COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 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. 2007AP1629 **Cir. Ct. No. 2005CV110**

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

DANIEL S. BERG,

PLAINTIFF–RESPONDENT–CROSS-RESPONDENT,

V.

GULF UNDERWRITERS INSURANCE COMPANY,

DEFENDANT–RESPONDENT–CROSS-APPELLANT,

ELMRIDGE GROUP, INC. F/K/A MCCLAIN GROUP, INC. F/K/A MCCLAIN E-Z PACK, INC. F/K/A GALION HOLDING COMPANY F/K/A GALION DIVISION OF PEABODY INTERNATIONAL CORPORATION, MCCLAIN GROUP, INC., ELMRIDGE HOLDINGS, INC. F/K/A MCCLAIN INDUSTRIES, INC. A/K/A MCCLAIN E-Z PACK, INC. D/B/A MCCLAIN E-Z PACK, INC., MCCLAIN INDUSTRIES, INC., GENERAL CASUALTY INSURANCE COMPANY OF WISCONSIN, ELLIOTT EQUIPMENT COMPANY, WASTE SYSTEMS, INC. AND ST. PAUL SURPLUS LINES INSURANCE COMPANY P/K/A ST. PAUL FIRE & MARINE INSURANCE COMPANY,

DEFENDANTS–RESPONDENTS–CROSS-RESPONDENTS,

TENNECO, INC. AND ACE MERICAN INSURANCE COMPANY,

DEFENDANTS–APPELLANTS–CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed*.

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

¶1 VERGERONT, J. Tenneco, Inc., appeals an order granting summary judgment in favor of Gulf Underwriters Insurance Company on Tenneco's cross-claim against Gulf based on the insurance contract between Gulf and McClain Group, Inc.[1] Tenneco also appeals the court's grant of summary judgment in favor of McClain on Tenneco's cross-claim against McClain. Based on the undisputed facts, we conclude McClain is entitled to summary judgment because of the one-year time limit for bringing claims against it under Michigan's corporate dissolution statute. We also conclude Gulf is entitled to summary judgment because Tenneco is not a third-party beneficiary to the insurance contract between Gulf and McClain. Thus, although our analysis differs from that of the circuit court, we conclude that the circuit court properly granted summary judgment in favor of both Gulf and McClain.

BACKGROUND

¶2 For purposes of this appeal, the following facts are not in dispute. In April 2004, Daniel Berg was injured in Wisconsin while cleaning debris, in the scope of his employment, from a trash compactor in a garbage truck. The compactor was manufactured and distributed by Michigan corporations that were

[1] Ace American Insurance Company is Tenneco's insurer and also an appellant, but it is not necessary to refer to it separately on this appeal. McClain Group, Inc., changed its name to Eldridge Group, Inc., but we refer to this entity as McClain in this opinion.

predecessors to McClain. McClain, a Michigan corporation, dissolved on September 1, 2004.

¶3 Through a series of mergers and acquisitions, Tenneco, an Illinois corporation, became liable for damages resulting from the trash compactor and garbage trucks manufactured and distributed by McClain. However, Tenneco and McClain were successors in interest to an assumption agreement under which McClain was obligated to indemnify Tenneco for that liability.

¶4 Gulf is a Connecticut-based insurer that issued a commercial general liability policy to McClain. The policy was in effect at the time of Berg's injury.

¶5 In February 2005, Berg filed this action against McClain and Gulf,[2] asserting claims for product liability and negligence and seeking damages for his injuries resulting from the incident with the trash compactor. Although McClain was named in the initial complaint and each of the three subsequent amended complaints, it was not served until the fourth amended complaint.[3]

¶6 In the first amended complaint, Berg named Tenneco as a defendant. Tenneco answered by denying liability and asserting cross-claims against McClain and Gulf. Tenneco's cross-claim against McClain alleged that, under the

[2] Berg also named General Casualty Insurance Company of Wisconsin as a defendant, alleging this Wisconsin corporation to be the worker's compensation insurer for Berg's employer. General Casualty is not participating in this appeal.

[3] Gulf has filed a cross-appeal, contending that the circuit court erred in allowing Berg to file a fourth amended complaint and to serve McClain for the first time with that complaint. It is unnecessary for us to address this issue because of our disposition of the issues raised on appeal. We observe, however, that it was unnecessary for Gulf to raise this issue on a cross-appeal because it is an alternative ground for affirming the court's order dismissing McClain. *See* ***B&D Contractors, Inc. v. Arwin Window Sys., Inc.***, 2006 WI App 123, ¶4 n.3, 294 Wis. 2d 378, 718 N.W.2d 256 (citing ***State v. Alles***, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982)).

assumption agreement with McClain, McClain was obligated to indemnify Tenneco for its liability to Berg, to hold Tenneco harmless, and to pay Tenneco's defense costs. Tenneco's cross-claim against Gulf alleged that the insurance policy Gulf issued to McClain required Gulf to indemnify Tenneco for all damages for which McClain became liable under the assumption agreement.

¶7 Berg, Tenneco, and Gulf all filed motions for summary judgment seeking a declaration of Gulf's obligation under the insurance policy it had issued McClain. Tenneco's motion sought a ruling that Gulf was obligated to defend it or pay its defense costs and to indemnify it. McClain also filed a motion for summary judgment contending that under Michigan's corporate dissolution statute, MICH. COMP. LAWS ANN. § 450.1842a (2007),[4] Berg's and Tenneco's claims against it were barred because they had not been filed and served on McClain within one year of publication of notice of McClain's dissolution.

¶8 Prior to the commencement of this action, Gulf had filed a declaratory judgment action in Michigan including Berg and McClain as defendants, but not Tenneco. Gulf sought a declaration that McClain was entitled to no coverage from it under the policy for the claims of Berg and other claims of indemnification resulting from Berg's injuries. While the summary judgment motions in this action were pending, the Michigan court issued its decision, agreeing with Gulf. The Michigan court concluded that, because McClain had failed to pay the $250,000 Self-Insured Retention [SIR] required by the insurance

[4] All references to the Michigan Compiled Laws Annotated are to the version current through the end of the 2007 legislative session. The current versions of the statutes cited in this opinion are the same as those in effect at the times relevant to this appeal.

policy, McClain had not fulfilled its contractual obligation, and Gulf's duty to pay under the policy was therefore not triggered.

¶9 In light of the Michigan judgment, Gulf argued in support of its summary judgment motion in this case—in addition to other arguments that its policy did not provide coverage for Tenneco—that the Michigan judgment barred Tenneco's cross-claim for coverage under Gulf's insurance policy in this action. Tenneco's position on the Michigan judgment was that neither issue preclusion nor claim preclusion barred its cross-claim against Gulf in this action. Tenneco's submissions showed that when it tendered the defense to Gulf (before the Michigan judgment was entered), it had offered to pay the $250,000 SIR to Gulf on certain conditions. Tenneco argued that the Michigan judgment did not bar its claim against Gulf because Tenneco was not a party nor in privity with a party to that action, and the Michigan court did not rule on its claim that Gulf was obligated under its policy to cover Berg's claim against Tenneco in view of Tenneco's offer to pay the SIR.

¶10 The circuit court granted Gulf's motion for summary judgment, dismissing it without prejudice[5] and denied Berg's and Tenneco's motions. The court concluded that the Michigan judgment was entitled to full faith and credit, and the doctrine of claim preclusion barred Berg's claim against Gulf. In contrast, the court ruled, the Michigan judgment was not a bar to Tenneco's claim against Gulf under either the doctrine of claim preclusion or the doctrine of issue preclusion. However, for other reasons, the court concluded that dismissal of

[5] The claim was dismissed without prejudice because the circuit court did not agree with the reasoning of the Michigan decision and wanted to allow for the possibility that it would be reversed on appeal. Tenneco could then renew its claim in Wisconsin.

Tenneco's claim against Gulf was required. First, the court agreed with the parties that Tenneco could not bring a direct action against Gulf under WIS. STAT. § 632.24 (2005-06).[6] The court then rejected Tenneco's assertion that it could join Gulf under WIS. STAT. § 803.04(2), reasoning that, given the Michigan judgment, Gulf had no interest in the outcome of the action as required by that statute.

¶11 The court also granted McClain's motion for summary judgment, dismissing McClain without prejudice. The court concluded that Berg's and Tenneco's claims against McClain were time-barred by the Michigan corporate dissolution statute.

¶12 The court denied Tenneco's motion for reconsideration.

DISCUSSION

¶13 Tenneco appeals the court's order denying its motion for summary judgment against Gulf and granting McClain's and Gulf's motions for summary judgment. Tenneco contends there are no disputed issues of fact and it is entitled to judgment as a matter of law that the Gulf policy issued to McClain obligates Gulf to defend and indemnify it (Tenneco) because of the assumption agreement. Gulf and McClain respond that the circuit court correctly decided summary judgment in their favor.[7]

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

[7] Although Berg is labeled as "Plaintiff–Respondent–Cross-Respondent" in the caption and has filed a brief titled "Brief of Plaintiff-Respondent," that brief responds to Gulf's cross-appeal challenging the court's order allowing the filing of the fourth amended complaint. *See* footnote 3. Berg has not filed a brief in response to Tenneco's appeal.

¶14 Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). In an appeal from the grant of summary judgment our review is de novo, and we apply the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). First, we must determine whether a claim for relief is set forth in the pleading—in this case, Tenneco's cross-claim. ***Id.*** at 317. In analyzing whether a pleading states a claim for relief, we construe it liberally, and we take as true all allegations and reasonable inferences from the allegation that favor the claimant. ***Id.***

¶15 If the cross-claim does state a claim for relief, we examine the submissions to determine whether there are any genuine issues of material fact. *See* ***id.*** at 320. If there are none, we decide which party is entitled to judgment as a matter of law. *See* ***id.***

I. Tenneco's Claim Against McClain

¶16 We first examine Tenneco's cross-claim to determine if it states a claim for relief against McClain. We conclude it does state a claim under the assumption agreement for indemnification from McClain for its liability to Berg. No party argues otherwise.

¶17 Turning to the summary judgment submissions, we do not understand Tenneco to argue on appeal that the Michigan corporate dissolution statute does not bar its claim for indemnification from McClain. Rather, Tenneco's position is that it should be able to join McClain as a "nominal" party, so that it, Tenneco, can join Gulf as a party. We return to this argument later in this opinion. *See* ¶36 & n.14, *infra*. At this point, we confirm that the undisputed

facts show that Tenneco did not file a claim against McClain within one year of the publication of the notice of dissolution, as required by MICH. COMP. LAWS ANN. § 450.1842a.[8] It is undisputed that McClain published notice of its

[8] MICHIGAN COMP. LAWS ANN. § 450.1842a provides:

> **Dissolved corporations; publication of notice, barred claims.**
>
> **Sec. 842a.** (1) A dissolved corporation may also publish notice of dissolution at any time after the effective date of dissolution and request that persons with claims against the corporation present them in accordance with the notice.
>
> (2) The notice must be in accord with both of the following:
>
> (a) Be published 1 time in a newspaper of general circulation in the county where the dissolved corporation's principal office, or if there is no principal office in this state, its registered office, is or was last located.
>
> (b) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within 1 year after the publication date of the newspaper notice.
>
> (3) If the dissolved corporation publishes a newspaper notice in accordance with subsection (2), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within 1 year after the publication date of the newspaper notice:
>
> (a) A claimant who did not receive written notice under section 841a.
>
> (b) A claimant whose claim was timely sent to the dissolved corporation but not acted on.
>
> (c) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.
>
> (4) Notwithstanding subsection (3), a claimant having an existing claim known to the corporation at the time of publication in accordance with subsection (2) and who did not receive written notice under section 841a is not barred from commencing a proceeding until 6 months after the claimant has actual notice of the dissolution.

dissolution in an appropriate newspaper on October 1, 2004. It is also undisputed that Tenneco did not commence a proceeding to enforce a claim against McClain within one year from that date. Therefore, pursuant to MICH. COMP. LAWS ANN. § 450.1842a, Tenneco's claim for indemnification from McClain under the assumption agreement is barred.

II. Tenneco's Claim Against Gulf

¶18 Tenneco asserts that under Michigan law it is a third-party beneficiary to the insurance contract between McClain and Gulf, and therefore it has the right to enforce that contract. Gulf responds that Michigan case law establishes that Tenneco is not a third-party beneficiary.[9]

¶19 Beginning with the allegations in Tenneco's cross-claim, we see that there is no reference to "third-party beneficiary." The allegations relating to Gulf are that the insurance policy Gulf issued to McClain required Gulf to indemnify Tenneco for all damages for which McClain became liable under the assumption agreement, and for reasonable attorney fees and other defense costs. The absence of an express reference to "third-party beneficiary" does not necessarily mean that the complaint does not state a claim for relief as a third-party beneficiary to a contract. In deciding whether a complaint states a claim for relief, we consider the facts alleged and decide whether, if true, they entitle the claimant to relief based on any legal theory; the legal theory need not be identified in the complaint. ***Jost v. Dairyland Power Coop.***, 45 Wis. 2d 164, 169-70, 172 N.W.2d 647 (1969). We

[9] Because both parties confine their arguments on this point to Michigan law, we do so as well.

therefore discuss the legal theory on which Tenneco relies before further examination of the allegations in the cross-claim.

¶20 Tenneco relies on MICH. COMP. LAWS ANN. § 600.1405 (2007) as the legal basis for its third-party beneficiary claim. This statute provides in relevant part:

> **Rights of third-party beneficiaries.**
>
> **Sec. 1405.** Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2)(a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.
>
> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.
>
> ….
>
> (3) Nothing herein contained shall be held to abridge, impair or destroy the rights which the promisee of a promise made for the benefit of another person would otherwise have as a result of such promise.
>
> ….

¶21 Gulf responds that ***Schmalfeldt v. North Pointe Ins. Co.***, 670 N.W.2d 651 (Mich. 2003), establishes that this statute does not make Tenneco a third-party beneficiary of the insurance contract between Gulf and McClain. In ***Schmalfeldt***, a person injured in a tavern fight sued the tavern owner's insurer for reimbursement for dental bills. ***Id.*** at 652. The court concluded that the plaintiff was not a third-party beneficiary under MICH. COMP. LAWS ANN. § 600.1405 because he was only an incidental beneficiary to the insurance contract between the tavern owner and the insurer. ***Id.*** at 655. Relying on prior Michigan case law, the court stated that "the plain language of [the] statute reflects that not every person incidentally benefited by a contractual promise has a right to sue for a breach of that promise…. Thus, only intended, not incidental, third party beneficiaries may sue for a breach of a contractual promise in their favor." ***Id.*** at 654 (ellipses in original).

¶22 The ***Schmalfeldt*** court explained that a court is to determine if a person is an intended third-party beneficiary within the meaning of the statute by looking at the contract. ***Id.*** at 654-55. The court framed the issue in that case as whether, in agreeing to cover medical expenses for bodily injury caused by accidents, the insurer had "undertaken to give or do or refrain from doing something directly to or for [the plaintiff] pursuant to the third-party beneficiary statute, [MICH. COMP. LAWS] § 600.1405(1)." ***Id.*** at 654. Examining the insurance policy, the court determined there was nothing that "specifically designates [the plaintiff], or the class of business patrons of the insured of which [the plaintiff] was one, as an intended third-party beneficiary of the medical benefits provision." ***Id.*** at 655. Rather, "the contract primarily benefits the contracting parties because it defines and limits the circumstances under which the policy will cover medical expenses without a determination of fault." ***Id.*** at 655.

Therefore, the court concluded, the plaintiff was "only an incidental beneficiary without a right to sue for contract benefits." ***Id.*** at 655.

¶23 While ***Schmalfeldt*** was concerned with a clause agreeing to pay medical expenses for accidents occurring at the insured's business without regard to the insured's fault,[10] an earlier Michigan case deals with a standard liability clause. In ***Allstate Ins. Co. v. Keillor***, 476 N.W.2d 453, 455 (Mich. Ct. App. 1991), *rev'd on other grounds sub nom*. ***Allstate Ins. Co. v. Hayes***, 499 N.W.2d 743 (Mich. 1993), the court addressed a clause agreeing to "pay all sums arising from the same loss which an insured person become [sic] legally obligated to pay as damages because of bodily injury …." The court concluded the person allegedly injured as the result of the insured's negligent conduct was not a third-party beneficiary because this clause showed an intent to "create[] a contractual promise to indemnify the insured, not directly benefit the injured party"; there was no "promise or duty to benefit … an injured third-party." ***Id.***

¶24 Returning to the allegations in Tenneco's cross-claim against Gulf, we observe there is no reference to or description of any provisions in the insurance contract between Gulf and McClain. We will nonetheless assume without deciding that the cross-claim does state a claim for relief under a third-party beneficiary theory. We do so because Gulf did not argue in the circuit court, and does not argue on appeal, that the cross-claim does not state a claim for relief under a third-party beneficiary theory because it does not refer to or describe the

[10] The plaintiff in ***Schmalfeldt v. North Pointe Ins. Co.***, 670 N.W.2d 651, 652 n.1 (Mich. 2003), did not sue the tavern, apparently conceding the tavern had not breached any duty to him.

relevant policy provisions. This omission would have been easy for Tenneco to remedy had Gulf made this argument.

¶25 The policy Gulf issued to McClain was submitted with the summary judgment motions and its contents are not disputed. McClain is the named insured under the policy. Gulf agrees to

> pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" … to which this insurance applies. [Gulf] will have the right and duty to defend the insured against any "suit" seeking those damages.…

¶26 Although there is an exclusion for bodily injury or property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement," this exclusion does not apply to liability for damages:

> ….
>
> (2) Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" … occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury[,]" provided
>
> (a) Liability to such party for, or the cost of, that party's defense has also been assumed in the same "insured contract"; and
>
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

¶27 As relevant to this appeal, "insured contract" is defined in the insurance policy as:

> That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability for another party to pay for "bodily injury" … to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

¶28 Thus, Gulf agrees to pay the sums McClain becomes legally obligated to pay as damages for bodily injury both because of McClain's own torts and because of tort liability for another that McClain assumed under a contract.

¶29 Tenneco contends that ***Schmalfeldt*** (and presumably also ***Keillor***) does not apply because Tenneco is not an injured person but an indemnitee of the insured. Tenneco relies on ***Brunsell v. City of Zeeland***, 651 N.W.2d 388, 389 (Mich. 2002), in arguing that it is a member of a class sufficiently described in the insurance contract—an indemnitee under an indemnitee agreement—to allow the court to conclude that the contract was intended to benefit it. In ***Brunsell***, the plaintiff, a pedestrian injured by tripping over a defect in a sidewalk, asserted she was a third-party beneficiary of a lease between the city and the owner of the property. ***Id.*** The sidewalk was one of the improvements constructed by the city and the lease required the city to "repair improvements which it constructs on the premises as may be necessary for the public safety." ***Id.*** The Michigan supreme court rejected the plaintiff's assertion that, as a member of the public, she was a third-party beneficiary of the lease. The court concluded that "the public as a whole is too expansive a group to be considered 'directly' benefited by a contractual promise." ***Id.*** at 391. The court also concluded that an objective analysis of the contract showed that the contract provision at issue was "intended to delineate the obligations of the city and the [lessor] with regard to the premises, not to directly benefit third parties." ***Id.***

¶30 We do not agree with Tenneco that ***Schmalfeldt*** is inapplicable because Tenneco is not an injured person but rather an indemnitee of the insured. The reasoning in ***Schmalfeldt*** does not turn on whether the plaintiff is an injured person but on whether the insurance contract shows the plaintiff is an intended, as opposed to an incidental, beneficiary of the contract. 670 N.W.2d 654-55. The same is true of ***Keillor***, 476 N.W.2d at 455. Whether McClain is legally obligated to pay money to another because of its own torts or because it assumed contractual liability for another's torts, the insurance clauses in paragraphs 25-27, *supra*, show the primary intent of Gulf's promise is to benefit McClain by paying those sums.

¶31 In addition to the insurance clauses cited above, Tenneco refers us to the subsection on "Supplementary Payments" and, in particular, to the clause beginning: "If we defend an insured against a 'suit' and an indemnitee of the insured is also named a party to the 'suit,' we will defend that indemnitee if all the following conditions are met[.]" Among the conditions are that the "'suit' against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an 'insured contract'; [t]his insurance applies to such liability assumed by the insured"; and the "obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same 'insured contract[.]'" Some additional conditions are that there must appear to be no conflict of interest between the insured and the indemnitee and that both the "indemnitee and the insured ask us to conduct and control the defense of that indemnitee … and agree we can assign the same counsel to defend the insured and the indemnitee[.]" If these and other conditions are met, Gulf agrees to pay the attorney fees and litigation expenses incurred in defending the indemnitee as "Supplementary Payments," and the payments will not reduce the limits of insurance.

¶32 Tenneco argues that this clause makes specific promises to a specific class—indemnitees—and it is a member of this class. We conclude ***Brunsell*** does not resolve this issue. While it is true that an "indemnitee" is a more specific designation than "the public," the crux of the issue here is whether Gulf, in promising McClain that it will do these things, is "undertak[ing] to give or to do … something directly to or for" an indemnitee who meets the specified conditions under an insured agreement. *See* MICH. COMP. LAWS ANN. § 600.1405. We conclude the answer is no.

¶33 Reading the "defense of an indemnitee" clause in context with the provisions for coverage and definition of an "insured agreement," we conclude the primary purpose of this clause is to benefit both the insured and the insurer, and the indemnitee is only an incidental beneficiary. This clause applies only where the insured would be obligated under the insured agreement to pay the indemnitee's cost of defense, as well as its liability; in that case, it is in the insured's interest to have the insurer pay for the indemnitee's defense without having that payment reduce payments from the insurer for the tort liability the insured has assumed; and it is in the insurer's interest to minimize its obligation with the efficiency of a combined defense where feasible and where agreeable to the insured. This clause thus delineates the conditions under which the insurer will make these supplementary payments.

¶34 Notably, the insurer has no obligation to defend an indemnitee unless the insured and indemnitee both ask the insurer to defend the indemnitee

and agree that the insurer can assign the same counsel.[11] These conditions make it particularly clear that Gulf is not, in the words of the statute, "undertak[ing] to give or to do … something directly to or for" Tenneco or any class of which it is a member. *See* MICH. COMP. LAWS ANN. § 600.1405. Instead, an indemnitee may incidentally benefit if all the conditions of this clause are met; and that depends on what the insured wants, within the defined limits of the clause, not on what the indemnitee wants.

¶35 We conclude that, based on the insurance contract language, Tenneco is not a third-party beneficiary under the contract.

¶36 Tenneco has not presented us with any other legal theory under which it has a claim against Gulf.[12] Accordingly, it is unnecessary for us to decide

[11] Indeed, because Gulf has this obligation only if it is defending an insured and because the Michigan court has ruled that Gulf does not have a duty to defend or to indemnify McClain, even if Tenneco were somehow a third-party beneficiary because of this clause and could enforce Gulf's obligations under the clause, Gulf would have no obligation to provide Tenneco a defense because it is not defending McClain. Similarly, unless McClain asks Gulf and agrees, which it has apparently not done and has no intention of doing, Gulf has no obligation to provide a defense to Tenneco under this clause.

[12] Tenneco conceded in the circuit court that its claim against Gulf is not based on the direct action statute and it does not argue otherwise on appeal. 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 whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

Gulf's position, which Tenneco does not dispute, is that the policy it issued to McClain was not delivered or issued for delivery in Wisconsin and, therefore, under ***Kenison v. Wellington Ins. Co.***, 218 Wis. 2d 700, 710, 582 N.W.2d 69 (1998), § 632.24 does not apply. In ***Kenison***, we decided that "the unambiguous language of § 631.01 … limits the application of § 632.24 … to insurance policies delivered or issued for delivery in this state." ***Id.***

(continued)

whether, if Tenneco did have a viable claim against Gulf, the Michigan judgment bars its litigation in this action. It is also unnecessary for us to decide whether, if Tenneco did have a viable claim against Gulf, it could proceed against Gulf in this action even though it could not recover from McClain because of the Michigan corporate dissolution statute.[13]

We recently certified to the Wisconsin Supreme Court the issue of whether ***Kenison*** was correct on this point as well as the issue whether we correctly stated in ***Kenison***, 218 Wis. 2d at 710, that an aggrieved party can join an insurer to an action under WIS. STAT. § 803.04(2)(a) "provided the insured is also a party." ***Finder v. American Heartland Ins. Co.***, 06-918, unpublished certification to the Wisconsin Supreme Court (Wis. Ct. App. Aug. 23, 2007), *certification granted*, 2007 WI 34, 305 Wis. 2d 131, 742 N.W.2d 528, *certification dismissed* (Wis. Jan. 23, 2008). The petition for certification was granted, but was dismissed after the parties settled. *See* ***id.***

[13] Tenneco argues that, while the Michigan dissolution statute may be a bar to recovery from McClain, it is permitted to name McClain as a "nominal" party for the sole purpose of joining Gulf under WIS. STAT. § 803.04(2)(a). This section provides:

> 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.

In ***Kenison***, 218 Wis. 2d at 710, we concluded that, where the accident occurs in Wisconsin, but the insurance policy was delivered or issued outside Wisconsin, a plaintiff may not pursue the insurer under the direct action statute; however, he or she may join the insurer as a defendant under WIS. STAT. § 803.04(2)(a) "provided the insured is also a party." *See* footnote 13.

CONCLUSION

¶37 Based on the undisputed facts, we conclude McClain is entitled to summary judgment on Tenneco's cross-claim because of the one-year limitation of MICH. COMP. LAWS § 450.1842a. Based on the undisputed facts, we conclude Gulf is entitled to summary judgment on Tenneco's cross-claim because Tenneco is not a third-party beneficiary to the insurance contract between Gulf and McClain. Thus, although our analysis differs from that of the circuit court, we conclude that the circuit court properly granted summary judgment in favor of both Gulf and McClain.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.