

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 94-2062

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**COMMERCIAL FINANCIAL
CORPORATION,**

Plaintiff-Appellant,

v.

**TAYLOR MC CAFFREY,
a partnership, and
WALTER J. KEHLER,**

Defendants-Respondents,

**CONFEDERATED GROUP, INC.,
and JAMES E. ROSENHEIMER,**

Defendants.

APPEAL from a judgment of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. The issue on appeal is whether the trial court obtained long-arm personal jurisdiction over Taylor McCaffrey, a Canadian law firm, and one of its attorneys, Walter J. Kehler (Taylor McCaffrey), pursuant to § 801.05(1)(d), STATS. We agree with the trial court's ruling that Taylor McCaffrey's activities in Wisconsin were isolated and not substantial and therefore were insufficient to confer personal jurisdiction.¹ We therefore affirm the judgment dismissing the complaint of Commercial Financial Corporation (CFC) against Taylor McCaffrey.

FACTS

CFC is a Wisconsin corporation engaged in the business of commercial lending. Confederated Group, Inc. (Confederated) is a Wisconsin corporation which provides financing on a wholesale basis to commercial lenders. In 1993, CFC sought to obtain \$250,000,000 of commercial lending from Confederated. These negotiations resulted in an agreement whereby Confederated orally agreed to provide such financing to CFC. This agreement was confirmed in writing by James Rosenheimer, the president of Confederated.

¹ CFC named Taylor McCaffrey and Kehler as separate defendants. Unless the context requires otherwise, we consider Taylor McCaffrey and Kehler as a single entity for purposes of this decision and we will refer to them as "Taylor McCaffrey."

Throughout the negotiations with CFC, Rosenheimer indicated that Walter Kehler of Taylor McCaffrey was representing Confederated in coordinating the transfer of funds to CFC. Taylor McCaffrey is a forty-five lawyer Canadian firm with offices in Winnipeg, Manitoba, and satellite offices in the towns of Gimli and LaBroquerie, Manitoba. No member of the Taylor McCaffrey firm is licensed to practice in Wisconsin.

Relying on this agreement, CFC solicited and entered into negotiations with numerous third parties who were seeking funding for their individual commercial projects. In December 1993, CFC's president began to question whether Confederated would actually deliver the promised funds. CFC contacted Rosenheimer about this concern. Rosenheimer indicated that Kehler was the most knowledgeable about the matter and that he would obtain confirmation of the transfer commitment from Kehler.

On December 23, 1993, a CFC representative went to Rosenheimer's Milwaukee office to obtain the confirmation. While the representative was there, Rosenheimer placed a telephone call to Kehler at Taylor McCaffrey and relayed CFC's confirmation request. Shortly after the telephone conversation, a facsimile transmission was sent to Rosenheimer's office from Kehler confirming that the funds would be available. The letter stated:

As attorney for Confederated Group Inc., I wish to confirm that arrangements have now been settled whereby Confederated Group Inc. will cause funds to be transferred to Commercial Financial Corporation Inc., on or before January 20, 1994. These funds will

be in a minimum amount of 100 million USD. They will be for the purpose of providing project funding.

After receiving this confirmation, CFC finalized arrangements with numerous clients to loan a total of \$98 million. However, CFC never received the funds from Confederated.

On February 21, 1994, CFC initiated this action alleging breach of contract and false representation against Confederated, Rosenheimer, Taylor McCaffrey and Kehler. Taylor McCaffrey brought a motion challenging the trial court's personal jurisdiction under Wisconsin's long-arm statute, § 801.05, STATS.² In a supporting affidavit, Kehler stated that he had made three or four prior visits to Wisconsin. Two of these visits occurred in 1993 and involved consultations with Rosenheimer concerning matters unrelated to the instant case. Kehler also stated that the legal services which he provides to clients from other jurisdictions relate to businesses or investments in Manitoba in which the client is involved. A separate affidavit by a member of Taylor McCaffrey's management committee stated: "Taylor McCaffrey has not at any time solicited or conducted legal service activities in the State of Wisconsin." The affidavit further stated that Taylor McCaffrey's representation of any Wisconsin clients was limited to legal matters pertaining to Manitoba-related corporations, assets or events.

² Summary judgment was ultimately granted in favor of CFC against Confederated and Rosenheimer. That matter is not before us on this appeal.

Taylor McCaffrey filed a brief in support of its motion to dismiss. In this brief, Taylor McCaffrey argued that the trial court did not have personal jurisdiction under § 801.05(1)(d), STATS., which requires that the person over whom jurisdiction is sought must be engaged in “substantial and not isolated activities” in Wisconsin. In addition, Taylor McCaffrey contended that jurisdiction did not lie under subsec. (4) of the statute entitled “Local injury; foreign act.” Finally, Taylor McCaffrey contended that CFC's attempt at personal jurisdiction violated Taylor McCaffrey's due process rights. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

CFC did not present any evidence or affidavits in response to Taylor McCaffrey's motion. Nor did its brief against Taylor McCaffrey's motion expressly oppose Taylor McCaffrey's arguments under § 801.05(1)(d) & (4), STATS. Instead, CFC argued that the trial court had personal jurisdiction pursuant to subsec. (5)(a), which provides, in part, that jurisdiction lies in an action which “[a]rises out of a promise, made anywhere to the plaintiff ... by the defendant to perform services within this state”

The trial court rejected CFC's argument for personal jurisdiction pursuant to § 801.05(5)(a), STATS. In addition, the court agreed with Taylor McCaffrey's argument against personal jurisdiction under subsec. (1)(d) of the statute.³ In light of these holdings, the court was not required to address Taylor

³ Although the trial court had already ruled that personal jurisdiction did not exist under § 801.05, STATS., the court nonetheless went on to also address Taylor McCaffrey's due process argument. Although we need not address this aspect of the court's ruling because we agree with the court's threshold ruling, we commend the court's thoroughness. This procedure avoided the possibility of our having to remand on the due process question if we had disagreed with the court's threshold jurisdictional ruling.

McCaffrey's further argument against jurisdiction under subsec. (4) of the statute. CFC appeals.

DISCUSSION

We begin by defining the perimeters of this appeal. CFC does not renew its trial court argument that personal jurisdiction lies under § 801.05(5)(a), STATS., dealing with a promise made to perform a service within this state. Therefore, we do not address that aspect of the case, although the bulk of the trial court's opinion was devoted to this issue since it was the primary basis for CFC's jurisdictional argument.

Instead, CFC argues that personal jurisdiction lies pursuant to the "Local presence or status" provisions of § 801.05(1)(d), STATS., and the "Local injury; foreign act" provisions of subsec. (4). However, we will not address the latter subsection. The trial court's decision did not address this point, and CFC never asserted this subsection as a basis for jurisdiction. Rather, Taylor McCaffrey asserted it as a basis against jurisdiction.

Therefore, we limit our consideration on this appeal to whether personal jurisdiction over Taylor McCaffrey lies pursuant to the provisions of § 801.05(1)(d), STATS.⁴ This subsection requires that, in order for jurisdiction to attach, the person served be "engaged in substantial and not isolated activities within this state"

⁴ Technically, we could also hold CFC to waiver on this issue since, like the claim under § 801.05(4), STATS., CFC did not assert this ground as a basis for jurisdiction. However, since the trial court substantively addressed this issue, we chose to address it.

Personal jurisdiction is a question of law that we review independently. *Brown v. LaChance*, 165 Wis.2d 52, 65, 477 N.W.2d 296, 302 (Ct. App. 1991). In a contest of personal jurisdiction under a long-arm statute, the burden is on the party claiming jurisdiction over a foreign corporation. *Schmitz v. Hunter Mach. Co.*, 89 Wis.2d 388, 396, 279 N.W.2d 172, 175 (1979). Statutes regulating long-arm jurisdiction are to be given a liberal construction in favor of the exercise of jurisdiction. *Id.* However, before a party will be subject to personal jurisdiction in Wisconsin, we must conclude that its contacts with Wisconsin were sufficient to confer jurisdiction under Wisconsin's long-arm statute and that such application of the statute does not violate due process requirements. See *id.* at 396, 403, 279 N.W.2d at 176, 179; *Zerbel v. H.L. Federman & Co.*, 48 Wis.2d 54, 65-66, 179 N.W.2d 872, 878-79 (1970).

Section 801.05, STATS., codifies the minimum contacts jurisdictional test to ensure that a nonresident's due process rights are not violated, as required by *International Shoe Co.*, 326 U.S. at 316-17. See *Capitol Fixture & Woodworking Group v. Woodma Distribs., Inc.*, 147 Wis.2d 157, 161, 432 N.W.2d 647, 649 (Ct. App. 1988). CFC argues that Wisconsin has jurisdiction over Taylor McCaffrey under § 801.05(1)(d).⁵ To determine whether

⁵ Section 801.05, STATS., reads, in part, as follows:

Personal jurisdiction, grounds for generally. 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:

jurisdiction exists under this statute, we must look to the nature of Taylor McCaffrey and Kehler's activities in Wisconsin and assess whether they constituted "substantial and not isolated activities" within the meaning of the statute in light of the requirements of due process. *See Nagel v. Crain Cutter Co.*, 50 Wis.2d 638, 646, 184 N.W.2d 876, 880 (1971).

In *Zerbel*, the supreme court adopted an analytical framework for determining the substantiality of contacts for due process purposes, and the court has found that framework equally applicable in cases in which the general jurisdictional provision, § 801.05(1), STATS., is to be applied. *See Nagel*, 50 Wis.2d at 648, 184 N.W.2d at 881. The factors that a reviewing court should consider are: (1) the quantity of contacts with Wisconsin, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action with those contacts, (4) the interest of Wisconsin in the action, and (5) the convenience to the parties. *Id.*; *see also Milwaukee County v. Hartford Casualty Co.*, 151 Wis.2d 463, 471, 444 N.W.2d 455, 458 (Ct. App. 1989). When considering these factors, we properly weigh each one and consider them all in relation to each other, and the essential question will be the reasonableness of subjecting a nonresident defendant to Wisconsin litigation. *See Nagel*, 50 Wis.2d at 648, 184 N.W.2d at 881.

(..continued)

....

- (d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

Numerous cases have considered whether a nonresident defendant has engaged in “substantial and not isolated activities” under § 801.05(1)(d), STATS., and the results have necessarily varied depending upon the facts of a given case. See *Enpro Assessment Corp. v. Enpro Plus, Inc.*, 171 Wis.2d 542, 549-51, 492 N.W.2d 325, 328-29 (Ct. App. 1992). We limit our discussion to those cases which we see as relevant to the facts of this case.

In *Hartford Casualty*, 151 Wis.2d at 474, 444 N.W.2d at 459, we held that a foreign insurance company was engaged in substantial and not isolated activities within Wisconsin because the company was licensed to sell in Wisconsin and maintained a business office in Wisconsin.

In *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 159 Wis.2d 230, 234, 464 N.W.2d 52, 54 (Ct. App. 1990), we observed that personal jurisdiction over a foreign corporation could not be premised on activities which occurred two years prior to the commencement of the action because § 801.05(1)(d), STATS., requires that the “substantial activities” forming the basis for jurisdiction must be concurrent with “when the action is commenced.”⁶

In the present case, Taylor McCaffrey's personal jurisdiction objection triggered CFC's burden to present sufficient facts to establish jurisdiction. See *Schmitz*, 89 Wis.2d at 396, 279 N.W.2d at 175. Ironically,

⁶ However, in *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 159 Wis.2d 230, 464 N.W.2d 52 (Ct. App. 1990), we concluded that jurisdiction nonetheless existed under § 801.05(5)(d), STATS., because additional facts showed that the parties engaged in a “continuing obligations” relationship, *id.* at 236-37, 464 N.W.2d at 55-56, which required the Wisconsin party to ship goods to the nonresident party upon the latter's order. *Id.* at 234-37, 464 N.W.2d at 54-56.

however, it was Taylor McCaffrey, not CFC, which supplied the only evidence bearing on the “substantial contacts” jurisdictional question.

The evidence reveals that no Taylor McCaffrey attorney is licensed to practice in Wisconsin and that Taylor McCaffrey does not solicit legal business in Wisconsin. To the extent Taylor McCaffrey provides legal services to Wisconsin clients, such is limited to the clients' actual or potential business or investment interests in Manitoba. The evidence further reveals that Kehler, on behalf of Taylor McCaffrey, made only three or four prior visits to Wisconsin. Two of these trips involved consultations with Rosenheimer on matters unrelated to this case. However, the evidence does not reveal the nature of the other one or two trips.

This meager record does not permit us to conclude that Taylor McCaffrey's Wisconsin contacts were “substantial and not isolated” within the meaning of § 801.05(1)(d), STATS. First, while not necessarily dispositive of the issue, the evidence shows that Taylor McCaffrey holds no special license to practice in Wisconsin, does not maintain any business office in Wisconsin, does not solicit business in Wisconsin, and its advice to Wisconsin clients pertains to Canadian business or investment interests.⁷ Second, and likely controlling, the few contacts demonstrated by the record all occurred before the commencement of this action—a fact which fails to satisfy the statute. See *Sub-Zero Freezer Co.*,

⁷ Jurisdiction is not defeated merely because a particular business does not have territorial presence in a state in which jurisdiction is sought and that the business need only purposefully direct its commercial efforts towards the state's residents. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). However, in such a case, the minimum contacts test must still be satisfied by the party claiming jurisdiction.

159 Wis.2d at 234, 464 N.W.2d at 54. Finally, and definitely controlling, is the failure of CFC to provide the necessary details regarding these contacts such that we can meaningfully apply the *Nagel* factors and evaluate the substantiality of these contacts as required by § 801.05(1)(d).⁸ This is especially so as to the nature and quality of the contacts, the source and connection of the contacts with the instant cause of action, and the convenience to the parties. See *Nagel*, 50 Wis.2d at 648, 184 N.W.2d at 881.⁹

Again, it was CFC's burden to demonstrate such facts, and CFC cannot complain that Taylor McCaffrey's evidence on these matters was lacking. CFC had the burden and the opportunity to fill these voids by showing that Taylor McCaffrey solicited, created, nurtured or maintained continuing business relationships with Wisconsin either through personal contacts or long-distance communications. See *Stauffacher v. Bennett*, 969 F.2d 455, 457 (7th Cir.), cert. denied, 113 S. Ct. 814 (1992). This it failed to do.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.

⁸ We suspect this is so because, in the trial court, CFC focused on the provisions of § 801.05(5)(a), STATS., as the basis for its jurisdictional claim. As noted, CFC does not pursue this argument on appeal.

⁹ CFC also contends that we should consider the “occasions when [Kehler] took advantage of the benefits of Wisconsin's highway system en route to other destinations, trips respondent neither describes nor enumerates.” However, CFC fails to cite any authority (and we are unaware of such) which holds that the mere use of a state's transportation system is a relevant or persuasive factor in a “substantial contacts” analysis. Moreover, CFC's observation that Taylor McCaffrey's failure to more fully describe or enumerate its trips to Wisconsin overlooks the fact that CFC, not Taylor McCaffrey, has the burden of proof in this matter.