COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2762 **Cir. Ct. No. 2011CV139**

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

JUSTIN NINEDORF,

PLAINTIFF-APPELLANT,

V.

DAVID D. JOYAL, GENERAL CASUALTY COMPANY OF WISCONSIN, GENERAL BEER-NORTHWEST, INC., REGENT INSURANCE COMPANY, GENERAL BEVERAGE GROUP EMPLOYEE BENEFIT PLAN, BARRON COUNTY, GROUP HEALTH COOPERATIVE OF EAU CLAIRE, UNITED STATES CENTERS FOR MEDICARE & MEDICAID SERVICES AND QBE AMERICAS, INC.,

DEFENDANTS,

WISCONSIN MUTUAL INSURANCE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washburn County: KENNETH L. KUTZ, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Justin Ninedorf appeals a summary judgment dismissing his claim against Wisconsin Mutual Insurance. The circuit court determined worker's compensation was Ninedorf's exclusive remedy. Ninedorf argues the court erred because the automobile accident in which he was injured did not occur in the course of employment. We reject Ninedorf's argument and affirm.

BACKGROUND

¶2 Ninedorf worked as a sales supervisor for General Beer-Northwest, Inc., a beverage distributor. He lived in Rice Lake and called on customers in a seven-county territory about four days per week. General Beer assigned Ninedorf a company vehicle, which he could also use for personal purposes. General Beer prohibited any driver from operating the vehicle while intoxicated.

¶3 On a Friday in October 2010, Ninedorf completed his regular shift and went home expecting to be done for the day. However, he was contacted by General Beer employee David Joyal around 4:15 p.m. El Mariachi's restaurant had requested beer, but the owner was unavailable when Joyal attempted a delivery earlier that day. Joyal informed Ninedorf that El Mariachi's had called again and requested beer after Joyal had completed his daily route and returned home to Rice Lake. Ninedorf and Joyal decided to deliver the beer together.

¶4 Ninedorf anticipated that, after the beer delivery, he and Joyal would visit bars on their own time, "being it was a Friday night." As Joyal's company vehicle was not authorized for personal use, they transferred the beer to Ninedorf's vehicle. They agreed Ninedorf would drive to El Mariachi's but Joyal would then

take over driving. Ninedorf did not want to drive because he had been recently cited for operating while intoxicated.

¶5 El Mariachi's was located approximately thirteen miles east of Hayward, at the intersection of County Highways B and CC.[1] To reach El Mariachi's from Rice Lake, Ninedorf and Joyal traveled east through Birchwood, on County Highway C east of Big Chetac Lake, and then along the Chippewa Flowage past Herman's Landing.[2] They delivered to El Mariachi's around 5:45 p.m. and decided to stay for a drink or two. Ninedorf handed Joyal the keys before drinking. In a deposition, Ninedorf explained, "Work was done, and it was my time now." They departed El Mariachi's around 7:45 p.m. after two drinks.

¶6 Ninedorf and Joyal then drove to Stone Lake, which features three bars in close proximity. Ninedorf and Joyal intended to return to Stone Lake to

[1] Ninedorf's brief repeatedly refers to El Mariachi's as being in or near Hayward. However, Wisconsin Mutual indicates the restaurant was "substantially to the east" of Hayward, and our review of maps indicates the restaurant was located approximately thirteen miles east of Hayward on County Highway B. This case is "map intensive," and we accept Wisconsin Mutual's invitation to take judicial notice of state highway maps. We have utilized the online public mapping resources MapQuest and Google Maps. Additionally, the record contains a portion of a state road map and several printed MapQuest maps with highlighted routes.

[2] Ninedorf's full description of the route alledegly taken to El Mariachi's is impossible and somewhat vague. The route is impossible because it has the men leaving Rice Lake on County Highway C, but that highway is located well east of the city, beyond Big Chetac Lake.

We understand Ninedorf's route description to convey that the men traveled east from Rice Lake on State Highway 48 through Birchwood, then north onto County Highway C, briefly east on State Highway 27/70, and then north on County Highway CC to its intersection with County Highway B. It appears Ninedorf's reference to "Herman's Landing" was to a historic resort located on County Highway CC, which is a meandering roadway that travels through the Chippewa Flowage chain of lakes. "In 1949, Herman's Landing Resort became known as the home of the world's record musky …." *The Landing*, LAKE CHIPPEWA FLOWAGE RESORT ASSOC., http://www.chippewaflowage.com/the-landing-lco.php (last visited May 3, 2016).

work at Cranberry Fest early the next morning, but they had no work responsibilities there Friday night.[3] They drank at all three bars in Stone Lake. Ninedorf consumed ten to twelve drinks. Joyal did not count his own drinks in Stone Lake, but knew he drank "a lot" and "more than 10." They departed Stone Lake with Joyal driving west on State Highway 70. Joyal then turned south onto County Highway M toward Rice Lake. Joyal missed a curve and entered a ditch about one-half mile north of the intersection with County Highway D, at approximately 1:00 a.m. The accident left Ninedorf paralyzed. Ninedorf's blood-alcohol content at 4:30 a.m. was 0.144. Joyal's blood-alcohol content was 0.176 at 3:20 a.m.

¶7 Ninedorf commenced a civil suit against Joyal and others, including Joyal's personal automobile insurer, Wisconsin Mutual. Wisconsin Mutual and others moved for summary judgment, arguing worker's compensation was Ninedorf's exclusive remedy.[4] The circuit court granted the motion, holding the exclusive-remedy rule applied because Ninedorf was within the course of employment at the time of injury. Ninedorf now appeals.[5]

[3] Wisconsin Mutual notes all three bars in Stone Lake were General Beer customers, but it essentially concedes that any business purpose of the visits in Stone Lake related to Cranberry Fest was incidental to the personal purpose of socializing and drinking.

[4] Regent Insurance Company was General Beer's insurer for both worker's compensation and automobile liability. Regent's worker's compensation division denied benefits because Ninedorf was not on the job at the time of the accident, while its automobile division denied coverage because Ninedorf was on the job. Ninedorf elected to not pursue a formal worker's compensation claim and instead pursue claims for liability coverage.

[5] Wisconsin Mutual is the only defendant still affected by the exclusive-remedy issue decided by the circuit court. Consequently, it is the sole respondent.

DISCUSSION

¶8 Ninedorf contends the circuit court erroneously granted summary judgment holding that worker's compensation was Ninedorf's exclusive remedy. Summary judgment is appropriate when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).[6] When determining whether there are genuine factual issues, the facts must be viewed in the light most favorable to the nonmoving party. ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). We review grants of summary judgment de novo. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 229-30, 564 N.W.2d 728 (1997). Additionally, this case involves application of WIS. STAT. § 102.03, which presents a question of law subject to de novo review. *See* ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273; ***Heritage Mut. Ins. Co. v. Larsen***, 2001 WI 30, ¶25, 242 Wis. 2d 47, 624 N.W.2d 129.

¶9 This case involves the interplay of several provisions of WIS. STAT. § 102.03 of the Worker's Compensation Act. As relevant here, § 102.03 provides:

> **(1)** Liability under this chapter shall exist against an employer only where the following conditions concur:
>
> (a) Where the employee sustains an injury.
>
> ….
>
> (c) 1. Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment.
>
> ….

[6] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> (e) Where the accident or disease causing injury arises out of the employee's employment.
>
> (f) Every employee whose employment requires the employee to travel shall be deemed to be performing service growing out of and incidental to the employee's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee's employment.
>
> ….
>
> **(2)** When such conditions exist the right to the recovery of compensation under this Chapter shall be the exclusive remedy against the employer, and any other employee of the same employer and the worker's compensation insurance carrier.

Our supreme court has recognized that the § 102.03(1)(f) coverage exclusion for personal deviations "provides for an interruption in the employment during such time as an employee is on a 'frolic of his [or her] own.'" ***Lager v. DILHR***, 50 Wis. 2d 651, 658, 185 N.W.2d 300 (1971). However, the statute "creates a presumption that a traveling employee is performing services incidental to employment at all times during the business trip."[7] ***Heritage Mut.***, 242 Wis. 2d 47, ¶33.

¶10 Ninedorf argues Wisconsin Mutual failed to demonstrate he was in the course of employment at the time of injury, rather than on a deviation for a private or personal purpose. The clause, "performing services growing out of and incidental to his [or her] employment," is used interchangeably with the phrase

[7] Alternatively, our supreme court has stated, "The statute has been interpreted to create a presumption that an employee who sets out on a business trip in the course of his employment performs services arising out of and incidental to his employment *until he returns from his trip*." ***Lager v. DILHR***, 50 Wis. 2d 651, 658, 185 N.W.2d 300 (1971) (emphasis added).

"course of employment." ***Ide v. LIRC***, 224 Wis. 2d 159, 169, 589 N.W.2d 363 (1999). Both phrases refer to the time, place, and circumstances under which the injury occurred. ***Id.***

¶11 Initially, Ninedorf asserts there were ample facts to support the inference he was on a personal deviation at the time of the accident. We reject this assertion as a misguided attempt to convert a legal question to a fact question.[8] Application of statutory language to an undisputed set of facts is a legal question. ***McNeil***, 300 Wis. 2d 358, ¶7; ***Heritage Mut.***, 242 Wis. 2d 47, ¶25. Ninedorf fails to identify any material disputed issues of fact.

¶12 Ninedorf next argues the facts of this case are similar to ***Dibble v. DILHR***, 40 Wis. 2d 341, 161 N.W.2d 913 (1968). There, Dibble, a traveling salesman, checked into a motel around 6:00 p.m. in Onalaska, a village just north of La Crosse. ***Id.*** at 343. He drove to the Blue Moon Lounge, a mile north of the motel, for dinner around 7:00 p.m. ***Id.*** In the bar, Dibble visited with fellow patrons and displayed a miniature radio, which was a promotional item in his business. ***Id.*** He purchased a box dinner and, after three hours and "an undisclosed number of drinks," the bartender drove him back to the motel in Dibble's car. ***Id.*** at 343-44. At the motel, Dibble ate his dinner, filled out a daily report form, and then, at about 11:30 p.m., drove back to the Blue Moon. ***Id.*** at 344. He ordered another drink, left around midnight and drove north, the opposite direction of the motel. Less than a mile from the Blue Moon, he collided head-on with a semi-truck. ***Id.***

[8] Unlike most relevant published cases, the present case is not a review of a worker's compensation case decided by an administrative agency, where courts must give some level of deference to the agency determination.

¶13 The supreme court affirmed DILHR's determination that Dibble was on a personal deviation and "had not returned to the normal route to be used in his work at the time of the fatal accident." ***Id.*** at 348. It explained:

> There is no question that the deviation was not for a business purpose. Dibble had finished his day's work; he had completed his daily report, his planned itinerary would not take him north of the … Motel nor the Blue Moon Lounge; his next scheduled call was planned for 10 a.m. the next day at La Crosse, which is south of Onalaska and south of the … Motel; and there is no evidence to even remotely suggest that he intended to contact any potential customers or otherwise act in furtherance of his employer's business at the time and place in question.

Id. at 347-48. The court then addressed whether Dibble's conduct nonetheless consisted of acts "reasonably necessary for living or incidental thereto." *See* WIS. STAT. § 102.03(1)(f). It held:

> Intoxication is not an issue in this case. However, it is relevant evidence as to Dibble's state of mind insofar as it helps resolve the question of whether the deviation was for a private purpose and whether it was an act reasonably necessary for living or incidental thereto. Neither during his first nor second trip to the Blue Moon Lounge did Dibble contact any customer nor prospective customer. It cannot be said the intoxicants he ordered were in any way in the furtherance of his employer's business. …
>
> While a cocktail or two before dinner probably is an acceptable social custom incidental to an act reasonably necessary to living, the department could conclude that Dibble's indulgence was beyond reasonableness. Certainly at the time of his second trip to the lounge after he had dinner his indulgence was not an act reasonably necessary or incidental to living.

Dibble, 40 Wis. 2d at 350.

¶14 Ninedorf argues ***Dibble*** is similar factually to this case, emphasizing the supreme court's observations that Dibble had completed his day's work and

that the excessive alcohol consumption was relevant to his intent to deviate and was not incident to living. Ninedorf then argues ***Dibble*** is controlling, and ***Nutrine Candy Co. v. Industrial Commission***, 243 Wis. 52, 9 N.W.2d 94 (1943), is distinguishable, for several reasons. He asserts:

> First, the evidence shows Joyal and Ninedorf deviated to Stone Lake from the route between Hayward and Rice Lake, and never returned to a natural main route between Hayward and Rice Lake. They left Stone Lake heading west on Hwy 70, and then inexplicably turned south on CTH M, a slower and more treacherous route than the main road.[9]

¶15 We reject Ninedorf's assertion. First, we observe the location of Hayward, itself, is irrelevant; there is no evidence the two men ever entered that city, and El Mariachi's is well to the east. Regardless, review of any state road map discloses there are numerous reasonable routes between El Mariachi's/Hayward and Rice Lake. Several such routes would have one traveling through Stone Lake. We confirmed this by route searches on MapQuest and Google Maps, each of which provided three (similar, but not identical) recommended routes between El Mariachi's and Rice Lake, all of which are expected to take approximately the same amount of time to travel despite their wide geographical differences. One such route, the eastern path, was the approximate route taken to deliver the beer to El Mariachi's, entering/exiting the northeast side of Rice Lake and never coming near Hayward. A second

[9] Ninedorf's argument does not take a direct route. Rather, his circuitous argument winds back and forth among rationales, making it difficult to track. For example, compare the first sentence of his "first" argument quoted above with his nearly identical subsequent argument: "Third, the issue is not simply whether Ninedorf and Joyal were back in the car heading for home, but instead whether they had resumed their reasonably direct route from Hayward to Rice Lake."

recommended route, the central path, takes one through Stone Lake and likewise returns to the northeast side of Rice Lake. The third route runs farther west, utilizing U.S. highways, and returns to the west side of Rice Lake.

¶16 Each of the three recommended routes, particularly the two returning to the northeast side of Rice Lake, could be reasonably modified at various points. Quite simply, there is no single "natural main route" between Rice Lake and El Mariachi's (or Hayward). Regardless, that is not the standard.

> As between available alternative routes of travel between cities, the measuring stick must be the rule of reason. An employee, required to travel between cities and given no specific instructions as to which route he must travel, may choose any reasonable route among the available alternatives. If the route selected by him [or her] meets the test of reasonableness, it meets the requirements of [WIS. STAT. §] 102.03(1).

Bergner v. Industrial Comm'n, 37 Wis. 2d 578, 583-84, 155 N.W.2d 602 (1968). Thus, while the bar visits *in* Stone Lake were undisputedly a personal deviation, the route *through* Stone Lake was no deviation from the course of employment.

¶17 Ninedorf also questions whether the rest of his and Joyal's return trip, from Stone Lake (rather than from El Mariachi's), was a natural route to Rice Lake. Review of maps and online mapping resources leads to the same result as above. The accident occurred at a location on County Highway M where a natural route would have traversed. There are several such routes available, each perfectly reasonable.[10] Thus, regardless of how one views the fateful return trip,

[10] Consistent with this court's map reviews, the record includes three MapQuest route printouts, each displaying an alternate route between Stone Lake and an address in Rice Lake. One of the three routes traverses the accident location on County Highway M.

Stone Lake and the accident location were both located along a reasonable route back home from El Mariachi's.

¶18 Further, ***Dibble*** is easily distinguished. There, the employee had not only completed his daily employment tasks, he had already arrived at the day's final destination, the motel. Ninedorf and Joyal, on the other hand, were on a same-day out-and-back trip, which they had not completed by the time of the accident. Dibble was traveling in the opposite direction of both his temporary home and next business location when he crashed, while Ninedorf and Joyal had resumed their journey home in the proper direction.

¶19 In light of our foregoing discussion, we also reject Ninedorf's attempt to distinguish ***Nutrine Candy***, where it was argued "that at the time of the injury, neither [employee was] performing services growing out of their employment, or incidental thereto, and that the accident did not arise out of their employment." ***Nutrine Candy***, 243 Wis. at 54. We agree with the circuit court and Wisconsin Mutual that the case is, in fact, comparable. There, employees left Milwaukee for a Minneapolis sales conference. ***Id.*** at 53. They stopped and drank whiskey in Mauston and Tomah, and they then had lunch and continued drinking at a tavern in Menomonie. ***Id.*** at 53-54. Their recollections of Menomonie were "hazy," but they eventually departed. ***Id.*** at 54. The car left the road, and one employee was injured. ***Id.*** The supreme court held:

> The claim that by going on a drunken spree applicant took himself out of the course of employment must be rejected. He was actually en route to Minneapolis at the time he was injured. It is true that he had made a departure from the course of employment, and if he had been injured in a tavern, no doubt a very strong argument could be made that he was out of the course of employment and entitled to no compensation. … However, under the evidence in this case, the Industrial Commission was entitled to conclude that he had returned to his duties at the time of the injury.

Id. at 56.

¶20 Ninedorf argues ***Nutrine Candy*** is distinguishable "because the injured employee, while intoxicated, had returned to the route to Minneapolis on which he had started." As discussed above, however, that is precisely why the case is similar. Here, Ninedorf and Joyal had ceased their personal deviation to bars and were on their way back home.

¶21 Ninedorf also suggests attitudes toward drunk driving have shifted since 1943. However, the statutory provision partly relied on in ***Nutrine Candy*** was still in effect when Ninedorf was injured. Under that statute, intoxication does not negate worker's compensation coverage. The version cited in ***Nutrine Candy*** provided:

> Where injury is caused by the wilful failure of the employe to use safety devices where provided by the employer, or where injury results from the employe's wilful failure to obey any reasonable rule adopted by the employer for the safety of the employe, or where injury results from the intoxication of the employe, the compensation, and death benefit provided herein shall be reduced fifteen per cent.

WIS. STAT. § 102.58 (1941). The version in effect at the time of Ninedorf's injury in 2010, WIS. STAT. § 102.58 (2009-10), maintained similar language.[11] Additionally, a much more recent case held that whether a traveling employee's multiple drinks at a tavern was a deviation was irrelevant when the employee was

[11] The statute was, however, significantly revised recently. The present version of the statute replaces the prior content related to intoxication with the following: "If an employee violates the employer's policy concerning employee drug or alcohol use and is injured, and if that violation is causal to the employee's injury, no compensation or death benefits shall be payable to the injured employee or a dependent of the injured employee." WIS. STAT. § 102.58; *see* 2015 Wis. Act 180, § 66. As neither party discusses the modification, and it occurred after the events at issue here, we need not discuss it further.

injured while engaged in a later act reasonably necessary to living.[12] *See* ***Heritage Mut.***, 242 Wis. 2d 47, ¶32.

¶22 Ultimately, this is a straightforward case resolved by settled law. In ***Lager***, 50 Wis. 2d at 661, our supreme court held:

> It is clear, as a matter of law, that, in the event a salesman commences travel in the course of his employment and subsequently deviates from that employment but later resumes his route which he would have to follow in the pursuance of his employer's business, the deviation has ceased and he is performing services incidental to and growing out of his employment.

Here, Ninedorf and Joyal stopped off at taverns and became intoxicated during the return portion of a business trip, along a reasonable route. They then resumed their trip home along a reasonable route, and Ninedorf was injured when their vehicle left the road. Under ***Nutrine Candy*** and ***Lager***, it is clear they had terminated their deviation and were therefore entitled to the statutory presumption that they were then "performing service growing out of and incidental to [their] employment." *See* WIS. STAT. § 102.03(1)(f). Accordingly, Ninedorf's exclusive remedy for his injury is worker's compensation, and the circuit court properly granted summary judgment dismissing his claim against Wisconsin Mutual.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[12] Ninedorf also makes arguments based on the positional risk doctrine and public policy. We do not address these arguments separately as they are essentially restatements of the same arguments he already made or are irrelevant, and they do not affect our analysis.