COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1438

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

LLOYD M. MOREY TRUST, BY SALLY MOREY, AS PERSONAL REPRESENTATIVE,

PLAINTIFFS-APPELLANTS,

V.

ROBERT MOREY AND KSRR RADIO, F/K/A POSITIVE COMMUNICATIONS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Lloyd M. Morey Trust, by personal representative Sally Morey, appeals from the trial court's order dismissing its action against Robert Morey and KSRR Radio seeking repayment of an alleged loan. The Trust

claims that the trial court erred in finding that it did not have personal jurisdiction over Robert Morey. We affirm.

I. BACKGROUND

¶2 The decedent, Dr. Lloyd M. Morey, and his son, Robert, acquired a radio station in Utah, which they ultimately operated as a partnership. The decedent provided funding while his son managed and operated the station. The decedent's son periodically sent money to Dr. Morey in Wisconsin. According to the Trust, at the time Dr. Morey died, his son still owed him $160,000.

¶3 Robert Morey and the station moved to dismiss the action, arguing, among other things, that the court lacked jurisdiction over them.[1] After reviewing the parties' submissions, and effectively treating the motion as one for summary judgment, the trial court concluded that "there is no statutory basis for jurisdiction in this matter." The trial court found that there was no admissible evidentiary support for the Trust's contention that a loan existed. Moreover, the court stated, had the Trust established the existence of a loan, "the payment of money from outside of Wisconsin back into Wisconsin … was not enough to warrant jurisdiction." In addition, the court determined that "jurisdiction does not comport with due process."

[1] Defendants also moved to dismiss because: (1) the complaint failed to state a claim upon which relief could be granted; (2) another claim, identical to this one, was pending in Utah; and (3) the station lacked the capacity to be sued. The focus of the Trust's appeal, however, is the issue of personal jurisdiction.

II. DISCUSSION

¶4 A defendant is subject to personal jurisdiction if the defendant's contacts with Wisconsin are sufficient to meet the elements identified in our long-arm statute and if application of the statute does not violate due process. *See* ***Brown v. LaChance***, 165 Wis. 2d 52, 66, 477 N.W.2d 296, 303 (Ct. App. 1991). "The plaintiff has the burden of proving jurisdiction." ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 242, 430 N.W.2d 366, 368 (Ct. App. 1988). The long-arm statute is to be liberally construed in favor of exercising jurisdiction. *See* ***id.*** Although we will adopt a circuit court's findings of fact regarding jurisdiction "unless they are clearly erroneous," *see* ***id.***, "[p]ersonal jurisdiction is a question of law that we review *de novo*." ***Brown***, 165 Wis. 2d at 65, 477 N.W.2d at 302. The Trust claims that personal jurisdiction over Robert Morey exists under WIS. STAT. § 801.05(1)(d), (5), and (6)(c) (1997–98).[2] We address each claim in turn.

A. WISCONSIN STAT. § 801.05(1)(d)

¶5 According to WIS. STAT. § 801.05(1)(d), a Wisconsin court has personal jurisdiction in any action against a defendant who, when 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." *See also* ***Sub-Zero Freezer Co. v. R.J. Clarkson Co.***, 159 Wis. 2d 230, 234, 464 N.W.2d 52, 54 (Ct. App. 1990) (under § 801.05(1)(d), a defendant must have engaged in substantial activities in Wisconsin at the time the action was commenced). Here, the Trust alleges many instances of what it believes to be

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

"substantial and not isolated contacts." As Robert Morey correctly points out, however, none of these alleged contacts had taken place when this action was commenced.[3] Therefore, the trial court correctly determined that "[t]here's been no showing that either defendant is engaged in substantial and not isolated activities in this state at the time the action was commenced."

B. WISCONSIN STAT. § 801.05(5)

¶6 Jurisdiction under WIS. STAT. § 801.05(5) requires a showing that the arrangement underlying the matter sued on "involves or contemplates some substantial connection" with Wisconsin. *See* ***Capitol Fixture v. Woodma Distribs., Inc.***, 147 Wis. 2d 157, 162, 432 N.W.2d 647, 650 (Ct. App. 1988) (quoted source omitted). The Trust does not specify on which of the five statutory bases for personal jurisdiction under § 801.05(5) it relies.[4] The law is clear,

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[3] Robert Morey's money payments into Wisconsin ceased in September 1993. This action was commenced on September 8, 1997.

[4] WISCONSIN STAT. § 801.05(5) provides that a Wisconsin court has personal jurisdiction under the following circumstances:

> **LOCAL SERVICES, GOODS OR CONTRACTS.** In any action which:
> (a) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or
> (b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or
> (c) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value; or
> (d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction; or

(continued)

however, that "[t]he mere sending of money into this state, without more, cannot constitute a substantial minimum contact," and thus, is insufficient to establish long-arm jurisdiction. ***Nagel v. Crain Cutter Co.***, 50 Wis. 2d 638, 645, 184 N.W.2d 876, 879 (1971). Specifically, sending a money payment into Wisconsin does not constitute "other things of value" under § 801.05(5)(c)–(e). *See* ***id***. Thus, the trial court correctly determined that, regardless of whether the Trust established that a loan existed, "the payment of money from outside of Wisconsin back into Wisconsin … was not enough to warrant jurisdiction."[5]

C. WISCONSIN STAT. § 801.05(6)(c)

¶7 WISCONSIN STAT. § 801.05(6)(c) provides that a Wisconsin court may acquire jurisdiction over a non-resident defendant in an action claiming "that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it." The Trust argues that "[t]he loaned funds are a 'thing of value' which originated in this state at the time the defendant acquired possession or control over it."

> (e) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

[5] The Trust, as is permitted by the rules of appellate procedure, submitted a decision, ***Dorf v. Ron March Co.***, 99 F. Supp. 2d 994 (E.D. Wis. 2000), that was issued after briefing in this appeal was closed. *See* ***Seebach v. Public Serv. Comm'n***, 97 Wis. 2d 712, 724 n.8, 295 N.W.2d 753, 760 n.8 (Ct. App. 1980) ("While parties may not submit additional briefs beyond the reply brief, RULE 809.19, this court's practice has been to allow parties to bring relevant cases which are decided after the briefs have been submitted to the court's attention."). The defendant in ***Dorf***, unlike the defendant here, made several trips into Wisconsin, many of which were related to the subject of the lawsuit. ***Dorf*** has no relevance to the one issue in this case: whether merely sending money into this state will subject a defendant to the jurisdiction of our courts under Wisconsin's long-arm statute.

¶8 The Trust, however, failed to establish the existence of a loan. "It is not enough [for the party opposing the motion] to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." ***Helland v. Froedtert Mem'l Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318, 321 (Ct. App. 1999). As evidence of a loan, the Trust provided the affidavit of Sally Morey. Although Mrs. Morey stated that Dr. Morey loaned money to Robert Morey, this statement was not based on personal knowledge. The trial court found no admissible evidentiary support for the conclusion that a loan existed, stating "Mrs. Morey recites in various conclusory terms that this was a loan but provides no basis on which she can reach that conclusion other than her own opinion or perhaps speculation." We agree. Moreover, the money was not "within this state at the time the defendant acquired possession or control over it." *See* WIS. STAT. § 801.05(6)(c). We affirm the trial court's dismissal of this action for lack of personal jurisdiction.[6]

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[6] Lawyers owe candor and honesty to the tribunals before whom they appear. SCR 20:3.3(a) ("A lawyer shall not knowingly: 1) make a false statement of fact or law to a tribunal."). In its brief before this court, The Lloyd Morey Trust argues:

> In Ridge Leasing Corp. v. Monarch Royalty, Inc., 392 F. Supp. 573 (E.D. Wis. 1975), a single extension of credit was determined to be a sufficient contact for personal jurisdiction to lie. The court stated:
>
> > In my judgment, personal jurisdiction clearly exists under §§ 262.05(5)(b) and (e). The "service" which the plaintiff allegedly performed for Monarch in Wisconsin was essentially the extension of credit via the sale leaseback arrangement. The lease agreement constitutes a "thing of value" for purposes of § 262.05(5)(e). As Judge Reynolds observed in Doug Sanders Golf v. American Manhattan Ind., Inc., 359 F. Supp. 918 (E.D. Wis. 1973), at p. 921:

(continued)

> "An individual cannot induce a resident in Wisconsin which benefits the person making such representations and then claim immunity from suit in Wisconsin because of lack of personal jurisdiction in the state."

Id. At 574.

> Furthermore, in this case, we do not merely have one isolated extension of credit transaction as occurred in Ridge Leasing, rather there was a long standing debtor/creditor relationship between Lloyd Morey and Robert Morey which spanned at least five years, involved multiple renegotiations of the credit line, multiple additional advances, and a clear pattern of payments. The Ridge Leasing case provides the threshold for jurisdiction which is greatly exceeded by our facts.

The Trust does not reveal that the defendant's contacts with Wisconsin in ***Ridge Leasing***, unlike the situation here, were both substantial and extensive. This is how ***Ridge Leasing*** recounted them:

> In its brief, the defendant Monarch argues that its only connection with the state of Wisconsin was its payment of monthly lease payments to the plaintiff. However, the amended complaint, together with the affidavit of J. L. Dunn, president of Ridge Leasing Corporation, indicate that Monarch's connection with Wisconsin was much greater than the mere making of payments; these averments are uncontroverted.
>
> According to the plaintiff, the defendant Monarch 1) made the initial contact with the plaintiff; 2) sent its president to Milwaukee to solicit the plaintiff's participation in the sale and leaseback transaction; 4) [*sic*] delivered documentation of title to the subject property to Ridge in Milwaukee; 5) accepted payment from the plaintiff for such property in Milwaukee; and 6) executed the lease agreement which is the subject of this action in Milwaukee.

Id., 392 F. Supp. at 574. Moreover, the agreement between the parties in ***Ridge Leasing*** contained the following provision:

> This lease shall be governed by the laws of the State of Wisconsin. In the event that any legal action or actions arise out of or result from this lease, Lessee specifically waives any objections to Milwaukee County, Wisconsin as the place of venue.

Id., 392 F. Supp. at 573–574. Thus, the trial judge in ***Ridge Leasing*** explained:

> Finally P23 of the lease agreement indicates that the parties intended that any litigation would take place in Milwaukee.

(continued)

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

> Given the nature of the alleged sale and leaseback transaction, it is arguable that such provision represented a substantial consideration, in the absence of which the plaintiff may have declined to enter into the sale-leaseback agreement with Monarch. In any event, it further undermines the defendants' position.

Id. To compound matters, the Trust's reply brief before this court asserts: "The facts in Ridge Leasing establish no more contacts than in our case." As we have seen, this is simply not true. What makes matters worse is that the trial court in this case chastised trial counsel for a quotation from ***Ridge Leasing*** that the trial court noted "certainly borders on misrepresentation," explaining further that "to simply recite Ridge Leasing to purport to refer to an extension of credit, and imply that it stands for the proposition that that's enough, I think is a gross misrepresentation of what that case was holding."

The Trust was represented before the trial court and before this court by the Milwaukee law firm of O'Neil, Cannon & Hollman, S.C. Carl D. Holborn, Esq., signed the briefs submitted to this court on the Trust's behalf (although he was not the lawyer to whom the trial court was referring when it explained that it believed that the Trust's citation of and reliance on ***Ridge Leasing*** was improper). We admonish both the firm of O'Neil, Cannon & Hollman and Carl D. Holborn, Esq., for their lack of candor with us.