COURT OF APPEALS
DECISION
DATED AND RELEASED

July 18, 1995

No. 94-3000

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

LAVERN LARRY and
GERALDINE LARRY,

Plaintiffs-Appellants,

v.

JEFFREY LARRY,
DAWES TRANSPORT, INC., and
VANLINER INSURANCE COMPANY,

Defendants-Respondents,

MILWAUKEE COUNTY DEPARTMENT
OF HUMAN SERVICES,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Lavern and Geraldine Larry appeal from the trial court's grant of summary judgment to Jeffrey Larry, Dawes Transport, Inc., and Vanliner Insurance Company. They argue that the trial court erred in ruling that worker's compensation is Lavern Larry's exclusive remedy for his injuries sustained in an accident. We affirm.

On May 31, 1992, Lavern Larry was injured as a passenger when the semi-tractor driven by his son, Jeffrey Larry, was involved in an accident. The Larrys were employees of Backhaulers, Inc., and the semi-tractor in which they were riding was contracted to Dawes Transport, Inc., by Backhaulers, its owner. Backhaulers, Inc., did not have worker's compensation insurance. Therefore, after the accident Lavern Larry made a claim under his own worker's compensation policy. The application was dismissed for lack of coverage.

Lavern and Geraldine Larry sued Jeffrey Larry, Dawes Transport, and Vanliner Insurance (Dawes Transport's insurer), alleging that Jeffrey Larry was negligent in the truck's operation and that Dawes Transport was negligent in providing consent to Jeffrey Larry to operate the truck. The trial court granted summary judgment to the defendants, noting that "plaintiff Lavern Larry's exclusive remedy is under the Worker's Compensation Act." Lavern and Geraldine Larry appeal. The only issue is whether there is coverage under the Vanliner policy.

Summary judgment is used to determine whether there are any disputed issues for trial. ***U.S. Oil Co., Inc. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Appellate courts and trial courts follow the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). First, we examine the pleadings to determine whether the complaint states a claim for relief. ***Id.*** If the complaint states a claim and the answer joins the issue, the court then examines the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. ***Id.*** If the summary judgment materials do not indicate that there is a genuine issue of material fact and if the moving party is entitled to judgment as a matter of law, summary judgment must be entered, RULE 802.08(2), STATS.

Dawes Transport's policy with Vanliner specifies that: "We will pay all sums an `insured' legally must pay as damages because of `bodily injury' or `property damage' to which this insurance applies, caused by an `accident' and resulting from the ownership, maintenance or use of a covered `auto.'" (Uppercasing omitted.) An "insured" is defined as "you for any covered `auto'" or "anyone else while using with your permission a covered `auto' you own, hire or borrow" with certain exceptions not relevant here. (Uppercasing omitted.) Excluded from coverage under the policy is "`bodily injury' to any fellow employee of the `insured' arising out of and in the course of the fellow employee's employment." (Uppercasing omitted.) An endorsement under "Wisconsin changes" notes that "the fellow employee exclusion does not apply if the `bodily injury' results from the use of a covered `auto' you own." (Uppercasing omitted.) "You" is defined in the policy as "the named insured shown in the declarations," namely, Dawes Transport. (Uppercasing omitted.)

Section 102.03, STATS., provides in part:

> **(1)** Liability under this chapter [worker's compensation] shall exist against an employer only where the following conditions concur:
>
> (a) Where the employe sustains an injury.
>
> (b) Where, at the time of the injury, both the employer and employe are subject to the provisions of this chapter.
>
> (c) 1. Where, at the time of the injury, the employe is performing service growing out of and incidental to his or her employment....
>
> ....
>
> **(2)** Where such conditions exist the right to the recovery of compensation under this chapter shall be the *exclusive remedy* against the employer, any other employe of the same employer and the worker's compensation carrier.

(Emphasis added.)

Lavern and Geraldine Larry argue that they are entitled to recover for Lavern Larry's injuries under Dawes Transport's insurance policy from Vanliner. We disagree. In ***Maas v. Ziegler***, 172 Wis.2d 70, 492 N.W.2d 621 (1992), the supreme court held that the insurer waived the exclusive remedy provisions of the Worker's Compensation Act in § 102.03(2), STATS., by an endorsement that removed the fellow employee exclusion from the policy. ***Id.***, 172 Wis.2d at 82, 492 N.W.2d at 625–626; *see also* ***United States Fidelity & Guar. Co. v. PBC Productions, Inc.***, 153 Wis.2d 638, 643, 451 N.W.2d 778, 780 (Ct. App. 1989). ***Maas*** and ***PBC Productions*** apply only to policies where the employers were the named insured. Here, both Lavern Larry and Jeffrey Larry concede that the named insured on the policy, Dawes Transport, was not their employer. Thus, ***Maas*** and ***PBC Productions*** do not apply, and there is no waiver. Further, contrary to the Larrys' contention, there is no violation of § 632.32(6)(b)2.a, STATS., because that provision applies only to insurance policies. Here, Jeffrey Larry's immunity from tort liability—and, therefore, the inapplicability of the Vanliner policy—stems from § 102.03(2), not the policy's co-employee exclusion.

The trial court correctly held that worker's compensation is the exclusive remedy for Lavern Larry's injuries, and that he may not sue Jeffrey Larry.[1] Thus, the Vanliner policy, which states that it will "pay all sums an `insured' legally must pay," does not provide coverage. We affirm.

By the Court.—Judgment affirmed.

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

[1] Lavern Larry is not without a remedy even though Backhaulers, his employer, did not have worker's compensation coverage. *See* §§ 102.28(5) & 102.81(1)(a), STATS.