COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2422
00-0247

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

CHARLES E. FLYNN AND JEANANN FLYNN,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

ARCTIC EXPRESS, THE CONNECTICUT SPECIALTY INSURANCE COMPANY, FRANCES C. LINDSEY, WILLIAM RANDECKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AND FORTIS INSURANCE COMPANY,

DEFENDANTS,

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

NO. 00-0247

CARLA RANDECKER AND WILLIAM A. RANDECKER,

PLAINTIFFS-RESPONDENTS,

GOODYEAR TIRE & RUBBER CO., AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

SUBROGATED-PLAINTIFFS,

V.

FRANCES C. LINDSEY, ARCTIC EXPRESS INC., AND THE CONNECTICUT INDEMNITY CO. D/B/A CONNECTICUT SPECIALTY INS. CO. D/B/A SECURITY INS. CO. OF HARTFORD,

DEFENDANTS,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA A/K/A THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Reversed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 EICH, J. This is a consolidated appeal in two personal injury actions arising out of a single automobile accident. Plaintiffs Charles E. and Jeanann Flynn and Carla Randecker were passengers in a car driven by Carla's husband, William, when it collided with a truck driven by defendant Frances

Lindsay, an employee of the Arctic Express company. In addition to suing Lindsay and Arctic Express, the Flynns and Randeckers proceeded directly against the defendants' insurers. The two actions were consolidated for trial.

¶2 The trial court granted the plaintiffs' motions for default judgment against one of the insurers, the Insurance Company of the State of Pennsylvania (ISOP), for its failure to timely answer the complaints. ISOP appeals, arguing, among other things, that the judgments cannot stand because the complaints fail to state claims upon which relief can be granted. We agree and reverse the judgments in both actions.

¶3 It is well-settled law that a default judgment must have as its underpinning a complaint stating a claim upon which relief can be granted. *See* ***Davis v. City of Elkhorn***, 132 Wis.2d 394, 398-99, 393 N.W.2d 95 (Ct. App. 1986).

> Just because a party fails to answer within a prescribed time does not automatically entitle the complainant to judgment absent excusable neglect. The complainant must make two preliminary showings. First, the moving party must show that the complaint was served and filed in the manner and within the time prescribed by statute. Second, the complaint must contain allegations sufficient in law to state a claim for relief against a defendant.

Id. at 398-99, *cited sources omitted.*

¶4 The default judgment in this case focused only on whether ISOP's failure to answer the complaints was the result of excusable neglect; and the trial court ruled that it was not. We need not consider that question, however—or the

other issues raised by ISOP—because we are satisfied that both complaints fail to state a claim under the direct-action statute.[1]

¶5 In ***Decade's Monthly Fund v. Whyte & Hirschboeck***, 173 Wis.2d 665, 678, 495 N.W.2d 335 (1993), the supreme court discussed the requirements for commencing and maintaining a direct action against an insurer:

> Section 803.04(2)(a) sets forth the standards for bringing a direct action against an insurer in a negligence action. Specifically, the statute provides that before being joined as a defendant [the insurer] must meet at least one of the following criteria: (1) have an interest in the outcome of the controversy adverse to the plaintiff or any of the parties; (2) assume or reserve the right to control the prosecution, defense or settlement of the action; (3) agree to prosecute or defend said action; or (4) agree to pay the defendant's litigation costs.

There is, in addition, a "threshold" requirement that, in order for a direct action to be commenced against an insurer, the policy in question must have been delivered or issued for delivery in the State of Wisconsin. ***Kenison v. Wellington Ins.***, 218 Wis. 2d 700, 705-06, 582 N.W.2d 69 (1998).[2]

---

[1] The issue—whether the allegations of the complaints state a claim against ISOP—is a question of law which we review de novo. ***Dull v. Advance MEPCO Central Lab***, 151 Wis. 2d 524, 528, 444 N.W.2d 463 (Ct. App. 1989).

[2] This limitation does not leave injured parties without avenues of redress against out-of-state insurers, however, for

> [i]f the accident, injury or negligence occurs in Wisconsin, and the insurance policy was issued or delivered outside Wisconsin, although a plaintiff may not pursue the insurer directly because of the § 631.01(1), Stats., limitation, he or she may *join* the insurer as a proper party defendant provided the insured is also a party.

Kenison v. Wellington Ins., 218 Wis. 2d 700, 710, 582 N.W.2d at 73 (emphasis in original).

¶6 The Randeckers' complaint contains the following allegations relating to ISOP:

> Defendant, the Insurance Company of the State of Pennsylvania (hereinafter, "Insurance of Pennsylvania") is a Pennsylvania corporation with its principal place of business at 70 Pine Street, New York, New York 10270. Insurance of Pennsylvania engages in the business of, among other things, providing excess liability insurance to its policy holders. Insurance of Pennsylvania is authorized to and engages in the business of providing excess liability insurance within the State of Wisconsin.
>
> Insurance of Pennsylvania was a liability insurer covering Arctic and Lindsey against liability imposed by law for incidents arising on September 16, 1995. Insurance of Pennsylvania is named as a party defendant pursuant to Section 632.24 and Section 803.04(2) Wis. Stats.

The Flynns' allegations are similarly brief:

> The Defendant, The Insurance Company of the State of Pennsylvania is incorporated in the State of Pennsylvania with its principal place of business at 70 Pine Street, New York, New York, 10270. This Defendant is the liability insurer of the Defendants, Arctic Express and Frances C. Lindsey.

¶7 As may be seen, neither complaint alleges that ISOP either issued or delivered a policy of insurance to Arctic Express or Lindsey in Wisconsin. In fact, both complaints affirmatively acknowledge that ISOP is incorporated in Pennsylvania and has its principal place of business in New York City. Nor are there any allegations in either complaint that any of the insureds received delivery of the ISOP policy in the state of Wisconsin. Indeed, as the complaints state, Lindsay was a resident of New York at the time of the accident, and Arctic Express has its principal place of business in Ohio. It is true that both Arctic Express and ISOP are alleged to conduct some business in Wisconsin, but, as indicated, neither complaint alleges issuance or delivery of the Arctic Express

policy in Wisconsin. On the contrary, the allegations suggest quite strongly that the policies were issued in either New York or Ohio.

¶8 We conclude, therefore, that neither the Randeckers' nor the Flynns' complaints state a cause of action under the direct action statute and the cases decided thereunder.[3]

By the Court.—Judgments reversed.

Not recommended for publication in the official reports.

[3] Because we consider this issue dispositive, we need not consider the other arguments put forth by the parties.