COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2010

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 an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

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

¶1 DYKMAN, P.J. David Rasmussen appeals from an order dismissing the Japan-based Nissan Motor Company (Nissan Japan) from Rasmussen's class-action conspiracy and anti-trust action against various local and foreign automobile companies.[1] Rasmussen contends that Nissan Japan is subject to personal jurisdiction in Wisconsin under WIS. STAT. § 801.05 (2007-08),[2] and that the exercise of that jurisdiction comports with Due Process principles. Alternatively, Rasmussen argues that the circuit court erred in limiting the scope of jurisdictional discovery, thus preventing Rasmussen from obtaining documents he needed to establish personal jurisdiction over Nissan Japan. We conclude that Nissan Japan is not subject to personal jurisdiction in Wisconsin and that we have no basis to disturb the circuit court's discovery order. Accordingly, we affirm.

Background

¶2 The following facts are taken from the jurisdictional hearing materials. On September 18, 2003, David Rasmussen filed a class action anti-trust suit against various automobile companies, including Nissan Japan and its wholly

[1] David Rasmussen and Lisa Lindsay are the named plaintiffs in this class action. For ease of reading, we frame the plaintiffs' arguments as Rasmussen's.

Additionally, because this appeal relates only to Wisconsin's personal jurisdiction over Nissan Japan based on the actions of Nissan North America, we need not discuss the other named defendants.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

owned subsidiary Nissan North America, for conspiring to maintain new car prices in the United States at significantly higher levels than prices in Canada for the same vehicles. Rasmussen alleged that, as part of this conspiracy, the defendants arranged for United States dealers to not honor warranties on cars imported from Canada, to prevent the lower priced Canadian Nissans from being exported to the United States. Rasmussen claimed that the circuit court had personal jurisdiction over all of the defendants because they all had "directly or through their subsidiaries, affiliates or agents," conducted business in Wisconsin, based on Nissan dealerships throughout the state.

¶3 On December 22, 2003, Nissan Japan filed a motion to dismiss for lack of personal jurisdiction. Nissan Japan argued that it had no contacts with Wisconsin and thus was not subject to personal jurisdiction here. Following a motion hearing, the court denied Nissan's motion to dismiss for lack of personal jurisdiction without prejudice, pending a period of jurisdictional discovery.

¶4 Rasmussen then moved the court to compel discovery from Nissan Japan. On June 24, 2004, the circuit court ordered Nissan North America to respond to Rasmussen's discovery requests relating to whether the court had jurisdiction over Nissan Japan. It also appointed a Special Master to resolve any future disputes regarding discovery. The court set a discovery schedule, ordering Rasmussen to serve his discovery questions regarding Nissan Japan on Nissan North America.

¶5 Following arguments, a hearing and a telephonic conference, the Special Master issued an order regarding the parties' discovery disputes. The Special Master granted Rasmussen's request to depose the president of Nissan Japan. He ordered Nissan Japan's president to appear in person, at Nissan Japan's

chosen location, for a deposition to last up to three hours. He also granted Rasmussen's requests to depose a corporate representative of Nissan Japan on certain warranty issues, and ordered Nissan Japan to produce proposed stipulations to respond to Rasmussen's requests to depose a corporate representative about contracts between Nissan Japan and Nissan North America. Finally, the Special Master gave the parties the option of reaching stipulations in lieu of depositions.

¶6 On July 14, 2005, the Special Master ordered the parties to prepare a joint report on any stipulations they had reached. The parties then entered a joint written report, which stated that Rasmussen did not seek any further discovery from Nissan Japan at that time.

¶7 The circuit court held a jurisdictional hearing on August 14, 2006. At the conclusion of the hearing, the court found that Wisconsin did not have personal jurisdiction over Nissan Japan, and that exercising jurisdiction over Nissan Japan would violate Due Process. Rasmussen appeals.

Standard of Review

¶8 Whether the facts of a case support a court's exercise of personal jurisdiction over a defendant under WIS. STAT. § 801.05 is a question of law that we review de novo. *See* ***Kopke v. A. Hartrodt S.R.L.***, 2001 WI 99, ¶10, 245 Wis. 2d 396, 629 N.W.2d 662. The question of whether exercising personal jurisdiction over a defendant violates Due Process is also a question of law that we review de novo. *See* ***Landreman v. Martin***, 191 Wis. 2d 787, 798, 530 N.W.2d 62 (Ct. App. 1995). We will uphold the circuit court's findings of historical fact unless those findings are clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

Discussion

¶9 Rasmussen argues that Nissan Japan is subject to personal jurisdiction in Wisconsin under WIS. STAT. § 801.05 and that exercising jurisdiction over Nissan Japan comports with Due Process principles. Alternatively, Rasmussen asserts that the circuit court erroneously exercised its jurisdiction in limiting Rasmussen's access to discovery materials, preventing Rasmussen from establishing personal jurisdiction over Nissan Japan. We reject each of these contentions, and affirm the circuit court's order dismissing Nissan Japan from this action for lack of personal jurisdiction.

¶10 To determine whether a foreign corporation is subject to personal jurisdiction in Wisconsin, we apply a two-step inquiry: First, whether the defendant is subject to jurisdiction under WIS. STAT. § 801.05; next, whether exercising that jurisdiction comports with Due Process principles. ***Kopke***, 245 Wis. 2d 396, ¶8. We liberally construe § 801.05 in favor of jurisdiction, but the plaintiff bears the burden of showing that the statute establishes jurisdiction over the defendant. ***Kopke***, 245 Wis. 2d 396, ¶10.

¶11 We begin, then, with an analysis of whether Nissan Japan is subject to personal jurisdiction under WIS. STAT. § 801.05. Rasmussen asserts that Nissan Japan is subject to personal jurisdiction under two provisions of the statute: §§ 801.05(1)(d) and (4)(a). Section 801.05(1)(d) provides that Wisconsin has personal jurisdiction "[i]n any action whether arising within or without this state, against a defendant who when the action is commenced …. [i]s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise." Under this section, a defendant is subject to *general jurisdiction* in Wisconsin based on its contacts with the state,

whether or not the action arises out of those contacts. *See* ***Insolia v. Philip Morris Inc.***, 31 F. Supp. 2d 660, 668 (W.D. Wis. 1998) (explaining that "[w]hen general jurisdiction exists, a nonresident defendant may be sued in the state regardless of the subject matter of the lawsuit," and that Wisconsin has general jurisdiction over nonresident defendants through § 801.05(1)(d)). Section 801.05(4)(a), on the other hand, allows for *specific jurisdiction* over a defendant:

> In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:
>
> (a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or
>
> (b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

Section 801.05(4)(a), then, authorizes Wisconsin courts to exercise specific jurisdiction over nonresidents under certain circumstances; that is, personal jurisdiction over the defendant for claims arising out of the defendant's particular contacts with the state. *See* ***Insolia***, 31 F. Supp. 2d at 671 (explaining specific personal jurisdiction).

¶12 Rasmussen argues first that Nissan Japan is subject to general jurisdiction under WIS. STAT. § 801.05(1)(d), based on the acts of its wholly owned subsidiary, Nissan North America. Rasmussen points to the definition of "defendant" for jurisdictional purposes in WIS. STAT. § 801.03(1), which includes both the named defendant "and where … acts of the defendant are referred to, the reference attributes to the defendant any person's acts for which acts the defendant is legally responsible." Rasmussen argues that this definition of "defendant" incorporates agency principles into § 801.05(1)(d). Thus, Rasmussen asserts,

when a principal's agent is subject to general jurisdiction in Wisconsin under § 801.05(1)(d) based on having engaged in "substantial and not isolated" activities in Wisconsin, the acts of the agent subject the principal to general jurisdiction as well.[3] In support, Rasmussen cites ***Schroeder v. Raich***, 89 Wis. 2d 588 (1979); ***Pavalon v. Fishman***, 30 Wis. 2d 228, 140 N.W.2d 263 (1966); and ***Pavlic v. Woodrum***, 169 Wis. 2d 585, 486 N.W.2d 533 (Ct. App. 1992).

¶13 In ***Pavalon***, 30 Wis. 2d at 231-35, the supreme court addressed whether an out-of-state corporation was subject to specific jurisdiction in Wisconsin based on the acts of its brokerage firm. A partner from the brokerage firm Divine & Fishman had telephoned Pavalon in Wisconsin from Illinois, and arranged for Pavalon to purchase $50,000 of bonds issued by Sulray, Inc. ***Id.*** at 233. In a lawsuit arising from that transaction, Pavalon asserted that Wisconsin had personal jurisdiction over Sulray because Divine & Fishman had acted as

[3] Nissan Japan contends that Rasmussen may not argue on appeal that Nissan North America is Nissan Japan's agent, because he did not raise that argument in the circuit court. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-31, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to timely raise argument forfeits the argument on appeal). Nissan Japan argues that Rasmussen relied solely on an "alter ego" theory to "pierce the corporate veil" below, and may not now raise the alternate argument of establishing personal jurisdiction through an agency theory.

While we agree that Rasmussen relied primarily on the "alter ego" theory below, we do not agree that the agency theory was not raised. First, Rasmussen referenced the agency theory in his complaint by alleging that Nissan Japan acted either directly or through its agents in Wisconsin. While the parties argued primarily about whether the court should find jurisdiction based on piercing the corporate veil, they also touched on whether personal jurisdiction could be found through an agency relationship and some of the corresponding case law and statutes. The circuit court said that it had considered whether the court had personal jurisdiction over Nissan Japan based on piercing the corporate veil or "some other theory." Although the circuit court did not elaborate on the parties' agency argument, the issue was clearly before the court, and therefore Rasmussen has not forfeited that argument on appeal.

Finally, we agree that Rasmussen has abandoned his argument that Wisconsin has personal jurisdiction over Nissan Japan based on piercing the corporate veil. We therefore do not consider this argument further.

Sulray's agent in arranging the sale. ***Id.*** at 234-35. Sulray contested jurisdiction. ***Id.*** at 231-35.

¶14 The ***Pavalon*** court explained, first, that personal jurisdiction could only be asserted under WIS. STAT. § 262.05(5)(e) (1965),[4] which authorized personal jurisdiction over a non-resident defendant in an action "[r]elat[ing] to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred."[5] ***Pavalon***, 30 Wis. 2d at 232 & n.3. The court then said that the question of personal jurisdiction turned on whether Divine & Fishman had acted as Sulray's agent in the transaction, because the actions of Divine & Fishman would then be attributed to Sulray. ***Id.*** at 234-35. The court cited the jurisdictional definition of "defendant," which is identical to the definition in the current statute. *See* ***Pavalon***, 30 Wis. 2d at 235 n.7. The court then said that, because "[t]he general rule, in Wisconsin as well as elsewhere, is that brokers, whether employed for a single transaction or a series of transactions, are agents," Sulray was subject to personal jurisdiction in Wisconsin in the action arising out of Divine & Fishman's acts. ***Id.*** at 235.

¶15 We do not agree with Rasmussen that ***Pavalon*** stands for the proposition that a parent corporation may be subject to general jurisdiction under WIS. STAT. § 801.05(1)(d) based on the acts of its wholly owned subsidiary under

[4] WISCONSIN STAT. § 262.05 (1965) was Wisconsin's previous personal jurisdiction statute. It was renumbered to WIS. STAT. § 801.05 by Supreme Court order effective January 1, 1976. *See* Judicial Council Committee Note, 1974, 67 Wis. 2d at 592-96.

[5] The court rejected Pavalon's argument that there was personal jurisdiction under other subsections that required "injury to person or property," because Pavalon had not alleged any personal or property injury. ***Pavalon v. Fishman***, 30 Wis. 2d 228, 232, 140 N.W.2d 263 (1966).

an agency theory. First, ***Pavalon*** held only that the acts of the corporation's agent subjected the corporation to specific jurisdiction in that case; that is, the corporation was subject to personal jurisdiction for acts of its agent in an action arising from those acts, under the corresponding specific jurisdiction provision. Because only the issue of specific jurisdiction was before the court, it cited the jurisdictional definition of "defendant," encompassing a person's acts for which the defendant is responsible, in the context of explaining that the principal was subject to personal jurisdiction in an action arising out of the acts of the agent. The court did not discuss whether an agency relationship could subject a corporation to general jurisdiction. We therefore do not find ***Pavalon*** instructive on this point.

¶16 In ***Schroeder***, 89 Wis. 2d at 590-93, the supreme court addressed whether a partner was subject to general jurisdiction based on the acts of the partnership. Schroeder had filed suit against Raich, a non-Wisconsin resident, to recover on a promissory note Raich signed in purchasing land from Schroeder through a partnership, and Raich contested personal jurisdiction. ***Id.*** at 592. The jurisdictional hearing established that Raich held interests in two other properties in Wisconsin. ***Id.*** at 592-93. One of the properties was a store, owned by Raich and one of his partners. ***Id.*** The other property was also a store, but there were no other facts in the record as to the extent of Raich's interest in that store. ***Id.***

¶17 The supreme court held that because "each partner is the agent of his or her copartners for the purpose of the partnership business[,]…. Raich, a partner, may be said to be doing business in Wisconsin because the partnership does business in this state and partnership business is carried on in behalf of each partner." ***Id.*** at 595-96. The court said that "[a] reasonable inference from the record is that Raich engaged in continuous and systematic activities in Wisconsin

relating to the real estate whether he did so in person, by mail, by telephone or by agent." ***Id.*** at 596. Thus, the court concluded that "Raich was 'engaged in substantial and not isolated activities within' Wisconsin, within the meaning of [WIS. STAT. §] 801.05(1)(d)," and was subject to general jurisdiction. ***Id.***

¶18 ***Schroeder***, therefore, supports a finding of general jurisdiction over a partner based on the activities of a partnership. In ***Schroeder***, the court explained at length that the core of its decision to impute the actions of the partnership to the partner, thus establishing general jurisdiction under WIS. STAT. § 801.05(1)(d), was that the essence of a partnership relationship is that the partnership acts for the partners. Thus, when a partnership is engaged in substantial and not isolated activities in Wisconsin, the partners are necessarily engaged in those activities. A partnership, however, is fundamentally different from a corporation, where the subsidiary's acts are not generally imputed to the parent. *See* ***Insolia***, 31 F. Supp. 2d at 669 ("Courts begin with the presumption of corporate separateness. This presumption can be rebutted only if there is a basis for piercing the corporate veil and thus attributing the subsidiaries' torts to the parent." (citations omitted)). In contrast to ***Schroeder***, this case presents the question of whether the actions of a wholly owned subsidiary establish general jurisdiction over a parent corporation. ***Schroeder***, like ***Pavalon***, is not instructive on this point.

¶19 Finally, in ***Pavlic***, 169 Wis. 2d at 588, we addressed whether the acts of one corporate officer subjected another corporate officer to personal jurisdiction in Wisconsin. Woodrum had organized a corporation outside of Wisconsin, and served as its president. ***Id.*** His father was also a shareholder and served as vice president. ***Id.*** Woodrum's father wrote to Pavlic in Wisconsin to solicit his investment in the Woodrums' corporation, which ultimately led to the action in

that case. ***Id.*** at 588-89. Pavlic asserted that Wisconsin had personal jurisdiction over Woodrum based on Woodrum's father's acts. ***Id.*** We analyzed WIS. STAT. § 801.05(4) to determine whether Woodrum's father's acts established specific jurisdiction over Woodrum. ***Id.*** at 590-91. We concluded that there was no basis to find that Woodrum's father was acting on Woodrum's behalf, and therefore held that, as a matter of law, there was no agency relationship to support the court's exercise of jurisdiction over Woodrum. ***Id.*** at 591-92.

¶20 ***Pavlic***, then, establishes that an agency relationship may support a finding of specific jurisdiction over the principal under WIS. STAT. § 801.05(4)(a). It does not support Rasmussen's argument that the relationship between a parent and subsidiary corporation supports a finding of general jurisdiction over the parent under WIS. STAT. § 801.05(1)(d).

¶21 Instead, we agree with Nissan Japan that ***Insolia*** is persuasive on the issue of the circumstances under which a parent corporation is subject to general jurisdiction based on the acts of its subsidiary. In ***Insolia***, 31 F. Supp. 2d at 663, the United States District Court for the Western District of Wisconsin addressed whether the court had personal jurisdiction over a foreign parent corporation based on the acts of its domestic indirect subsidiary. The plaintiffs argued that the court had personal jurisdiction over the parent corporation because the subsidiary was either an "alter ego" or the agent of the parent. ***Id.***

¶22 The court first rejected the plaintiffs' argument that the court had general jurisdiction over the parent corporation under WIS. STAT. § 801.05(1)(d). ***Id.*** at 668-71. After finding that the facts did not support "piercing the corporate veil," and thus that the subsidiary was not the alter ego of the parent, the court explained that Wisconsin's long-arm statute does not support finding general

jurisdiction based on an agency theory. ***Id.*** at 668-69, 671. The court said that the only provision in Wisconsin's personal jurisdiction statute that supported finding personal jurisdiction based on an agency theory was WIS. STAT. § 801.05(4)(a), which authorizes a court to exercise specific jurisdiction over a defendant for an in-state injury if, in addition, "solicitation or service activities were carried on within this state by *or on behalf of* the defendant." ***Insolia***, 31 F. Supp. 2d at 671 (emphasis added). The court cited federal and Wisconsin case law, including ***Pavlic***, which supported finding specific jurisdiction over a parent corporation based on actions "on behalf of" the parent, as stated in § 801.05(4)(a), under an agency theory. ***Insolia***, 31 F. Supp. 2d at 671. The court concluded that "[n]o other provision in the statute supports the exercise of jurisdiction based on an agency theory," and that the plaintiffs' argument that the parent corporation was subject to general jurisdiction based on the wholly-owned subsidiary's substantial contacts in Wisconsin was therefore "incorrect." ***Id.***

¶23 We agree with ***Insolia***'s analysis, and therefore reject Rasmussen's argument that Wisconsin has general jurisdiction over Nissan Japan based on the theory that Nissan North America is Nissan Japan's agent.[6] Rasmussen has not

[6] Rasmussen cites to three prior cases from the United States District Court for the Eastern District of Wisconsin to support finding general jurisdiction based on an agency relationship: ***Hayeland v. Jaques***, 847 F. Supp. 630 (E.D. Wis. 1994), ***Brunswick Corp. v. Suzuki Motor Co., Ltd.***, 575 F. Supp. 1412 (E.D. Wis. 1983), and ***Handlos v. Litton Indus., Inc.***, 304 F. Supp. 347 (E.D. Wis. 1969). In response, Nissan Japan argues that ***Insolia v. Philip Morris Inc.***, 31 F. Supp. 2d 660 (E.D. Wis. 1998), a more recent case, has since recognized those cases as incorrectly stating the law, and that in any event, none of the cases Rasmussen cites turn on agency principles. In reply, Rasmussen asserts that a district court in the Western District of Wisconsin has no authority to overturn cases from district courts in the Eastern District.

We need not resolve which district case is controlling, as we are not bound by federal court interpretations of Wisconsin law. *See* ***Baldewein Co. v. Tri-Clover, Inc.***, 2000 WI 20, ¶10, 233 Wis. 2d 57, 606 N.W.2d 145. Instead, we follow the reasoning of ***Insolia*** because we conclude it is sound and more persuasive than the cases Rasmussen cites.

cited any Wisconsin case law, nor are we aware of any, supporting the exercise of general jurisdiction over a parent corporation based on the substantial contacts in Wisconsin of its wholly owned subsidiary, under an agency theory.[7] As ***Insolia*** explains, the corporate structure and corresponding presumption of separateness requires more than an agency theory to assert general jurisdiction over a parent corporation. We conclude, as did the court in ***Insolia***, that the only provision of our personal jurisdiction statute authorizing personal jurisdiction over a parent corporation based on an agency relationship with its subsidiary is WIS. STAT. § 801.05(4)(a), which allows for specific personal jurisdiction over a defendant based on an act of the defendant or an act "on behalf of the defendant."[8]

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[7] We recognize, as Rasmussen asserts, that ***Hayeland***, ***Brunswick*** and ***Handlos*** found that the parent-subsidiary relationship was sufficient to establish general jurisdiction over the parent under WIS. STAT. § 801.05(1)(d) as long as the subsidiary had substantial and not isolated contacts with Wisconsin. These cases were based on the theory that:

> It is against sound policy, when a corporation has grown so large, and it has entered into activities so various and so generally distributed, that it finds itself compelled to operate through many subsidiaries, doing nothing directly itself in carrying on its business, to permit it to enjoy exclusively the fruits of such subsidiary activity and to escape the concomitant responsibilities flowing therefrom.

Handlos, 304 F. Supp. at 350 (citation omitted). However, we conclude that ***Insolia*** states the better rule of law in light of corporate structure and our case law on Wisconsin's long-arm statute, and reiterate that the federal cases are not controlling. *See* ***Baldewein***, 233 Wis. 2d 57, ¶10.

[8] Because we conclude that WIS. STAT. § 801.05(1)(d) does not authorize general jurisdiction over a parent corporation based on the acts of its wholly owned subsidiary under an agency theory, we need not consider the parties' arguments over whether Nissan North America was an agent of Nissan Japan for general jurisdiction purposes.

Additionally, Rasmussen argues in his reply brief that Nissan Japan is subject to personal jurisdiction under WIS. STAT. § 801.05(1)(d) "wholly apart from agency principles," because Wisconsin consumers are third-party beneficiaries of the Nissan warranty. Rasmussen asserts that Nissan Japan is a party to those warranties, and Wisconsin consumers can enforce those warranties against Nissan Japan. We decline to address this argument for two reasons: first, Rasmussen argues it for the first time in reply, *see* ***Northwest Wholesale Lumber, Inc. v.*** (continued)

¶24 Next, Rasmussen argues that Nissan Japan is subject to specific jurisdiction under WIS. STAT. § 801.05(4). Section 801.05(4) authorizes a Wisconsin court to exercise specific jurisdiction over an out-of-state defendant under certain circumstances. First, § 801.05(4) requires that the action arise from an act or omission outside of Wisconsin which the plaintiff claims caused an injury to person or property within Wisconsin. Second, it requires that there were either solicitation or service activities in Wisconsin by or on behalf of the defendant, or that products manufactured by the defendant were consumed in Wisconsin in the ordinary course of trade. Here, the parties dispute whether Rasmussen has made a prima facie showing that this action arises out of an injury to person or property in Wisconsin based on an out-of-state action by Nissan Japan. We conclude that he has not.

¶25 Rasmussen argues that two out-of-state acts by Nissan Japan caused injury to Wisconsin consumers: (1) that Nissan Japan, along with Nissan North America, established higher prices for Nissan vehicles distributed in Wisconsin as compared to Nissan vehicles distributed in Canada; and (2) that Nissan Japan ratified a letter Nissan North America sent to Wisconsin dealers in February 2002 stating that Nissan North America did not authorize the Wisconsin Nissan dealers to perform warranty services on Nissan vehicles originally distributed in Canada, and therefore would not reimburse the dealers for those services. Nissan Japan responds, first, that the circuit court found that there was no act of Nissan Japan to place vehicles in Wisconsin at higher prices and that Rasmussen has pointed to no

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Anderson, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995); secondly, Rasmussen does not develop the argument sufficiently for us to respond to it, s*ee* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

evidence contradicting the court's finding. Nissan Japan then asserts that the circuit court found that Nissan Japan did not do any act to direct or encourage Wisconsin Nissan dealers to not honor warranties on cars distributed in Canada, based on the absence of any evidence that Nissan Japan ratified the letter from Nissan North America. Rasmussen replies that Nissan Japan authorized Nissan North America to respond to the letter on its behalf, and thus is responsible as a principal for the acts of its agent, and does not reply to Nissan Japan's argument that we should uphold the circuit court's factual finding that Nissan Japan did not act to set prices in Wisconsin at a higher level than the prices in Canada.

¶26 We agree with Nissan Japan that the circuit court's unchallenged factual findings preclude Wisconsin's exercise of specific jurisdiction under WIS. STAT. § 801.05(4). The threshold inquiry under § 801.05(4) is whether there was an out-of-state act by the defendant that caused injury to person or property within the state. In the circuit court, Rasmussen argued that Nissan Japan conspired with Nissan North America to set higher prices on Nissan vehicles in Wisconsin, and that Nissan Japan ratified Nissan North America's instruction not to honor warranties on vehicles distributed in Canada when it was copied on the February 2002 letter from Nissan North America to Wisconsin Nissan dealers. The circuit court found that Nissan Japan did not do any act to set higher prices in Wisconsin and did not ratify the letter from Nissan North America to Wisconsin Nissan dealers. Rasmussen does not challenge the circuit court's factual findings, arguing only that the circuit court should have inferred that Nissan Japan ratified the letter by directing Nissan North America to reply to the Wisconsin dealers and by not challenging Nissan North America's response. Whether a party has ratified the conduct of another, however, is a question of fact, and we will not disturb the trier of fact's finding on ratification unless that finding is not supported by the evidence

in the record. *See, e.g.*, ***Home Savings Bank v. Gertenbach***, 270 Wis. 386, 401-02, 71 N.W.2d 347 (1955). Accordingly, we conclude that Rasmussen has not met his burden of showing that jurisdiction is proper under WIS. STAT. § 801.05(4).[9]

¶27 Finally, Rasmussen contends that if we conclude, as we have done, that the facts of this case do not satisfy the requirements for exercising personal jurisdiction over Nissan Japan, then we should reverse and remand to allow Rasmussen to conduct jurisdictional discovery on Nissan Japan because the circuit court's discovery orders effectively denied Rasmussen a jurisdictional hearing. *See* ***Kavanaugh Restaurant Supply, Inc. v. MCM Stainless Fabricating, Inc.***, 2006 WI App 236, ¶¶8-11, 297 Wis. 2d 532, 724 N.W.2d 893 (plaintiff is entitled to an evidentiary hearing on a challenge to personal jurisdiction). Rasmussen argues that the circuit court's order for Rasmussen to direct his jurisdictional questions to Nissan North America rather than Nissan Japan, and the circuit court's stated belief that it could not order Nissan Japan to respond to discovery,[10] deprived Rasmussen of the opportunity to obtain information regarding Nissan Japan's activities in Wisconsin separate from Nissan North America. Rasmussen also contends that he was denied the opportunity to obtain any documents from Nissan Japan that would have established that Nissan Japan caused injury to Wisconsin consumers.

[9] Because we conclude that the statutory requirements for personal jurisdiction over Nissan Japan have not been met, we need not consider whether, if they were, exercising jurisdiction in this case would comport with Due Process principles.

[10] Rasmussen points to statements by the circuit court that it could not order Nissan Japan to do anything absent a finding of personal jurisdiction.

¶28 Nissan Japan responds that Rasmussen forfeited any argument as to discovery by failing to raise it below. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-31, 315 Wis. 2d 653, 761 N.W.2d 612. It argues that Rasmussen did not raise any evidentiary challenges before the Special Master or seek review in the circuit court; that the Special Master ordered the president of Nissan Japan to participate in a deposition with Rasmussen, but that Rasmussen opted instead to negotiate stipulations in lieu of a deposition; and that Rasmussen entered a final set of stipulations stating that Rasmussen did not seek any further discovery from Nissan Japan. Alternatively, Nissan Japan argues that Rasmussen has not developed an argument as to how the circuit court erroneously exercised its discretion in limiting the scope of jurisdictional discovery. *See* ***First Interstate Bank of Wisconsin-Southeast v. Heritage Bank & Trust***, 166 Wis. 2d 948, 952, 480 N.W.2d 555 (Ct. App. 1992) (whether to limit discovery is within the circuit court's discretion).

¶29 Rasmussen replies that he was not obligated to object to the circuit court's order before the Special Master or to move the circuit court for reconsideration of its discovery order. Rasmussen also contends that he reasonably declined to depose the president of Nissan Japan for three hours in Japan, per the Special Master's order, because the deposition would have been meaningless without any relevant documents. Rasmussen does not reply to Nissan Japan's argument that Rasmussen did not explain how the circuit court erroneously exercised its discretion in limiting discovery.

¶30 We conclude, first, that Rasmussen was not denied his right to an evidentiary hearing under ***Kavanaugh***. Rasmussen does not argue that the circuit court failed to hold a jurisdictional hearing, only that the court's order limiting the scope of jurisdictional discovery effectively denied him the right to a hearing.

This, however, is simply a repackaging of Rasmussen's discovery argument. If there was not reversible error with respect to limiting discovery, it follows that there is no basis to order a second jurisdictional hearing because of the same discovery limitation.

¶31 Next, we conclude that, even assuming *arguendo* that Rasmussen properly preserved his discovery arguments and the circuit court erroneously exercised its discretion in ordering Rasmussen to direct its jurisdictional questions to Nissan North America rather than Nissan Japan, that error was harmless. *See* ***Alswager v. Roundy's, Inc.***, 2005 WI App 3, ¶17, 278 Wis. 2d 598, 692 N.W.2d 333 (an error is harmless if there is no possibility it would have effected the outcome of the trial). The record reveals that, following the circuit court's initial discovery order, the parties argued their ongoing discovery disputes before a Special Master. Ultimately, the Special Master ordered the president of Nissan Japan to participate in a deposition, and the parties reached stipulations on all of their disputed discovery issues. We fail to see how the outcome would have been different if the circuit court had initially ordered Rasmussen to submit questions to Nissan Japan rather than Nissan North America.[11] Because we discern no error in the jurisdictional hearing and the outcome was consistent with Wisconsin's long-arm statute, we affirm.[12]

[11] Rasmussen ultimately informed the Special Master that he had no more discovery requests for Nissan Japan, contrary to his argument on appeal that he was unable to obtain the documents he needed.

[12] In its response brief, Nissan Japan argues that we should maintain the highly confidential status of certain sensitive material obtained during jurisdictional discovery. Rasmussen does not dispute maintaining the documents' highly confidential status. We therefore maintain the documents' confidential status in this appeal.

(continued)

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

Finally, Nissan Japan requests costs, fees, and attorney fees under WIS. STAT. § 809.25(3), arguing that Rasmussen's appeal is frivolous. We disagree, and decline to award costs or fees to Nissan Japan. First, Nissan Japan has not filed a separate motion for costs and fees as required by § 809.25(3). *See* ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621 ("We caution that a statement in a brief that asks that an appeal be held frivolous is insufficient notice to raise this issue."). Moreover, we disagree with Nissan Japan's contention that Rasmussen's appeal was frivolous. The issue of personal jurisdiction over a foreign corporation based on the acts of its wholly owned subsidiary is complex, and Rasmussen has made a good faith argument under existing law. We have no basis to find his appeal frivolous.