

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS EARL BARNES,

Plaintiff,

v.

WILLIAM J. BLACK and  
METROPOLITAN PROPERTY AND  
CASUALTY INSURANCE COMPANY,

Defendants.  
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OPINION AND  
ORDER

03-C-703-C

This is a civil action for monetary relief in which plaintiff Dennis Earl Barnes contends that defendant William J. Black, a policy holder of defendant Metropolitan Property and Casualty Insurance Company, negligently drove his vehicle into the side of another vehicle in which plaintiff was a passenger. After receiving supplemental information regarding the existence of diversity jurisdiction in this action, I granted plaintiff leave to proceed pursuant to 28 U.S.C. § 1915. Now before the court is defendants' motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2).

Defendants argue that defendant Black is not within the reach of the Wisconsin long-arm statute and that plaintiff may not maintain a direct action against defendant

Metropolitan because the policy on which plaintiff's claim is based was not delivered or issued for delivery within the state. Plaintiff has neither shown that the long-arm statute reaches defendant Black nor contested defendant's assertion that the policy on which he seeks recovery was not delivered or issued for delivery in Wisconsin. Accordingly, defendants' motion will be granted.

For the purpose of deciding this motion, I assume the following allegations in the complaint to be true. Purdue Research Foundation v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 782-83 (7th Cir. 2003) (in deciding motion challenging jurisdiction without an evidentiary hearing, court accepts all well-pleaded allegations in complaint as true unless controverted by challenging party's affidavits; any conflicts concerning relevant facts are to be decided in favor of party asserting jurisdiction ).

#### JURISDICTIONAL FACTS

On December 18, 2001, defendant Black caused a serious traffic accident when he pulled out into an intersection in Livingston County, Illinois, colliding into the passenger side of another vehicle in which plaintiff was a passenger. Defendant Black did not have the right of way and shortly after the accident, he stated that he had not seen plaintiff's vehicle when he pulled out into the intersection. Plaintiff was taken to the Kankakee Trauma Center, where he was later released with instructions to seek follow-up treatment with his

family physician or V. A. hospital provider.

Defendant Metropolitan, defendant Black's insurance provider, sent plaintiff claims forms indicating that defendant Black was at fault. Plaintiff submitted claims forms with the bills he incurred as a result of the accident. Defendant Metropolitan has paid some but not all of plaintiff's claims. Both plaintiff and his wife Debra have contacted defendant Metropolitan several times regarding these outstanding claims to no avail. Plaintiff continues to suffer from the physical injuries he incurred as a result of the collision.

## OPINION

### A. Defendant Black

In a case based on diversity of citizenship, a federal court has personal jurisdiction over a non-consenting, nonresident defendant to the extent authorized by the law of the state in which that court sits. Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 664 (7th Cir. 1986). In Wisconsin, the requirements of the state's long-arm statute, Wis. Stat. § 801.05, must be satisfied. Marsh v. Farm Bureau Mutual Insurance Co., 179 Wis. 2d 42, 52, 505 N.W.2d 162, 165 (Ct. App. 1993). The statute is liberally construed in favor of the exercise of jurisdiction, Federated Rural Electric Ins. v. Inland Power & Light, 18 F.3d 389, 391 (7th Cir. 1994), but ultimately, "[t]he burden is on the plaintiff to establish jurisdiction under the long-arm statute." Lincoln v. Seawright, 104 Wis. 2d 4, 10, 310

N.W.2d 596, 599 (1981).

The Wisconsin long-arm statute provides in relevant 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:

**(1) Local presence or status.** In any action whether arising within or without this state, against a defendant who when the action is commenced:

- (a) Is a natural person present within this state when served; or
- (b) Is a natural person domiciled within this state; or
- (c) Is a domestic corporation or limited liability company; or
- (d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

Wis. Stat. § 801.05.

Defendants contend that defendant Black cannot be reached under the long-arm statute because he was not served in Wisconsin, is not domiciled there and does not engage in substantial activities within the state. Plaintiff argues that personal jurisdiction attaches by virtue of certain representations made by defendants' in-state counsel, Steven Caya. Plaintiff relies on a letter sent to him from Caya stating as follows:

Please be advised that I have been retained by Metropolitan Property and Casualty Insurance Company to defend the lawsuit you have filed in the United States District Court for the Western District of Wisconsin against William Black. I am in receipt of the Waiver of Service Summons form, and accept service upon Mr. Black as of today's date. Accordingly, we have 60 days from today's date to file a Motion under Rule 12 of the

Federal Rules of Civil Procedure and/or an Answer to your  
Complaint.

1. Section 801.11

In support of his assertion that the court can exercise jurisdiction over defendants, plaintiff cites Wis. Stat. § 801.11(1)(d), which provides that a court “having jurisdiction of the subject matter *and grounds for personal jurisdiction as provided in § 801.05* may exercise personal jurisdiction over a defendant . . . by serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment of by law to accept service of summons for defendants.” (Emphasis added). Plaintiff is misreading the statute if he thinks that service can create grounds for personal jurisdiction. Section 801.11 simply provides the means of *exercising* personal jurisdiction where it exists; it does not provide an independent basis for *establishing* the existence of personal jurisdiction. As the text makes clear, the provision does not apply unless a court finds that it has subject matter jurisdiction “and grounds for personal jurisdiction as provided in § 801.05 [Wisconsin’s long-arm statute].” Wis. Stat. § 801.11(1)(d).

2. Local presence

Plaintiff argues that by retaining in-state counsel, defendants have become part of an

association with a local presence. He notes that “jurisdiction over the person” includes jurisdiction over “any natural person, partnership, association and body politic and corporate.” Wis. Stat. § 801.03(2). If plaintiff’s suit were against defendants and their counsel and he could show that they constitute an “association,” his argument might carry some weight; however, defendants’ counsel is not a party to this suit.

Moreover, because the “association” between defendants and their local attorney is not a natural person, domestic corporation or limited liability company, plaintiff would need to show that the association engaged in substantial and not isolated activities in Wisconsin if he is to satisfy the act’s local presence provision. Wis. Stat. § 801.05(1). The only evidence on the record of collaborative activity between defendants and their attorney is the receipt of a waiver of service summons and the sending of a response letter indicating defendants’ intent to waive service. Clearly, these two facts do not meet the substantial activities standard. On the facts presently before the court, plaintiff’s local presence associational theory is unpersuasive.

### 3. In-state service of process on an agent

It is not clear whether plaintiff meant to argue that if Caya were personally served in his capacity as defendants’ agent, subsection (1)(a), which extends personal jurisdiction to natural persons served within the state, would confer personal jurisdiction over defendants.

To the extent plaintiff raised this argument, it is unsuccessful; it depends upon a misinterpretation of the statute. Subsection (1)(a) extends the long-arm statute to defendants who are physically present in the state when served. Cf. Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 610 (1990) (“Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are *physically present* in the State.”) (emphasis added). A party’s agent is not a substitute for his “natural person.”

Even if the statute were not clear, plaintiff has not shown defendants waived their objection to personal jurisdiction. Waiving service of a summons does not waive any objection to the exercise of personal jurisdiction. Fed. R. Civ. P. 4(d)(1). Because plaintiff has not shown that defendant Black comes within the scope of the Wisconsin long-arm statute, plaintiff cannot establish personal jurisdiction over him in this case. Accordingly, defendant Black will be dismissed from this case.

B. Defendant Metropolitan Property and Casualty Insurance Company

Defendants argue that if the court concludes that defendant Black is not subject to personal jurisdiction then plaintiff’s claim against defendant Metropolitan must also fail. That claim arises under the Wisconsin direct action statute, Wis. Stat. § 632.24, which provides injured parties with a direct cause of action against a negligent party’s insurance

provider. Defendants contend that when the insured is no longer a party to the suit, Wis. Stat. § 631.01 limits the direct action statute to claims seeking recovery under a policy delivered or issued for delivery in Wisconsin.

Defendants are correct. Section 631.01(1) limits the application of chapter 632 to “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,” with certain exceptions not applicable in this case. As the Court of Appeals for the Seventh Circuit has recently noted,

Wisconsin permits a direct action regardless of whether the insured is a party, but only if the insurance policy was issued or delivered in Wisconsin, which neither of these policies was. Otherwise the direct action can be maintained only if and so long as the insureds remain parties.

Wild v. Subscription Plus, Inc., 292 F.3d 526, 532 (7th Cir. 2002) (citing Kenison v. Wellington Ins. Co., 218 Wis. 2d 700, 710, 582 N.W.2d 69, 73 (1998)) (other citations omitted). Because defendant Black is no longer a party to this suit and it is uncontested that the policy on which plaintiff seeks recovery against defendant Metropolitan was not delivered or executed for delivery in Wisconsin, defendant Metropolitan will be dismissed from this action.

ORDER

IT IS ORDERED that defendants William J. Black and Metropolitan Property and Casualty Insurance Company's motion to dismiss is GRANTED and this action is DISMISSED without prejudice.

Entered this 23rd day of May, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge