Appeal No. 2005AP423 **Cir. Ct. No. 2003CV10418**

WISCONSIN COURT OF APPEALS
DISTRICT I

KARL MCNEIL,

PLAINTIFF-APPELLANT,

V.

BRANDON HANSEN AND
MARYLAND CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

FILED

APR 18, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Wedemeyer, P.J., Curley and Kessler, JJ.

Pursuant to WIS. STAT. § 809.61 (2003-04),[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether the facts presented here constitute "operation of a motor vehicle" as that term is used in WIS. STAT. § 102.03(2), so that the injured co-employee is not limited to the exclusive remedy of the Worker's Compensation Law.

---

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

BACKGROUND

On April 12, 2003, Karl McNeil was working with co-employee Brandon Hansen at Fast Track Oil Change. The two were performing a radiator flush on a Jeep Wrangler. McNeil hooked the Jeep up to a machine that flushes the radiator. In order for the machine to actually flush out the radiator, the Jeep's engine needed to be turned on. McNeil asked Hansen to turn on the ignition. McNeil remained in front of the Jeep because he was going to determine whether the hoses being used to perform the radiator flush were leaking.

Hansen took the keys to the Jeep, leaned in through the open window of the car, and started the ignition. The Jeep unexpectedly lurched forward and struck McNeil, causing injury.

As a result, McNeil filed this personal injury lawsuit against Hansen. Hansen and Maryland Casualty Company filed a motion for summary judgment seeking dismissal of the case based on the exclusive remedy provision of the worker's compensation statute.

The trial court concluded that the facts and circumstances presented in this case did not constitute "the operation of a motor vehicle" as that term is used in the worker's compensation statute, WIS. STAT. § 102.03(2). As a result, the trial court granted the summary judgment and dismissed McNeil's complaint. McNeil appealed the decision to this court.

DISCUSSION

The issue in this case is whether the act of reaching in through the Jeep's window and turning the key to start the ignition constitutes "the operation of a motor vehicle." If such action is the operation of a motor vehicle, then

McNeil may pursue his tort claim against co-employee Hansen under the worker's compensation statutory exception to its exclusive remedy provision. If such action did not constitute the operation of a motor vehicle, then the trial court was correct to dismiss McNeil's claim against co-employee Hansen because McNeil would be limited to the exclusive remedy of worker's compensation.

The statute involved in this case provides:

> [T]he right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier. This section does not limit the right of an employee to bring action against any coemployee … for negligent operation of a motor vehicle not owned or leased by the employer ….

WISCONSIN STAT. § 102.03(2).

McNeil points out that although "operation of a motor vehicle" is not defined within the worker's compensation statute, it has been defined both in WIS. STAT. § 346.63, the operating under the influence statute, and other case law. WISCONSIN STAT. § 346.63(3)(b) defines "operate" as "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." *See also* ***State v. Modory***, 204 Wis. 2d 538, 542-43, 555 N.W.2d 399 (Ct. App. 1996). In ***Burg ex rel. Weichert v. Cincinnati Cas. Ins. Co.***, 2002 WI 76, 254 Wis. 2d 36, 645 N.W.2d 880, we recognized the WIS. STAT. § 350.01(9r) definition of "operate" for the purposes of operating a snowmobile as "the exercise of physical control over the speed or direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion." ***Id.***, ¶4 (quoting § 350.01(9r)).

Clearly, under all of these definitions, turning the key and starting the ignition of the car involved here constituted activation of the controls necessary to put the car in motion. Thus, in applying these definitions, it would lead to the conclusion that the instant case did involve "operation of a motor vehicle."

Hansen argues, nonetheless, that the court should not apply the definitions recited above because this is not a drunk driving case. He argues that the definition of operation of a motor vehicle in the context of a worker's compensation case should be narrowly construed. He notes that until 1977, co-employees could sue each other for negligent acts. The intent of the 1977 amendment prohibiting co-employee suits was to "recreate the statute so that coemployee immunity would be the rule, and coemployee liability would be the exception to that rule." ***Hake v. Zimmerlee***, 178 Wis. 2d 417, 423, 504 N.W.2d 411 (Ct. App. 1993).

Hake is the only case in Wisconsin that addresses the "operation of a motor vehicle" exception in the context of the Worker's Compensation Law. In ***Hake***, we held that the co-employee's act of closing the door on her co-employee's hand "does not fall within the definition of 'operation of a motor vehicle' as that phrase is used in sec. 102.03(2)." ***Hake***, 178 Wis. 2d at 420. In ***Hake***, we observed that the legislative history was not very helpful in ascertaining the reason for allowing suits between co-employees for the negligent operation of a motor vehicle not owned or leased by the employer. ***Id.*** at 423-24.

This court's own legislative research demonstrates that the only indicated intent behind the amendment with respect to the motor vehicle exception was to account for the fact that most insurance policies for fleet coverage on

employer-owned or employer-leased vehicles excluded payment of damages where the claim was between co-employees. *See* "Explanation of Worker's Compensation Advisory Council Bill." Thus, the legislative history does not shed helpful light on the reason behind the "operation of a motor vehicle" exception.

Hansen argues that this exception should really only apply to a situation where an employee is actually driving the vehicle in a negligent manner on an actual roadway. In this instance, Hansen was following the direction of his supervisor, McNeil, who instructed him to start the car's engine. Hansen had no intent to actually put the car into motion, or move it from the position it was in. In fact, the vehicle was attached to a radiator flush machine and could not be driven at the time the incident occurred. Hansen contends that under these circumstances, we should construe "operation" in a narrow fashion to support the intent that worker's compensation be the exclusive remedy when an employee is injured at work.

Unfortunately, the legislature did not define the term "operation of a motor vehicle" within the worker's compensation statute itself. Moreover, we are not persuaded that a person's "intent" to drive or not drive a car constitutes the determinative factor as to whether or not the person's conduct actually was "operation of a motor vehicle." Based on the conflict presented between our conclusion that the facts here fall squarely into existing definitions of "operation of a motor vehicle" and the overriding public policy concerns of maintaining narrow exceptions to the worker's compensation exclusive remedy provision, it would make more sense for this case to be decided by the Wisconsin Supreme Court.

CONCLUSION

We respectfully certify this question to the Wisconsin Supreme Court and ask the court to accept jurisdiction over this appeal.