

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 20, 2001**

Cornelia G. Clark  
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. 00-3008**

**Cir. Ct. No. 98-CV-996**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**TIMOTHY J. KOPKE,**

**PLAINTIFF,**

**UNITED STATES FIDELITY & GUARANTY COMPANY, A  
FOREIGN INSURANCE CORPORATION, AND LEICHT  
TRANSFER AND STORAGE CO., A WISCONSIN  
CORPORATION,**

**SUBROGATED-PLAINTIFFS,**

**V.**

**A. HARTRODT S.R.L., A FOREIGN CORPORATION,**

**DEFENDANT,**

**CARTIERE BINDA IN LIQUIDAZIONE S.P.A., A  
FOREIGN CORPORATION,**

**DEFENDANT-THIRD-  
PARTY PLAINTIFF-APPELLANT,**

**SOCIETA' COOPERATIVE L'ARCIERE, A FOREIGN  
CORPORATION,**

**DEFENDANT,**

V.

**RIUNIONE ADRIATICA DI SICURTA S.P.A., A FOREIGN  
CORPORATION,**

**THIRD-PARTY DEFENDANT-  
RESPONDENT.**

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APPEAL from a judgment of the circuit court for Brown County:  
WILLIAM M. ATKINSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cartiere Binda in Liquidazione S.p.A. (Binda), an Italian paper manufacturer, appeals a judgment dismissing its third-party complaint against its insurer, Riunione Adriatica Di Sicurta S.p.A. (RAS). Binda argues that the circuit court erroneously determined that it had no personal jurisdiction over RAS. Although we employ a different rationale from that of the circuit court, we affirm the judgment of dismissal.

## BACKGROUND

¶2 The underlying facts are undisputed.<sup>1</sup> Timothy Kopke, a truck driver, sustained severe injuries at a Neenah warehouse where he attempted to unload cargo that had arrived in an ocean cargo container from Italy. The cargo consisted of paper that had been manufactured by Binda in Italy. During transit,

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<sup>1</sup> The parties submitted their dispute on affidavits. Based on the affidavits, the court arrived at numerous findings of fact that are apparently undisputed.

the load apparently shifted and a pallet of paper fell forward as Kopke opened the container's door, knocking Kopke to the ground.

¶3 Kopke filed a negligence suit against Binda.<sup>2</sup> Binda impleaded RAS, alleging liability under the terms of its insurance contract. Kopke then filed a claim against RAS directly. RAS denied that its policy afforded coverage, relying on an exclusion of coverage for any damages produced by goods after delivery to third parties. RAS moved for dismissal on the pleadings, citing a lack of personal and subject matter jurisdiction. The circuit court granted RAS's motion and entered judgment dismissing Binda's and Kopke's claims.

¶4 Based upon the parties' submission, the circuit court determined that in 1992, RAS and Binda entered into an insurance contract procured by an Italian insurance broker. The policy was negotiated, drafted, executed, issued and delivered in Italy. Premiums were paid in Italian currency, the negotiations occurred in the Italian language and the policy was drafted in Italian.

¶5 The circuit court found that RAS, an Italian insurance company located in Milan, Italy, was not formally authorized to conduct insurance business in Wisconsin and does not have a registered agent for service of process in the United States. RAS does not advertise or solicit business in Wisconsin and sells

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<sup>2</sup> Kopke also filed suit against Societa' Cooperativa L'Arciere, whose employees helped package the shipment. Our supreme court affirmed the trial court's holding that it had personal jurisdiction. *Kopke v. A. Hardtrodt*, 2001 WI 99, 245 Wis. 2d 396, 629 N.W.2d 662.

its insurance policies in Italy. RAS has no employees, offices or assets in Wisconsin.<sup>3</sup>

¶6 All RAS and Binda employees involved with the policy reside in Italy. The policy incorporates provisions of Italian law. RAS's records regarding the Binda claim are maintained in Italy. The policy's forum selection law designates the courts of Milan and Busto Arsizio in Italy. The experts retained by Binda and RAS analyzed coverage under Italian substantive law; neither expert contends that Wisconsin substantive insurance law applies.

¶7 Binda agreed that the legal issue of coverage is one best addressed to Italian courts. Based upon the parties' submissions, the trial court determined the Wisconsin long-arm statute "does not reach RAS" and granted its motion to dismiss. Binda appeals the judgment of dismissal; Kopke does not.

#### STANDARD OF REVIEW

¶8 RAS brought its motion for dismissal pursuant to WIS. STAT. § 802.06.<sup>4</sup> This section provides that if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 802.08. *See* WIS. STAT. § 802.06(2)(b). Here, the parties submitted matters outside the pleadings for the court's consideration. Because the submissions were not excluded, we review the matter as one for summary judgment. *Id.*

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<sup>3</sup> Binda contends that RAS appointed the Allianz Insurance Company as its claims representative in Wisconsin. The record is unclear whether this is a disputed issue of fact. In any event, it is not material to our review.

<sup>4</sup> All statutory references are to the 1999-2000 edition unless otherwise indicated.

¶9 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

## DISCUSSION

¶10 Binda argues that the trial court erroneously determined that Wisconsin’s long-arm statute, WIS. STAT. § 801.05(10), does not confer personal jurisdiction over RAS.<sup>5</sup> It concedes: “Binda agrees that this insurance contract should be construed by an Italian court applying Italian law. Italian courts are far better suited than American courts to construe the subtleties of the Italian language and to apply the intricacies of Italian insurance law.” Nonetheless, Binda argues that factual issues concerning coverage should be determined by Wisconsin courts.

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<sup>5</sup> WISCONSIN STAT. § 801.05 “**Personal jurisdiction, grounds for generally**” reads in 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:

....

**(10) INSURANCE OR INSURERS.** In any action which arises out of a promise made anywhere to the plaintiff or some 3rd party by the defendant to insure upon or against the happening of an event and in addition either:

....

(b) The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person insured resided.

¶11 Binda acknowledges that the policy excludes coverage for “any damages produced by goods or things in general after delivery to third parties.” It contends, however, that the coverage dispute centers around whether Binda’s products had been “delivered” to third parties within the meaning of the contract. It points out that Binda’s container had been transported to Neenah and

[q]uestions ... whether custody of goods had been accepted by warehouse workers, whether the goods had a further destination, what the custom and practice was in unloading the goods, who was responsible for unloading the cargo, how the cargo was to be unloaded and a wide variety of other questions bear centrally on this coverage issue.

Binda maintains that it makes good sense to discover and develop these facts in Wisconsin courts.

¶12 We are unpersuaded. First, Binda fails to refer to any submissions of record that demonstrate that the facts it seeks to have established are in dispute. *See* WIS. STAT. § 802.08. Additionally, Binda fails to identify to what degree the allegedly disputed facts would have legal significance under Italian law. *See* WIS. STAT. § 809.19(1)(e). Also, Binda fails to provide any legal authority for his proposition that questions of fact can be tried separately from the legal issue of coverage and, if so, that a Wisconsin circuit court’s fact finding is binding on an Italian court. *See id.*

¶13 We are satisfied that the record fails to reveal any material dispute of law or fact between Binda and RAS for the circuit court to determine. Kopke does not appeal, so the only issues are between Binda and RAS, Italian companies. Binda agreed to have Italian courts determine insurance coverage. We conclude that the circuit court correctly entered judgment of dismissal. *See* WIS. STAT. § 802.08.

¶14 Binda claims nonetheless that WIS. STAT. § 803.04(2) provides authority for its contentions.<sup>6</sup> This procedural statute governs permissive joinder of insurers. While this section permits the joinder of an insurance company in a negligence action in which it has an interest in the outcome, § 803.04(2) does not require joinder. *Id.* (“Nothing herein contained shall be construed as prohibiting

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<sup>6</sup> WISCONSIN STAT. § 803.04, “**Permissive joinder of parties**,” reads in part:

(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.

(b) If an insurer is made a party defendant pursuant to this section and it appears at any time before or during the trial that there is or may be a cross issue between the insurer and the insured or any issue between any other person and the insurer involving the question of the insurer's liability if judgment should be rendered against the insured, the court may, upon motion of any defendant in the action, cause the person who may be liable upon such cross issue to be made a party defendant to the action and all the issues involved in the controversy determined in the trial of the action or any 3rd party may be impleaded as provided in s. 803.05. Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting separate trials on the issue of liability to the plaintiff or other party seeking affirmative relief and on the issue of whether the insurance policy in question affords coverage. Any party may move for such separate trials and if the court orders separate trials it shall specify in its order the sequence in which such trials shall be conducted.

the trial court from directing and conducting separate trials ... on the issue of whether the insurance policy in question affords coverage.”). Here, because the parties agreed that the issue of coverage is one for the Italian courts, the circuit court did not err in dismissing RAS from the action.

*By the Court.*—Judgment affirmed.

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