

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2008

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. 2007AP35

Cir. Ct. No. 2003CV8337

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DAVID RASMUSSEN AND LISA A. LINDSAY,

PLAINTIFFS-APPELLANTS,

v.

GENERAL MOTORS CORPORATION, GENERAL MOTORS OF CANADA, LTD., FORD MOTOR COMPANY, FORD MOTOR COMPANY OF CANADA, LTD., TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES USA, INC., TOYOTA CANADA, INC., HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR COMPANY, INC., HONDA CANADA, INC., DAIMLER CHRYSLER, DAIMLER CHRYSLER CANADA, INC., MERCEDES BENZ CANADA, INC., NISSAN NORTH AMERICA, INC., NISSAN CANADA, INC., BMW OF NORTH AMERICA, INC., BMW CANADA, NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND CANADIAN AUTOMOBILE DEALERS ASSOCIATION,

DEFENDANTS,

NISSAN MOTOR Co., LIMITED,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County:
JOHN A. FRANKE, Judge. *Reversed.*

Before Wedemeyer, Fine and Anderson, JJ.

¶1 WEDEMEYER, J. David Rasmussen and Lisa A. Lindsay (hereinafter “Rasmussen”) appeal from an order dismissing their action against Nissan Japan based on lack of personal jurisdiction. Rasmussen contends that the trial court erred in so ruling. He also appeals from a March 6, 2007 order denying his motion seeking to include the transcripts and exhibits, which were filed with the special master during the course of jurisdictional discovery. He asserts that this information is needed to establish prejudice resulting from the trial court’s June 24, 2004 order denying Rasmussen’s ability to compel jurisdictional discovery directly from Nissan Japan. Because the trial court erroneously exercised its discretion when it denied the motion to allow the inclusion of the transcripts and exhibits in the appellate record, we reverse that portion of that order, and direct the clerk of the circuit court to supplement the record with all of the materials which were filed with the special master during the course of jurisdictional discovery within fourteen days of the date of this opinion.

BACKGROUND

¶2 In September 2003, Rasmussen filed an antitrust action against Nissan Jidosha Kabushiki Kaisha d/b/a Nissan Motor Co., Ltd. (“Nissan Japan”). Nissan Japan filed a motion to dismiss based on lack of personal jurisdiction. The trial court denied that motion, ruling that Rasmussen should be permitted to obtain jurisdictional discovery before the court resolved the motion to dismiss.

¶3 On June 24, 2004, the trial court ruled that Rasmussen could conduct jurisdictional discovery, but that the discovery could only be compelled from Nissan North America, Inc., and not directly from Nissan Japan. The court then appointed former Judge Frank T. Crivello to act as special master for the purpose of resolving any jurisdictional discovery disputes. During the discovery proceedings, several hearings were held before Judge Crivello and exhibits were filed.

¶4 Once discovery was complete, the trial court held a hearing on Nissan Japan's motion to dismiss. At the conclusion of the hearing, it dismissed Rasmussen's action for lack of personal jurisdiction. In December 2006, Rasmussen filed a notice of appeal. Before the record was sent to this court, Rasmussen filed a motion in the trial court requesting that the transcripts and exhibits that were filed with the special master during the jurisdictional discovery proceedings be included in the record. Rasmussen cited WIS. STAT. § 805.06(5)(a) (2003-04)¹ as the basis for the motion. Rasmussen argued that that information was needed to establish prejudice resulting from the trial court's June 24, 2004 order denying his ability to compel discovery directly from Nissan Japan. The trial court denied Rasmussen's motion, ruling: (1) that § 805.06(5)(a), which requires a referee to file all transcripts and exhibits in any action to be tried without a jury, did not apply because this antitrust action was not one to be tried without a jury; (2) Rasmussen waived the right to have the information included in the record; and (3) the jurisdictional limitation order was not affected by the discovery proceedings.

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

¶5 Rasmussen then filed a motion with this court seeking to bifurcate the briefing in this appeal so that this court could initially address the appropriate composition of the record. We granted the motion, by order dated August 14, 2007. This decision, therefore, addresses solely the issue of the composition of the record and not the merits of the dismissal.

DISCUSSION

¶6 The issue presented in this appeal is whether the trial court erroneously exercised its discretion in denying Rasmussen’s motion to include the discovery transcripts/exhibits in the appellate record. In denying the motion, the trial court provided three reasons to support its decision: (1) WIS. STAT. § 805.06(5)(a) did not apply; (2) Rasmussen waived his right to raise the issue; and (3) the jurisdictional limitation order was not affected by the discovery proceedings. We disagree with each of the trial court’s reasons, and therefore direct that all of the discovery information should be included in the record for purposes of appeal.

¶7 First, the trial court ruled that WIS. STAT. § 805.06(5)(a) did not apply because the antitrust action was to be tried to a jury. That statement is correct, but the issue here is not about the antitrust action on the merits, but the jurisdictional trial, which involved a separate and distinct proceeding, which was “tried” to the court and decided by the court rather than a jury. Accordingly, § 805.06(5)(a) does apply and requires the “referee ... in an action to be tried without a jury ... [to] file with the report a transcript of the proceedings and of the evidence and the original exhibits.” Thus, the statute supports a filing of the discovery transcripts/exhibits.

¶8 Second, the trial court ruled that Rasmussen waived the right to have the discovery transcripts/exhibits filed with the appeal because he did not raise the issue before the trial court ruled on the personal jurisdiction issue. We are not convinced. As Rasmussen notes, the discovery transcripts/exhibits were not pertinent to the trial court's decision on personal jurisdiction, but are relevant to the issue on appeal as to whether the imposed limitation of obtaining discovery from Nissan America, rather than Nissan Japan adversely affected Rasmussen's ability to establish personal jurisdiction. Further, the record reflects that the special master expressly stated that the discovery transcripts/exhibits would be filed in the event of an appeal, and Rasmussen timely raised this request in the trial court before the appeal proceeded to this court. Under such circumstances, waiver did not occur.

¶9 Finally, the trial court ruled that the discovery transcripts/exhibits were not material for purposes of this court's review. This court cannot determine whether that is the case without reviewing the records themselves.

¶10 Accordingly, we reverse sub. (1) of the trial court's March 6, 2007 order denying Rasmussen's motion to permit the discovery transcripts/exhibits to be included as a part of the record on appeal. We direct that such information shall be included in the record of this appeal. Because the composition of the record has now been decided, we direct this appeal to continue as stated in the August 14, 2007 order of this court:

Once the issues relating to composition of the record are resolved, the parties may file their briefs on the merits, but those briefs may not exceed 50 pages in length less the number of pages used on the brief regarding composition of the record. The appellants' brief shall be due thirty days from the date the court releases its opinion on the appropriate composition of the record.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

