" in § 631.01(1)(c) indicates other situations in which the chapters will not apply despite an insurance policy meeting the requirements stated in § 631.01(1).

One might argue that interpreting "[a]s otherwise provided" under WIS. STAT. § 631.01(1)(c) to mean WIS. STAT. § 632.24 allows direct action against an insurer regardless of where the policy was delivered or issued might render the limitations under § 631.01(1) meaningless. That is, interpreting § 632.24 to apply to policies regardless of where they were delivered or issued on the basis that it does not specifically state that it applies only to policies delivered or issued in Wisconsin would require all other sections under WIS. STAT. chs. 631 and 632 to specifically state that the section only applies to such policies to give effect to the mandate in § 631.01(1).

Finally, the ***Kenison*** court noted that WIS. STAT. § 803.04(2)(a) allows a plaintiff to join any insurance company as a proper party where the insured is already named as a party. ***Kenison*** limited the language in § 803.04(2)(a) to situations in which the insured is a named defendant and the

[6] *Ejusdem generis* is a cannon of construction that provides that when a general phrase follows a more specific list, the general phrase will be interpreted to include only things of the same type as the specific listings. BLACK'S LAW DICTIONARY 535 (7th ed. 1999).

insurer is joined. The best argument supporting this reading is that § 803.04(2)(a) is a joinder statute, and for it to apply, presumably, there would be a party being joined. However, joinder is permissive, not mandatory, under § 803.04(2)(a). Further, subjecting an insurance company that did not issue or deliver its policy in Wisconsin to liability for negligence that occurred in Wisconsin only where the insured is joined contravenes the purpose of the direct action statute, which is "to protect successful plaintiffs from having to pursue insolvent defendants before proceeding against the defendants' insurers." ***Stoppleworth v. Refuse Hideaway, Inc.***, 200 Wis. 2d 512, 520-21, 546 N.W.2d 870 (1996).

We conclude that our holding in ***Kenison*** was probably wrongly decided. But we are without authority to overrule, modify, or withdraw language from our published opinions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). ***Cook*** explains the procedure available to us if we conclude, as we have here, that a prior decision of the court of appeals probably was erroneously decided. We have so concluded.