05AP0423

SUPREME COURT OF WISCONSIN

KARL McNEIL,

Plaintiff-Appellant,

-vs- Case No. 05-0423

BRANDON HANSEN and
MARYLAND CASUALTY COMPANY,

Defendants-Respondents.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

APPEAL OF A JUDGMENT DATED 2/23/05, CIRCUIT COURT OF MILWAUKEE COUNTY, JUDGE JOSEPH DONALD, PRESIDING

John A. Becker
Becker, French & DeMatthew
Attorneys for Plaintiff-Appellant
822 Wisconsin Avenue
Racine, WI 53403
(262) 633-7530
State Bar No. 01009488

TABLE OF CONTENTS

LIST OF AUTHORITIES CITED

ISSUE

WHEN A PERSON TURNS THE KEY TO START AN AUTOMOBILE, DOES THAT CONSTITUTE "THE OPERATION OF A MOTOR VEHICLE" UNDER THE WORKER'S COMPENSATION STATUTES, § 102.03(2), STATS.?

The trial court answered no; not answered by the Court of Appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

McNeil believes oral argument would be helpful and publication is warranted.

FACTS

Karl McNeil and Brandon Hansen were co-employees. They worked together at Fast Track Oil Change. R. 12, p. 3; App. p. 9 (depo. pp. 4-5).

On April 12, 2003, McNeil was servicing a Jeep Wrangler. McNeil was in front of the Jeep and he requested that Hansen start the vehicle. R. 12, p. 7; App. p. 11 (depo. pp. 18-19).

The keys were not in the ignition, and Hansen got the keys from the customer. Hansen reached through the window with the keys and started the Jeep. R. 12; App. p. 11 (depo. pp. 19-20).

The vehicle had a manual transmission and it lurched forward. McNeil was pinned between the Jeep and the garage door, and sustained injuries. R. 12; App. p. 11 (depo. pp. 20-21).

The trial court ruled that the act of starting the car did not constitute the operation of a vehicle for purposes of the worker's compensation statute. (R. 24, pp. 13-14, App. pp. 7-8).

The Court of Appeals requested certification of this issue from the Supreme Court.

APPLICABLE STATUTES

> ...the 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 co-employee . . . for negligent operation of a motor vehicle not owned or leased by the employer . . .
> Sec. 102.03(2), Stats.

> "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion
> Sec. 346.63(3)(b), Stats.

> "Operate" means 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. "Operate" includes the operation of a snowmobile.
> Sec. 350.01(9r), Stats.

> (a) "Drive" means the exercise of physical control over the speed and direction of a vehicle while it is in motion.
> (c) "Operate" includes the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.
> Sec. 943.23, Stats.

(ir) "Operate" means to exercise physical control over the speed or direction of an all-terrain vehicle or to physically manipulate or activate any of the controls of an all-terrain vehicle necessary to put it in motion.

(it) "Operation" means the exercise of physical control over the speed or direction of an all-terrain vehicle or the physical manipulation or activation of any of the controls of an all-terrain vehicle necessary to put it in motion.

Sec. 23.33, Stats.

ARGUMENT

MANIPULATING OR ACTIVATING ANY OF THE CONTROLS OF A VEHICLE NECESSARY TO PUT IT IN MOTION CONSTITUTES OPERATION OF A MOTOR VEHICLE.

It is undisputed that Hansen and McNeil were co-employees, and that the Jeep was not owned or leased by the employer. The argument raised by Hansen, and accepted by the trial court, was that turning the key and starting the Jeep did not constitute "the operation of a motor vehicle" under the worker's compensation statute.

The Appellate Courts in Wisconsin have addressed this issue in the context of the OWI statute. In State v. Modory, 204 Wis. 538, 555 NW 2d 39 (Ct. App. 1986), the defendant was in a vehicle that was running but was stuck on the side of the road. The defendant claimed that because the vehicle could not be moved, he could not be operating a motor vehicle.

The Court stated "operation of a motor vehicle merely requires the

manipulation or activation of the controls of a vehicle 'necessary to put it in motion'." Modory, 204 Wis. 2d at 544 *citing* § 346.63(3)(b), Stats. The Court indicated that if the legislature intended to require vehicular movement as an ingredient of operating the vehicle, such a requirement would have been placed in the statute. Modory, 204 Wis. 2d at 544, 545.

In § 943.23, Stats., operating a vehicle without owner's consent. , the legislature explicitly differentiated between drive and operate. " 'Drive' means to exercise physical control over the speed and direction of a vehicle while it is in motion; ... 'operate' includes the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion." § 943.23(1)(c), Stats. Under Wisconsin law operate has a broader definition and is more encompassing than the term drive.

The term operate has also been defined in other statutes. The statutes dealing with snowmobiling and ATVs define the term operate as to physically manipulate or activate any of the controls necessary to put the vehicle in motion. § 23.33(1)(ir), Stats. § 350.01(9r), Stats.

In Burg v. Cincinnati Casualty, 2002 WI 76, the Court had to determine the scope of the term operate for purposes of operating a snowmobile. The court noted that operate was defined 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." Burg, ¶ 19, quoting. § 350.01(9r), Stats.

Although the worker's compensation statute does not specifically define the term "operate", the term is defined in several other statutes as it applies to the operation of a motor vehicle. The definition consistently used by the Wisconsin Statutes and the Wisconsin courts includes the activation of any of the controls of a vehicle necessary to put it in motion. There is no question that turning the key to start the engine is an activation of the controls necessary to put the vehicle in motion.

In Michigan, the court addressed the same issue with facts that were identical to the present case. North v. Jolomyjec, 199 Mich. App., 724, 502 NW 2d 765 (1993) (App. pp. 12-14). The plaintiff was working at Ionia 10-Minute Lube. The plaintiff was working in front of a car when another employee reached through the window and turned the key to start the engine. The car lurched forward, striking and injuring the plaintiff. Id., at 766. (App. p. 13).

In Michigan, the owner of a motor vehicle is liable for injuries caused by the negligent operation of the vehicle. Id., at 766. The Michigan

statutes define operate as "being in actual physical control of a vehicle". Id., at 767. (App. p. 13). The Court stated that the co-employee was in actual physical control of the vehicle at the time of the injury, and thus he was operating the vehicle. Id., at 767; (App. p. 13).

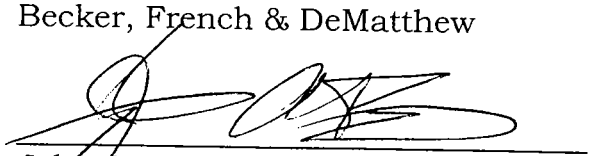
The Court of Appeals, in its certification to the Supreme Court, concluded that the facts fall squarely into the existing definition of operation of a motor vehicle. (App. p. 5). It has never been held, by any court in any context, that the starting of a vehicle is not included within the operation of the motor vehicle.

CONCLUSION

Hansen's turning the key to start the motor vehicle constitutes the operation of a motor vehicle, and therefore this action is not precluded by the exclusive remedy provisions of the Worker's Compensation Act.

Respectfully submitted this 25th day of May, 2006.

Becker, French & DeMatthew



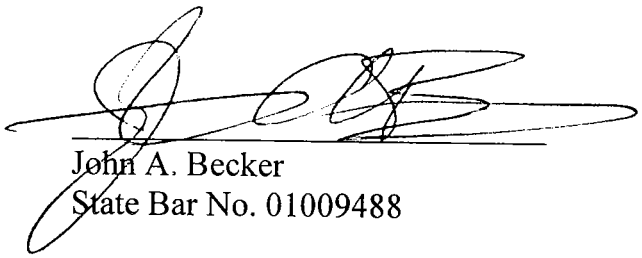
John A. Becker
Attorney for Plaintiff-Appellant

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

Desk Top Publishing or Other Means (proportional serif font, min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max. of 60 char. per line). The text is 13 point type and the length of the brief is 1,239 words.

Dated this 25th day of May, 2006.



John A. Becker
State Bar No. 01009488

APPENDIX

APPENDIX TABLE OF CONTENTS

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.

1

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.

mini lube, working with his co-worker when the car engaged.

This is an everyday type of occurrence. That act, I believe, was meant to have the Worker's Compensation be the exclusive remedy, and therefore, this case is barred here today.

THE COURT: All right. I've heard arguments from the parties, and, Mr. Becker, although I have to say, I find your position an interesting one, and I understand why you're arguing it the way you are, but in order to get to that exception under the Worker's Comp Act, you have to take a very broad and general definition of operation. And generally, under the Rules of the Road, you're correct; that merely reaching in and manipulating the controls of the vehicle is, in essence, operating the vehicle. However, this Court has to take a very narrow approach under the Worker's Compensation Statute, in that the exceptions to this whole employee immunity law are to be narrowly construed. And under the Hake case where they went into a discussion with respect to trying to explain what operation is, they ruled that it was ambiguous. And although the facts of the Hake case, you are correct, is one in which we have

closing a door, in this situation, this employee is directed to, in essence, start the vehicle, and at that direction, he reaches in and turns the ignition on, and that's when the vehicle lurches forward. It's clearly an accident that occurred at the workplace. Both employees were engaged in work-related activity.

And given those facts in this case, the Court is going to grant the defendant's motion for summary judgment because the scope of operation as that term is used under 102.03(2) is to be narrowly construed, and Court finds in this case that he was not in fact operating the vehicle for purposes of an exception to the Worker's Comp Act. Court is going to grant the motion for summary judgment in favor of the defendant.

MR. STEWART: Thank you, Judge

THE COURT: Mr. Stewart, would you draft an order?

MR. STEWART: Yes, I will.

THE COURT: All right.

(End of proceedings.)

APPEARANCES

BECKER, FRENCH & DeMATTHEWS, S.C., by
MR. JOHN A. BECKER,
822 Wisconsin Avenue,
Racine, Wisconsin 53403,
appeared on behalf of the Plaintiff.

LONG & ASSOCIATES, by
MR. EDWARD W. STEWART,
20935 Swenson Drive, Suite 310,
Waukesha, Wisconsin 53186,
appeared on behalf of the Defendants

* * * * *

INDEX

TRANSCRIPT OF PROCEEDINGS

BRANDON HANSEN, called as a witness herein, having been first duly sworn on oath, was examined and testified as follows:

EXAMINATION

BY MR. BECKER:

Q Please state your name for the record, please.
A Brandon Scott Hansen, H-A-N-S-E-N.
Q Your address?
A 2621 South 86th Street.
Q Are you working now?
A Yeah.
Q Where do you work now?
A Squared Away Builders.
Q And what do you do there?
A Carpentry.
Q Now, you know we're here because of an accident which occurred back in April of last year, right?
A Um-hum.
Q You have to answer out loud.
A Yes.
Q And if you don't understand any of my questions, let me know. I want to make sure we have an accurate record here. All right?
A Okay.

Q You were working for who at the time?
A For Fast Track.
Q How long had you worked there?
A I worked there four months.
Q What was your job there?
A Lube tech, I guess was the title.
Q What were your duties?
A Most often I was in the pit, which is underneath the car, doing the -- changing the oil, filter. Other duties were vacuuming, cleaning the windows, checking tire pressure. Then we did coolant flushes and transmission flushes, sold wipers, accessories.
Q So you started there what, about the first of the year, approximately?
A No, it was I'd say about the 20th of February. It was like a week after my birthday.
Q So you had been there about two months when this happened?
A About, yeah, two, three months.
Q Well, if it happened in April and you started in February, it would be about two months?
A Yeah.
Q Prior to that time, had you ever worked at any type of -- had you had any type of employment which

involved working on cars?
A No.
Q What's your date of birth?
A 2/9/82.
Q And you started February 20th of '03, correct?
A Somewhere around there.
Q Who hired you, do you know, I mean what individual did you talk to?
A Karl McNeil.
Q And how did that go? Did you come in and fill out an application, did you have to go in for an interview, did he call you on the phone and say come in?
A I went down there -- I found out about the job from a friend, and I went down there and -- well, I was -- my friend knows Dan Beth, the district manager, and Dan referred me to Karl, so Karl called me in for an interview. I filled out an application, he gave me an interview and he hired me then.
Q First of all, who is your friend?
A John Ranthum.
Q R-A-M --
A R-A-N-T-H-U-M.
Q And he said [illegible]

being operated with the defendant's knowledge *727 or consent. Here, it is undisputed that defendant was the owner of the vehicle that caused plaintiff's injuries. It is similarly uncontested that defendant consented to the work that was being performed on his car by plaintiff and Moore and that plaintiff's injuries occurred when Moore turned the ignition switch in defendant's car.

[4] The Supreme Court and this Court have dealt with the issue of the liability of an owner for injuries in a repair or service situation on a number of occasions. Each time, it has been held that the owner's liability statute simply means what it says and that the owner is liable for such injuries. In *Dale, supra,* our Supreme Court found owner liability where the owner had delivered his car to a car wash and an employee hit a co-worker while driving the vehicle to the drying area. Similarly, in *Trasti v. Citizens Ins. Co. of America,* 181 Mich.App. 191, 448 N.W.2d 773 (1989), we found owner liability where a coemployee drove a truck over a mechanic who had crawled under it for inspection. In each case, as in this case, ownership of the motor vehicle was undisputed and consent was found in the owner's delivery of the vehicle to the facility. We have also made clear that an action based upon the owner's liability statute is not precluded by the immunity of the operator, as here, under the Worker's Disability Compensation Act. See *Wilson v. Al-Huribi,* 55 Mich.App. 95, 222 N.W.2d 49 (1974).

[5][6] Defendant attempts to distinguish *Dale* by claiming that Moore was not "operating" the vehicle because he was not driving it at the time of the injury. The meaning of the term "operation" of a motor vehicle is easily determined. Where a statute supplies its own glossary of terms, this Court must apply the meaning as expressly defined. *Mull, supra* 196 Mich.App. at 417, 493 N.W.2d 447. The Vehicle Code, of which the *728 owner's liability statute is a part, contains the following definitions:

> "Operate" or "operating" means being in actual physical control of a vehicle regardless of whether or not the person is licensed under this act as an operator or chauffeur. [M.C.L. § 257.35a; M.S.A. § 9.1835(1).]
>
> "Operator" means every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway. [M.C.L. § 257.36 ; M.S.A. § 9.1836.]

Clearly, whether starting a car can be considered driving it or not, Moore was the person in actual physical control of the vehicle at the time of the injury and, as such, it was his "operation" of the motor vehicle that resulted in liability under M.C.L. § 257.401; M.S.A. § 9.2101. Nor does the fact that the operation occurred on private land, as opposed to a public **768 highway, preclude owner liability. *Ladner v. Vander Band,* 376 Mich. 321, 136 N.W.2d 916 (1965).

[7] Finally, defendant argues that *Dale* is obsolete in view of the subsequent adoption of § 3106 of the no-fault act, M.C.L. § 500.3106; M.S.A. § 24.13106. That section excuses auto insurers from the responsibility to pay first-party benefits where the injuries arise from specified parked vehicle cases where workers' compensation benefits are available. See *Gordon v. Allstate Ins. Co.,* 197 Mich.App. 609, 615, 496 N.W.2d 357 (1992). This is a third-party residual liability case under § 3135 of the no-fault act. See M.C.L. § 500.3135; M.S.A. § 24.13135. The clear intent of the Legislature in § 3106 was to eliminate duplication of the medical and wage loss benefits *729 of workers' compensation with the first-party medical and wage loss benefits afforded by the no-fault act. See *Gordon, supra* 197 Mich.App. at 615, 496 N.W.2d 357; see also *Stanley v. State Automobile Mutual Ins. Co.,* 160 Mich.App. 434, 437, 408 N.W.2d 467 (1987). Whether that section would apply in a case between plaintiff and his no-fault insurer is not an issue presented by this third-party residual liability case against the owner of the vehicle.

The trial court's order granting summary disposition for defendant is reversed, and the case is remanded for further proceedings consistent with this opinion.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;

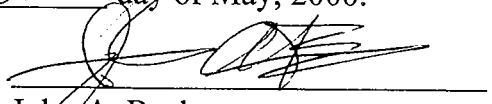
(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of May, 2006.



John A. Becker
State Bar No. 01009488

SUPREME COURT OF WISCONSIN

KARL McNEIL,

Plaintiff-Appellant,

-vs- Case No. 2005AP423

BRANDON HANSEN and
MARYLAND CASUALTY COMPANY,

Defendants-Respondents.

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS

**APPEAL OF A JUDGMENT DATED 2/23/05,
CIRCUIT COURT OF MILWAUKEE COUNTY,
JUDGE MARTIN J. DONALD PRESIDING**

Edward W. Stewart
State Bar No. 1019253
Danielle R. McCollister
State Bar No. 1045749
LOWE & ASSOCIATES
Attorneys for Defendants-Respondents
20935 Swenson Drive
Suite 310
Waukesha, WI 53186
(262) 798-8253

TABLE OF CONTENTS

LIST OF AUTHORITIES CITED

ISSUE

DOES THE ACT OF TURNING THE KEY IN THE IGNITION OF AN AUTOMOBILE WHILE STANDING OUTSIDE OF THE AUTOMOBILE CONSTITUTE "THE OPERATION OF A MOTOR VEHICLE" UNDER THE EXCEPTION TO THE EXCLUSIVITY PROVISION OF THE WISCONSIN WORKER'S COMPENSATION STATUTE § 102.03(2)?

The trial court held that it does not because the court "has to take a very narrow approach under the Worker's Compensation Statute, in that exceptions to this whole employee immunity law are to be narrowly construed." (R. 24,p. 13; A. App. pp. 7-8.)[1]

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Brandon Hansen ("Hansen") and Maryland Casualty Company believe that oral argument is appropriate. Hansen and Maryland Casualty Company request publication of this opinion because there are no other published decisions factually on point.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case arises out of an incident involving coworkers servicing a vehicle in a service bay at a Fast Track Oil Change on April 12, 2003. (R. 12, pp. 3-7; A. App. pp. 9-11.) Hansen reached inside the

[1] "A. App." denotes Appellant's Appendix and "S. App." denotes Respondent's Supplemental Appendix.

vehicle, which was connected to a radiator flush machine, and turned the key in the ignition to allow the radiator flush to occur. (R. 12, pp. 20-21; S. App. p. 7-8.) The vehicle moved forward, struck McNeil ("McNeil") and caused McNeil to suffer personal injuries. (R. 12, pp. 7-8; S. App. p. 1-2.) McNeil sued Hansen in Milwaukee County Circuit Court for compensatory damages. (R. 1.)

PROCEDURAL STATUS AND DISPOSITION IN THE TRIAL COURT

McNeil filed a complaint against Hansen for personal injuries. There are no claims asserted against Maryland Casualty Company. Maryland Casualty was only named because of its Wis. Stat. § 102.29 lien.

Hansen filed a motion for summary judgment in the Circuit Court on the basis that he was not operating a motor vehicle within the context of Wis. Stat. § 102.03(2) and therefore, McNeil is barred by the exclusive remedy provision of the Worker's Compensation Act from pursuing his personal injury claims. (R. 10 and 11.)

The Honorable M. Joseph Donald granted Hansen's motion for summary judgment and dismissed all of the claims against Hansen pursuant to the exclusivity provision of the Worker's Compensation Act. (R. 24; A. App. pp. 7-8.) Judge Donald ruled that Hansen's actions (turning a key while standing outside of a vehicle getting a radiator flush in a service bay), did not constitute "operation of a motor vehicle" within the context of Wis. Stat. § 102.03(2)because the phrase is to be construed narrowly and within the meaning of the Worker's Compensation Act. (R. 24; A. App. pp. 7-8.)

McNeil appealed Judge Donald's ruling and the Wisconsin Court of Appeals certified this case to the Wisconsin Supreme Court. (A. App. pp. 1-6.)

FACTS

This case involves an incident that occurred at Fast Track Oil Change on April 12, 2003. (R. 12, p.15; S. App. p. 3.) McNeil was the manager of Fast Track Oil Change and Hansen was a relatively new coworker. (R. 12, pp. 16-17; S. App. p. 4-5.) McNeil was

performing a radiator flush on a customer's Jeep Wrangler in a service bay at Fast Track. (R. 12, pp. 19-20; S. App. p. 6-7.) In order to perform the radiator flush, McNeil hooked the Jeep to a machine that flushes radiators. (R. 12, p. 20; S. App. p. 7.) The Jeep's engine had to be activated before the machine could flush the radiator. (R. 12, p. 22; S. App. p. 9.) McNeil told Hansen to activate the Jeep's engine. (R. 12, pp. 21-22; S. App. p. 8-9.) McNeil remained in front of the Jeep because he had to determine whether the hoses that were being used to flush the radiator were leaking. (R. 12, p. 21; S. App. p. 8.)

Hansen did not know that the Jeep was a stick shift vehicle. (R. 12, p. 7-8; S. App. p. 1-2.) Hansen reached through the Jeep's window and turned the key to the ignition pursuant to his boss' instruction. (R. 12, p. 7; A. App. p. 11.) The Jeep unexpectedly moved forward and struck McNeil. (R. 12, p. 21; S. App. p. 8.) Hansen did not get into the vehicle. He did not drive the vehicle. He never intended to drive the vehicle or steer it, move it, accelerate it, or apply

its brakes or do anything other than turn on the engine per his boss' request so the radiator flush could be performed. (R. 12, p. 22; S. App. p. 9.)

ARGUMENT

INTRODUCTION

This is a worker's compensation case; it is not a drunk driving case. This case involves a work-related accident between coworkers subjected to the special hazards of their employment. Wisconsin's drunk driving laws and rules of the road do not apply to this case. This Court must narrowly construe the meaning of the phrase "operation of a motor vehicle" ***within the context of the Worker's Compensation Act*** ("WCA") and find that Hansen's actions did not constitute "operation of a motor vehicle."

I. THE PHRASE "OPERATION OF A MOTOR VEHICLE" MUST BE NARROWLY CONSTRUED IN A MANNER THAT FURTHERS THE PURPOSE OF THE WORKER'S COMPENSATION ACT.

A. The Worker's Compensation Act's exclusions are to be narrowly construed or the purpose of the Worker's Compensation Act will be destroyed.

In 1977, the legislature amended the Worker's Compensation Act to prohibit employees injured on the

job from suing negligent co-employees. Hake v. Zimmerlee, 178 Wis. 2d 417, 422, 504 N.W.2d 411 (Ct. App. 1993). An explanation of the Worker's Compensation advisory bill included the following statement:

> "The Advisory Council recommends amendment to Wisconsin Statute 102.03(2) to prohibit most suits by employee against a co-employee. It would permit a suit where there was an assault by the co-employee or where there was negligent operation of a motor vehicle not owned or leased by the employer. It is a fact that all insurance policies issued to employers for public liability or for fleet coverage on employer owned or leased vehicles exclude payment of damages where the claim of an employee is against a co-employee. The result is that the employee who is being sued is left without protection and the little person is the one who gets hurt. The attention of the Advisory Council has been called to cases where . . . [the co-employee] who was sued was placed in a financial position[,] because of the cost of defending or because of the judgment for damages that was recovered[,] that the employee would not be able to recover from financially for many years or for the balance of his life."

Hake, 178 Wis.2d at 422. The Hake court also stated that:

> It is apparent that the main concern of the Advisory Council was the financial burden that co-employee suits imposed upon workers. Thus the Council advised the legislature to recreate the statute so that coemployee immunity would be the rule, and coemployee

> liability would be the exception to that rule. In examining the purpose behind co-employee immunity this court has explained: "Injuries caused by a negligent coemployee are everyday occurrences. Such injuries are directly related to the employment, and pursuant to the stated purpose or objective of the Worker's Compensation Act, the costs should be passed on to the consuming public. ***Because of the strong policy concerns that underlie the rule of co-employee immunity, we construe exceptions to that statutory rule narrowly.*** ("When a statute is ambiguous, the legislature is presumed to have intended an interpretation that advances the purposes of the statute.") (Citations omitted.)

Id. at 422-424. (Emphasis Added.)

"Operation of a motor vehicle" as used in Wis. Stat. § 102.03(2) is an exception to the general rule of co-employee immunity. "Exceptions should be recognized for what they are, instances in derogation of the general legislative intent, and should, therefore, be narrowly construed. . . ." Fox v. Bock, 149 Wis.2d 403, 411, 438 N.W.2d 589 (1989). Moreover, this Court must narrowly construe the term "operation" as used in a manner that advances the purpose of Wis. Stat. 102.03(2). Hake, 178 Wis.2d at 424. Doing otherwise could result in a decision that could effectively negate the worker's compensation

exclusivity provision for other employees and for Hansen.

B. The Definition of "Operation of a Motor Vehicle" Must be Narrowly Construed in a Manner that Advances the Purpose of the WCA to Protect Co-employees From Expensive Lawsuits.

McNeil disagrees that the exclusion at issue should be narrowly construed. (Court of Appeals Reply Brief of Plaintiff-Appellant, p. 1.) Rather, he argues that the general rule of co-employee immunity is in derogation of common law and, as such, the general rule of immunity should be strictly construed rather than the exclusion to the general rule. Id. The cases cited by McNeil dictate otherwise. See Ervin v. City of Kenosha, 159 Wis.2d 464, 475-477, 464 N.W. 2d 654 (1991) and LePoidevin v. Wilson, 111 Wis.2d 116, 129-130, 330 N.W. 2d 555 (1983). According to Ervin and LePoidevin, a statute in derogation of the common law is only strictly construed if the legislative intent to change the common law is not clear. Id. The legislature has made it clear in this case that co-employee immunity is now the rule and that its *exceptions* are to be narrowly construed. West Bend

Mutual v. Berger, 192 Wis.2d 743, 750, 531 N.W.2d 636 (Ct. App. 1995), and Hake, 178 Wis. 2d at 422-424.

C. The Definition of "Operation of a Motor Vehicle" is Ambiguous Within the Context of the WCA.

The Court of Appeals has already determined as a matter of law that the meaning of the phrase "operation of a motor vehicle" as used in Wis. Stat. § 102.03 (2) is ambiguous:

> The word "operation" has different meanings depending on the context in which it is used. The meaning of the phrase "operation of a motor vehicle" as used in Sec. 102.03(2) Stats., however, cannot be readily discerned by its context. Even in that context the phrase is ambiguous, i.e., subject to "more than one reasonable although not necessarily correct," interpretation. To find the meaning of a phrase or word that is ambiguous, we must determine the intent of the legislature through an examination of the statutes, "scope, history, context, subject matter and object to be accomplished."

Hake, 178 Wis. 2d at 421.

McNeil argues that the Hake court held that the phrase "operation of a motor vehicle" was only ambiguous in the context of the facts of the Hake case. (Court of Appeals Reply Brief of Plaintiff-Appellant, p. 2.) He further argues that the phrase is not

ambiguous in this case. Id. McNeil is incorrect.

First, the Hake Court clearly indicated that the phrase is ambiguous within the meaning of Wis. Stat. § 102.03 (2), not with regard to the facts at issue. Hake, 178 Wis.2d at 421. Second, if the term is not ambiguous then this Court would not resort to reviewing extrinsic evidence and McNeil would not be presenting definitions contained in unrelated statutes with completely different public policy concerns. See Ervin, 159 Wis.2d 473. "If the meaning of the statute is clear and unambiguous on its face, then resort to extrinsic aids for the purpose of statutory construction is improper." Id., citing State v. Derenne, 102 Wis.2d 38, 45, 306 N.W.2d 12 (1981).

D. The Definitions of the Phrase "Operation of a Motor Vehicle" within the Context of Other Laws are not Applicable to the Meaning of That Term Within the Context of the WCA.

McNeil argues that the definitions of "operation of a motor vehicle" contained in Wisconsin's drunk driving and road rule laws are applicable to this case. McNeil is incorrect. The legislature did not define the phrase "operation of a motor vehicle" for purposes of

Wis. Stat. § 102.03 (2). The Court of Appeals has determined that the phrase is ambiguous as a matter of law. The phrase "operation of a motor vehicle" must be narrowly construed within the meaning of the WCA and thus not within the meaning of non-worker's compensation related statutes and extrinsic evidence. Hake, 178 Wis.2d at 421-427.

In Hake, the court refused to resort to the definitions of the term contained in insurance laws and insurance policies. Id. at 424-427. It also did not rely on the criminal or road rule statutes for a definition although those statutory definitions existed at the time the case was decided. The Court indicated that the existing definitions were not appropriate to consider because they did not narrowly construe the term, nor consider the WCA's purpose. Id. at 425.

The legislature has chosen not to amend, define, nor incorporate a definition of "operation of a motor vehicle" anywhere within the WCA. That does not mean that the legislature intended to consider unrelated definitions because a phrase must be defined within the context of the statute in which it is used. Pulfus

Poultry Farms, Inc. v. Town of Leeds, 149 W.2d 797, 804, 440 N.W.2d 329 (1989). Only statutes concerning the same subject matter are construed together to ascertain their meaning. Id. The Hake court has already determined that the definitions contained in insurance laws and insurance policies are not applicable. This Court should likewise hold that the criminal and road rule statutes do not apply because (1) they apply to rules of law versus exclusions to a general rule and are thus construed in differing ways; (2)they do not take the intent of the WCA into account; and (3) they do not concern the very specialized subject matter of worker's compensation law.

The Modory case relied upon by McNeil interpreted the meaning of the phrase, "operation of a motor vehicle", within the meaning of Wis. Stat. § 346.63, the drunk driving statute. State v. Modory, 204 Wis.2d 538, 555 N.W.2d 399 (Ct. App. 1996). Wis. Stat. § 346.63 is not an exception to a statutory provision that ***restricts*** a particular policy like the statute at issue in this case, Wis. Stat. § 102.03(2). Rather, Wis. Stat. § 346.63 provides a broad, all encompassing

definition of the phrase for purposes of Wisconsin's policy of deterring intoxicated individuals from getting behind the wheel of a vehicle "in the first place rather than to have a court or jury make a fine distinction later whether the person was in a position to cause harm." State v. Modory, 204 Wis.2d 538, 544-545, 555 N.W.2d 399, (Ct. App. 1996).

McNeil argues that the drunk driving statute is applicable because, like the exclusion at issue, criminal laws are construed narrowly against a defendant. (Court of Appeals Brief of Plaintiff-Appellant, p.4.) McNeil ignores, however, that the definition of "operate" is not narrow and was actually broadened several times to ensure a broad application of the drunk driving laws to protect society from even potential drunk drivers. This is shown by the legislatures several amendments to Wis. Stat. § 346.63.

Originally Wis. Stat. § 346.63 only applied to vehicles driven on the highway. City of Kenosha v. Phillips, 142 Wis.2d 549, 554-555, 419 N.W.2d 236 (1988). In 1957, the legislature amended Wis. Stat. § 346.63 to broaden its application to include premises

held out to the public for use of their motor vehicles. Id. The purpose of the amendment was to provide a broader applicability of the drunk driving and reckless driving laws in the interest of public safety. Id. The statute was broadened yet again in 1995 to its current broader version. Wis. Stat. § 346.63. Therefore, although the statute may be narrowly construed against a defendant, it is clear that the legislature created as broad a definition as possible in order to prevent drunk driving accidents.

In comparison, the legislature intended to protect co-employees from lawsuits involving work-related accidents with a very narrow exception to the application of the exclusivity provision. Hake, 178 Wis.2d 422-424. The legislature would not have intended its broad drunk driving related definition to apply to a narrow exception in the Worker's Compensation Act or it could have defined the term or incorporated the drunk driving definition within the WCA. The legislature has had plenty of opportunities to do so since it amends the WCA approximately every two years.

Applying unrelated laws to the Worker's Compensation Act does not advance the purpose of the exclusive remedy provision and is an inappropriate method of statutory construction. A primary and basic rule of statutory construction is that a phrase must be defined within the context of the statute in which it is used. Pulsfus Farms v. Town of Leeds, 149 Wis. 2d 797, 804, 440 N.W.2d 329 (1989). McNeil does not discuss the context and distinguishing characteristics of the statutes at issue. The purposes and policies behind the drunk driving, road rule and criminal laws are not consistent with the purposes of the Worker's Compensation Act. All of those laws are intended to broadly protect the public as a whole from dangers affecting the public as a whole. In contrast, the public policy concern that underlies the rule of co-employee immunity, is to avoid putting a financial burden on coworkers such as Hansen because industrial accidents are certain to occur. Hake, 178 Wis.2d at 423-424.

It is also a fundamental rule of statutory construction that "[l]aws must be interpreted,

considering the legal and practical consequences, to avoid unreasonable and absurd results." Strenke v. Hogner, 2005 WI 25, P48 (2005) citing State v. Jennings, 2003 WI 10, P11 (2003). It would be an absurd and unreasonable result to find that Hansen was operating a motor vehicle within the context of the Worker's Compensation Act. Hansen was within the confines of his employment premises working in a service bay. McNeil and Hansen were subjected to the special hazards of their employment that the general public was not subjected to when the incident at issue took place. Hansen does not have private insurance coverage as the vehicle belonged to his employer's customer. Hansen never entered the vehicle. He had no intention of driving, steering, braking, changing its speed or direction, or in any way moving the vehicle and could not have done so without dragging the radiator flush machine with him. He was merely following his boss's instruction to turn the Jeep on while it was being serviced.

If one were to accept McNeil's argument, all auto shop employees and other automobile service employees

would be subject to liability never intended by the legislature when it enacted 102.03(2) and this would be an unreasonable and absurd result.

McNeil cited a Michigan case for the proposition that another jurisdiction has held that turning the key in the engine of a vehicle constitutes "operation of a motor vehicle." (Supreme Court Brief and Appendix of Plaintiff-Appellant pp. 5-6, citing North v. Jolomyjec, 199 Mich. App. 724, 502 N.W. 2d 765 (1993).) The North case is not applicable to this case because, like the other statutes McNeil relies on, the statute at issue in the North case does not involve Michigan's Worker's Compensation Act. It involves a civil liability statute. North provides that the exclusive remedy provision bars co-employee claims in a nearly identical factual circumstance.

In North, the owner of a vehicle took her car to a service station. North, 199 Mich. App. at 725. The owner gave the employees permission to work on the car. Id. at 727. One of the employees reached through the window and turned the key to the ignition which caused the vehicle to lurch forward and injure the plaintiff

employee. Id. at 725. The plaintiff sued the customer/owner of the vehicle, not the co-employee, pursuant to a Michigan civil liability statute that makes a vehicle owner liable for her own negligence and that of any person whom she gives consent for its use. Id. at 725-729. The North court indicated that the plaintiff could bring the case against the owner of the vehicle despite the fact that the negligent employee was immune from suit under Michigan's Worker's Compensation Act. Id. at 727. Thus, in Michigan, the plaintiff at issue was barred from filing suit against his co-worker for the same exact facts at issue in this case.

II. BRANDON HANSEN'S ACT OF TURNING THE KEY IN THE IGNITION PURSUANT TO HIS MANAGER'S ORDERS DOES NOT CONSTITUTE "OPERATION OF A MOTOR VEHICLE" UNDER THE NARROWLY CONSTRUED WORKER'S COMPENSATION EXCLUSIVITY EXCLUSION.

Hake is the only published case in Wisconsin that has specifically discussed the term "operation" as used in Wis. Stat. § 102.03(2). In Hake, The Court held that the term "operation" as used in Wis. Stat. Sec. 102.03(2) is ambiguous and the Court therefore had

to consider the purpose of the WCA in order to narrowly define the term. Hake, 178 Wis.2d at 422-424.

One purpose of the WCA is to prohibit most suits by an employee against a co-employee. Hake v. Zimmerlee, 178 Wis. 2d at 422 This is because,"[i]njuries caused by a negligent coemployee are everyday occurrences. Such injuries are directly related to the employment, and pursuant to the stated purpose or objective of the Worker's Compensation Act, the costs should be passed on to the consuming public." Id. at 422-424. "It is also significant that if not immune from suit under sec. 102.03(2), Stats., a negligent coemployee would be subject to reimbursement liability for funds paid to an injured worker by an employer or the employer's insurance carrier. Such a result would likewise frustrate the purpose of the Worker's Compensation Act." Oliver v. Travelers Ins. Co., 103 Wis.2d 644, 649 fn2, 309 N.W.2d 383 (Ct. App. 1981).

Hake involved a defendant who closed the door of a van on a passenger. The Court noted that per the already provided definitions of "operate" contained in

the insurance laws and policies, the defendant at issue may have been operating a motor vehicle. Hake, 178 Wis.2d at 424-426. The Court refused to rely on those broader definitions, however, and instead held that pursuant to the narrow scope of the phrase as used in Wis. Stat. § 102.03(2), the defendant was not operating a motor vehicle. Id.

The narrow construction of the Worker's Compensation exclusivity provision was also applied in Ross v. Foote, 154 Wis. 2d 856, 862 (Wis. Ct. App., 1990). The Ross case involved a motor vehicle accident that occurred in Italy. Several co-employees were in Italy for a work-related conference. Id at 858. When their flight was cancelled, the co-employees decided to rent a vehicle to travel to the closest airport with a flight available. Id. The driver/employee, Foote, leased a vehicle *in his own name* with the intention of being reimbursed for the expense by his employer at a later time. Id. at 858-859. The co-employees were involved in a car accident. Id. at 858. Co-employee, Ross, was injured in the accident and sued Foote. Id. at 859. Ross claimed that the exception to the

Worker's Compensation exclusivity provision regarding the "negligent operation of a motor vehicle not owned or leased by the employer. . . ." applied to the facts of his case because the vehicle at issue had not been "leased by the employer." Id. at 857 and 860-861. The Court disagreed with Ross's literal interpretation of the term "leased by the employer." The court held that because Foote had leased the vehicle for employment purposes, he was granted protection under the Worker's Compensation exclusivity rule. Id. at pp. 862-864.

The Ross Court also made the following statements and admonishments concerning the Worker's Compensation exclusivity exception:

> The Worker's Compensation Act is the product of competing interests and represents a political compromise. This legislation represents a "delicate balancing" of the interests represented in our industrial society. The exclusivity provisions are an integral part of the political compromise reached. Our supreme court has said that if an injury falls within the coverage of the act, the worker's compensation remedy is exclusive.
>
> This same logic applies to claims against co-employees. "Although an injured employee gives up the right to sue a negligent coemployee, if the injured employee were placed in the same position as the negligent coemployee, he, too, would receive the benefit of being immune from

suit." We properly bear in mind the admonition of our supreme court in Jenkins v. Sabourin, 104 Wis. 2d 309, 323, 311 N.W.2d 600, 607 (1981):

> New liabilities on employers or employees should not be imposed by courts without compelling and well-understood reasons. While a tort remedy could be beneficent [sic] and just in a particular case, such precedent, unless carefully considered from the viewpoint of general state policy, could well gut the Workers Compensation Act, create injustice, and substantially impair the exclusivity-of-remedy provision, which has made the Workers Compensation Act tolerable to employers. (Citations omitted.) (Emphasis added.)

Ross 154 Wis.2d at 861-862.

Like the courts in Ross and Hake, this Court should consider the purpose of the WCA in determining a narrow definition of "operation of a motor vehicle" within the context of the WCA.

A. This Court Should Adopt the Connecticut Approach and the "Special Hazards" Test.

This Court should adopt Connecticut's approach to defining the phrase "operation of a motor vehicle" within the WCA. Connecticut's statute is similar to Wisconsin's in that it provides co-employee immunity unless the action "is based on the fellow employee's negligence in the operation of a motor vehicle." Conn.

Gen. Stat. § 31-293a. Unlike Wisconsin, the Connecticut legislature incorporated a general definition of "operation" into its WCA. Conn. Gen. Stat. § 14-1.

Connecticut's Supreme Court determined, however, that despite the somewhat broad definition of the phrase "operation of a motor vehicle," the legislature intended the exclusion to be narrowly applied only to cases in which the employees were not facing "the special hazards of the work place." Kuhar v. Phillips, 49 Conn. Supp. 351, 881 A.2d 554 (2005).

Kuhar is directly on point. In Kuhar, the plaintiff-employee sued a fellow employee after a motor vehicle accident that occurred on the premises of the employer's motor vehicle service station. Kuhar, 49 Conn. Supp. at 351-352. Like the case at hand, the employees were working in a service station and the employee-defendant turned the ignition of a vehicle believing that the vehicle would not move. Id. The vehicle "lurched" forward and struck the plaintiff. Id.

The Court noted that "***while the text of § 31-293a is arguably broad enough to exclude any claim of a 'fellow employee's negligence in the operation of a motor vehicle' from the immunity provision of that statute, the exception in question has been more narrowly construed by the Supreme Court.***" Kuhar at 352 (Emphasis added). The Connecticut Supreme Court had previously concluded that where an accident involved a common danger to which the general public was exposed, the exclusivity provision did not apply. Id. citing Dias v. Adams, 189 Conn. 354, 456 A.2d 309 (1983). The Court stated that ordinary motor vehicle accidents that occur on a city street or supermarket parking lot are examples of common dangers to the general public. Kuhar, 49 Conn. Supp. at 354. In contrast, the Court found that the situation involved in the Kuhar accident was not a common danger because the accident occurred in the workplace and it occurred because of the special hazards of that particular workplace. Id. The Court held that under the circumstances, the exclusivity provision applied and the fellow employee was immune from suit. Id.

McNeil argues that Kuhar is in conflict with Wisconsin law. (Letter brief dated February 14, 2006 p. 2.) According to McNeil, the Wisconsin case, Gorzalski v. Frankenmuth Mutual Ins. Co., 145 Wis. 2d 794; 429 N.W.2d 537 (1988), which involves a co-employee motor vehicle accident, conflicts with the finding of the Connecticut Kuhar case. McNeil is incorrect. First, the definition of "operation of a motor vehicle" was not disputed or discussed in Gorzalski because the defendant was actually driving the vehicle at the time of the accident. Therefore, the Court did not make a determination as to the phrase's meaning. Moreover, the Gorzalski decision does not discuss the facts of the case in great detail, but it appears that the vehicle at issue was not being worked on in a service bay at the time of the accident or it could not have been driven. It is more likely that the negligent employee at issue was driving the vehicle on the lot where there was a common danger to all individuals on the lot versus just co-employees. Therefore, the Connecticut determination is not in conflict with Wisconsin law and this Court should adopt

its analysis and find that Hansen is protected by the Wisconsin WCA exclusivity provision.

CONCLUSION

A narrow construction that comports with the policies of the Worker's Compensation Act in the case at hand requires this Court to rule as a matter of law that Mr. Hansen was not operating a motor vehicle within the context of the worker's compensation statute.

Respectfully submitted this 16 day of June, 2006.

LOWE & ASSOCIATES
Attorneys for Defendants-Respondents

By: _____
Edward W. Stewart
State Bar No. 1019253
Danielle R. McCollister
State Bar No. 1045749

POST OFFICE ADDRESS

20935 Swenson Drive, Suite 310
Waukesha, WI 53186
(262) 798-8888

CERTIFICATION

I certify that this brief meets the requirements of Wis. Stat. § 809.19(8)(b) and (c) in that it is monospaced font (Courier New, font size 13), 10 characters per inch, double-spaced with a 1.5 inch margin on the left and 1 inch margins on all other sides. The portions of this brief referred to in § 809.19(1)(d), (e) and (f) are 26 pages long.

Dated this 16th day of June, 2006.

Danielle R. McCollister
State Bar No. 1045749

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS
OF SUPPLEMENTAL APPENDIX

car from me, on the passenger side.
Q Was the passenger door open?
A No, both doors were closed.
Q So he didn't have the door open and was vacuuming inside or anything like that?
A No, I'm sure he didn't even get to that point.
Q Do you know exactly -- was he just standing next to the car, or was he wiping the windows down or do you remember what he was doing?
A I don't remember. He was on that side of the car. He was helping Karl.
Q That was a -- what kind of a car was it?
A It was a Jeep Wrangler.
Q And on the passenger side was the window open?
A Yeah, I'm assuming. The windows don't roll down. They're flaps, they're zip down, but yeah, I remember it was open.
Q Did you have to open the door to start the car or did you reach through the window?
A Reached through the window.
Q Had you ever -- so after you let this other vehicle out, you walked over by the Jeep where Karl was working asked if there was anything else you could do?
A Um-hum.

Q Yes?
A Yes.
Q And he said could you start the car?
A Yes.
Q And what would be the purpose of starting the car while somebody is working on the hoods?
A You have to start it to -- the coolant machine, it pumps out the old coolant and replaces it with clean coolant, so the engine has to be running.
Q And what happened; you said you reached inside, reached through the window to start the car?
A Yeah, yes.
Q And then what happened?
A I reached through the window to start the car, and the keys weren't in the ignition, there was no keys. I told Karl, I said where is the customer, and the customer was standing on the opposite side of the car, on the passenger side, and he tossed the keys to me over the hood, so I put the key in the ignition, turned the key, it started, and then it -- there was like a second pause, like it lasted a second, and then it started rolling.
Q Let's back up. The customer tossed you the keys, tossed them over the Jeep?
A Um-hum.

Q Yes?
A Yes.
Q And then again you reached in or opened up the door at that time?
A No, I reached in through the window. The door is only about this high on a Wrangler.
Q And then you started the car, correct, by turning the key?
A Yeah, yes.
Q And then did it lurch forward, did it roll forward; explain what the car did.
A It rolled. It just started rolling, not very fast, it picked up a little speed, but it was only like from the front bumper to the door is maybe six feet.
Q So when you started the car, you knew Karl was in front of it?
A Yes.
Q And Karl was in front of it, at least as far you know, he knew you were starting it?
A Yes, he did know.
Q Then when the car started forward, can you tell me what happened with Karl?
A I don't know. I couldn't see him. The Jeep went -- it hit the door and went maybe a

foot through. I turned it off as fast as I could, but I don't know how to drive a stick, so I couldn't get it out of gear. I'm like -- well, I'm pulling on the Jeep to pull it off of him, so the owner came around and he's the one that took it ou of gear, and we all pulled it off of him.
Q So the Jeep went forward and hit Karl?
A Um-hum.
Q Yes?
A Yes.
Q And pinned Karl against --
A And went through the door maybe two feet with Karl in between.
Q What kind of door, is it like an aluminum door?
A An overhead aluminum.
Q And is this something where you pull in from one side and drive out the other?
A Yes.
Q Now, you said you've never driven a stick before?
A No.
Q In any of the cars that had come in, did you ever have to start a stick shift before?
A Yes, sometimes.
Q Did you get in the car to do it?
A Yes, you have to, because with a stick it won't

Page 22

start unless you put the clutch in.
Q And you've started stick shift before, you've just never driven one on the road; is that a fair statement?
A I learned how to start a stick there. I had trouble starting a stick because I didn't push the clutch in far enough.
Q Let's go back. Prior to working there, you had never driven a stick shift?
A No.
Q And you had never even started a stick shift before?
A No.
Q That's a correct statement?
A That's correct, I didn't know how.
Q And after working there, there were some stick shifts that came in where you did have to start the vehicle?
A Sometimes, but more often than not, I didn't have to -- I didn't have to start a vehicle, because I was in the pit.
Q But there were some times when --
A And when you're in the pit, you don't want to get into a car because you're covered in oil.
Q But you did -- prior to this incident, there were

Page 23

times where you had to start a stick shift?
A Sometimes.
Q You said --
A Rarely.
Q Right. But you knew that you needed to put the clutch in -- putting the clutch in puts it in neutral for starting the car, right?
A You push -- you have to push in the clutch, I don't know. I don't know about neutral.
Q But your understanding is when you start a stick shift, you put the clutch in and put your foot on the brake; you put the clutch in with your left foot and put your right foot on the brake?
A Yes.
Q Did you realize this was a stick shift when you went to start it?
A No, I just -- I walked up. He said go ahead and start it up, and I went to reach in and I told him there is no keys, so the customer threw the keys over the hood to me, and I stuck the key in there and I started it. And it did start.
Q But when you went to start it --
A That whole time frame from me walking up to the car to the car starting was maybe four seconds. I didn't look in the car at all. I just walked up

Page 24

and started it like Karl told me to.
Q But the question I have is I guess when you went to start the vehicle, did you realize it was a stick shift?
A No. Because they both come automatic and manual, that style.
Q Had you ever changed the oil on that style vehicle before?
A Um-hum.
Q Yes?
A Yes. There is no difference with that, though. It's the same engine.
Q Did you know the owner of the vehicle at all?
A No.
Q When you started, did you ever receive any type of written material from Fast Track?
A Like safety training?
Q Anything along those lines.
A No.
Q So when you started, he never gave you any kind of material saying read this, this will tell you your duties, safety?
A No.
Q Nothing?
A Nothing.

Page 25

Q Were you ever instructed that you're not supposed to start the cars from the outside?
A No.
Q Do you know if anybody -- I mean were you ever around when anybody else was instructed not to do that?
A No.
Q Had it been done before there?
A That you reached in to start the car?
Q Yes.
A All day, every day, by Karl, Junior, all of us.
Q And up until that point, you had never been told by anybody that you're not supposed to do that?
A No. After the accident, Dan Beth the district manager, he came to the scene, and he was complaining about -- he said that he had talked to Karl and Junior and he thought that I was there, too, but I wasn't that day, that that was policy. That you have to get in every car, but I was -- I was unaware of that up until that point, and everybody did it every day, reaching in and starting cars.
Q At what point would you have to -- in the process, when you're changing oil, coolant, whatever it is, at what point does somebody have to start the car?

restrictions is my understanding when you left Fast Track?
A. Yes.
Q. And you do not have any restrictions of any kind today, do you?
A. No.
Q. What does your job entail? Do you have to -- why don't you describe your typical day's work and what you have to do today.
A. Marketing.
Q. Okay. Well --
A. Marketing a lot of -- basically educating people how to utilize their equipment.
Q. What type of equipment do you sell?
A. Motorized wheelchairs. Motorized scooters, diabetic supplies, all that type of stuff, home medical equipment.
Q. Do you ever have to deliver it?
A. Not really, you know, maybe. I may have to deliver a nebulizer or something like that. That is the most I've ever delivered.
Q. Do you have a company vehicle?
A. No.
Q. How do you get to and from your appointments?
A. Drive.

Q. Who is your boss at Branc?
A. Dwight McTilic.
Q. How do you spell his name?
A. D-W-I-G-H-T M-C-T-I-L-I-C.
Q. Have you known him for awhile, or did you jus meet him?
A. Known him for awhile.
Q. Before you started working there?
A. Yes.
Q. Are you making a claim for future loss of earni capacity or not?
MR. BECKER: No.
MR. STEWART: We can stipulate on the record?
MR. BECKER: At least not on this point. We have no basis to claim it at this point.
MR. STEWART: All right.
Q. Where did you work before -- let me ask you this, at Fast Track who was your boss?
A. Dan Beth.
Q. What was your job title at Fast Track?
A. Which time?
Q. How about when you left?
A. Lube tech.
Q. Lube tech?

Q. Your own car?
A. Yes.
Q. Okay. Taking a look at your responses to written discovery, it appears I asked you a question in interrogatory number 11. Please identify all of your employers over the past ten years setting forth the name, address, nature of business, position held and dates of employment; and the response you provided was Lubricant Specialists, LLC, 4296 South 27th Street in Milwaukee.
A. Um-hm.
Q. Was that Fast Track?
A. Yes.
Q. Okay. And the date of these discovery responses was May 6th, 2004.
A. Um-hm.
Q. So that information on that discovery response was not up to date?
A. What do you mean by that?
Q. Well, that was your last employer. It was not your current employer, correct?
A. Yeah, before I got hired on with Branc Mobility.
Q. And on May 6th, 2004 you were working for Branc Mobility, right?
A. Yes.

A. Yes.
Q. What other job titles did you hold there?
A. Manager.
Q. Do you recall the date of the incident that is at issue in this lawsuit?
A. April 12th, 2003.
Q. And on that date were you a lube tech or were you a manager?
A. Manager.
Q. Were you demoted?
A. I took a demotion, yes.
Q. Who demoted you, and why did you take a demotion
A. Because of my condition.
Q. Explain.
A. Dan Beth demoted me actually.
Q. Okay, Dan Beth did?
A. Yes.
Q. Was there a reason for it?
A. Because I could not handle the store anymore.
Q. Why is that?
A. Because of my accident.
Q. How did that affect your ability to manage the store?
A. Because I was not there as frequent as I should be being a manager.

Q. Was that the only reason?
A. Yes.
Q. There was no other reasons that you can think of why you were demoted from manager to lube tech?
A. No.
Q. Okay. When did you start working for we'll call it Fast Track?
A. I started actually working at Fast Track when I was working for Jiffy Lube. It was -- it had to be June or July of '02. I'm not sure. I don't remember the accurate date.
Q. Were you working there about a year or maybe ten months to a year then like when the incident at issue occurred?
A. Yes.
Q. And when you were initially hired, were you hired as a manager?
A. No.
Q. At what point did you become a manager?
A. I believe the first part of 2000 -- the end of 2002, the first part of 2003.
Q. December of 2002 and/or January of 2003 you became manager?
A. Yes.
Q. Would it be fair to say by the end of January of

2003 you're most certain you were a manager at that point?
A. Yes.
Q. How did your job duties change as manager from just being a lube tech and I'm -- before I ask you that, were you a lube tech when you were hired?
A. Yes.
Q. Then when you became manager, how did your job duties change?
A. I now held responsibility for making a schedule, making sure the store ran properly, ordering supplies.
Q. Anything else?
A. Going to the bank, to and from the bank, taking inventory, going to managers' meetings.
Q. Where would the managers' meetings be held?
A. Hales Corners.
Q. Is that a store?
A. Yes.
Q. Where was your store located that you worked at?
A. 62nd and what is that street? 62nd and -- 6207, I can't even remember the street name.
Q. That is all right.
A. 6207 is the address though.
Q. Which city, which town, Milwaukee?

A. Yes, Milwaukee, 6207.
Q. Did you only work at one store there, or did you work at a variety of different stores when you were working for Fast Track slash Jiffy Lube?
A. As -- are you talking about as a lube tech or a manager?
Q. All right. How about the whole way through. You started working for them in June of 2002 approximately to the best of your recollection; is that right?
A. Yes, yes.
Q. Did you only work at the same store your whole tenure there, or did you change stores?
A. I'm trying to see, did we do any promotions with any other store that I worked at -- that I may have did a promotion? No, I worked at Hales Corners when I first started there.
Q. How long?
A. Up until I became a manager.
Q. Okay. And then when you became a manager, you moved to this other store?
A. North Avenue. That is the store.
Q. 6207 North Avenue?
A. Yes.
Q. All right. And then that was your store that you

were the manager at?
A. Yes.
Q. In addition to ordering supplies and doing inventory and attending managers' meetings and managing the store, did you have to hire employees?
A. Well, we have the general -- the district manager really does approve the hiring and firing.
Q. Who was that, Dan Beth?
A. Yes.
Q. Who was responsible for training employees that worked under you as the manager?
A. Well, we all were responsible for training.
Q. Okay. And as a manager of a store, it would be part of your duties to manage or -- Strike that. As the manager of a store, it would be part of your duties to go ahead and train employees?
A. Yes.
Q. And one of the employees you had the responsibility of training was Brandon Hansen?
A. Yes.
Q. Were you the primary person that was responsible for training Brandon?
A. While under my care.
Q. Okay. My understanding is that Brandon started

working -- do you know when Brandon started working at the store?
A. I don't remember the date.
Q. Do you know how long he had been working there?
A. I don't remember.
Q. My understanding is that he was -- had been working there for a month or two prior to the incident. Does that sound like it might be accurate?
A. It may be.
Q. Okay. And during that time period that he was working there, would it be fair to say that you were the one as the manager of the store that was responsible for training Brandon as to how to perform his job?
A. Yes.
Q. All right. Prior to working for Fast Track or Jiffy Lube we'll call it, where did you work before that?
A. I've worked for Porters of Racine.
Q. Where are they?
A. Actually right over there.
Q. Is that where you worked right before going to Fast Track?
A. No, actually I was incarcerated before I became an

employee of Fast Track.
Q. Okay. Where were you incarcerated?
A. Racine, Wisconsin.
Q. House of corrections or is it --
A. No, actually --
Q. County jail?
A. Well, they sent me to -- I mean, you want to know everywhere I was at when I was incarcerated? The City of Racine took care of all that to kind of generalize it.
Q. You were incarcerated for a period of time?
A. Yes.
Q. The first job you had before you got out of jail --
A. After that.
Q. -- was Fast Track?
A. After I got out.
Q. Okay.
A. I obtained a job at Fast Track.
Q. Okay. How long were you incarcerated?
A. Over two years.
Q. Obviously you were convicted of some crimes?
A. Yes.
Q. Were you convicted of felonies?
A. Yes.

Q. How many felonies have you been convicted of
A. I'm not sure.
Q. More than three?
A. I'm not sure.
Q. More than one?
A. I've been convicted of a felony.
Q. And you do not know if it is more than five or less than five?
A. No, I don't know.
Q. Okay. Does it all stem from the same incident c the convictions, or are they unrelated?
A. Related.
Q. What were you convicted of?
A. Drugs.
Q. What do you mean?
A. I was convicted of party to delivery of a controlled substance.
Q. What was it?
A. Cocaine.
Q. So all of your convictions, all of your felony convictions you're aware of only pertain to the cocaine drug charge? There might be more than one charge that relates to that? Is that your understanding?
A. Yes.

Q. Are you aware of any other -- go ahead. I thought I might have cut you off.
A. No, go ahead.
Q. Are you aware of any other crimes you've been convicted of?
A. I've been convicted of possession of marijuana, driving without a license.
Q. Anything else?
A. Having sex with a minor.
Q. Anything else?
A. No, not that I know of.
Q. And your incarceration had to do with just the drugs or all of the others you just mentioned?
A. Well, it led up to that, the incarceration.
Q. All right. Before -- what date did you -- the only place you were ever incarcerated was somewhere in Racine County?
A. No.
Q. Okay. Where else were you incarcerated?
A. Meaning while -- you have to allow me -- you have to give me --
MR. BECKER: For the record I guess I'm going to object to any continuing questions along this line. Obviously how many times he's been convicted and discovery you can get what for, but

A. My wrist was injured and my neck and my back.
Q. And I'm kind of repeating myself, but I've read some of your medical records. It is my understanding now you do not have any medical restrictions of any kind on you, true?
A. True.
Q. And it's also my understanding that you have not had any treatment of any kind since November of 2003?
A. As far as?
Q. As far as anything.
A. No, that is not true.
Q. When was the last time you had some treatment?
A. Last month.
Q. With whom?
A. Dr. Mawn.
Q. How do you spell that?
A. M-O-N -- I don't know.
MR. BECKER: M-A-W-N.
A. He was treating me for my neck and back.
Q. Is your neck and back 100 percent now?
A. No, I still have popping in my neck from time to time. I still have a lot of pain in my shoulder.
Q. What about your back?
A. That is part of my back right up in here.

usually do push-ups and stuff like that. I can't bend my hands all the way back or all the way forward or to each side. I can't have a lot of pressure on it, put it that way.
Q. Are you right handed or left handed?
A. Right handed.
Q. Did you play any sports at Horelick?
A. No.
Q. What type of -- do you still do push-ups?
A. I can't do push-ups.
Q. How many push-ups were you doing before the incident?
A. Probably 700 a day.
Q. How long have you been doing that?
A. A long time.
Q. Since you were a kid?
A. Awhile, at least for the past five years I should say.
Q. Okay. And you do not do any push-ups at all anymore?
A. No, I can't. If I do anything, it would have to be on my -- I can't do them.
Q. I'm sorry, I might have asked you this, are you right handed or left handed?
A. Right handed.

Q. What about your low back, is that fine?
A. It does not hurt as much as my upper.
Q. But you do not have any restrictions that prevent you from working at all?
A. No.
Q. Okay. You saw Dr. Mawn last month. Was he the last person you ever treated with?
A. Yes.
Q. When was the last time you had any treatment prior to that?
A. Probably November like you said with Dr. Anderson.
Q. Okay. Dr. Anderson performed surgery on your wrist?
A. Yes.
Q. Which wrist is it?
A. My right wrist.
Q. Can I see? Do you have a scar?
A. Yes.
Q. Okay. How is your right wrist today?
A. It still is not like it used to be.
Q. What type of limitations, if any, do you have?
A. What do you mean by limitations?
Q. Well, what kind of things do you have problems doing?
A. I have problems doing my regular exercises. I

Q. Does it affect your ability to write at all?
A. No, I can still write.
Q. Does it affect your ability to drive a car at all?
A. Yes, in fact, when I'm trying to turn, you know, I can feel it in my wrist.
Q. All right. Why don't you -- do you recall what time of day this accident occurred?
A. I think it was around 3 o'clock. If I'm not mistaken, it was around 3 o'clock. It was close to closing.
Q. What time do you close?
A. It was a Saturday, so we closed at five.
Q. What was the date again? You know it.
A. April 12th.
Q. Okay. And what kind -- were you working on the car when this accident occurred?
A. It was three of us. Actually it was four of us there. I believe it was three of us on the car.
Q. What were you doing?
A. I was doing hoods.
Q. And what does that mean?
A. Making sure the oil had -- the car has oil in it, making sure the fluids are topped off and you talking about -- explain to me what do you mean by hoods so I can know how to answer your question s

I can understand how you want me to answer it.
Q. I asked you what you were doing when the incident occurred.
A. When the incident occurred, I was doing hoods.
Q. Okay. And what exactly does hoods entail?
A. Checking all the fluids, checking all -- checking and topping off all the fluids, making sure there is oil in the car, doing an inspection.
Q. Were you doing any specific task when the incident occurred?
A. Yes.
Q. What specific task?
A. I was doing a radiator flush.
Q. And what does that entail?
A. Flushing of the radiator.
Q. How do you do that?
A. You hook up two lines to the vehicle. One flushes new coolant in, and one flushes the old coolant out.
Q. You said you were not the only person servicing this vehicle at the time.
A. Correct.
Q. What kind of vehicle was it?
A. A Jeep Wrangler.
Q. Do you recall the year?

A. No, I don't.
Q. Was it an early?
A. I'm not sure. I don't know. I don't remember. I know it was a Jeep Wrangler.
Q. Did it look like an old time Army Jeep?
A. I don't remember. I know it was a Jeep Wrangler though. I'm not familiar with what year it was.
Q. Okay. Was it -- as four-wheeled vehicles go, it was a smaller four-wheeled vehicle?
A. It was a Jeep Wrangler, so if a Jeep Wrangler is smaller, that is what it was.
Q. What color was it if you recall?
A. I'm not sure.
Q. Okay. Now, who else was working on the car?
A. Me, Brandon Hansen and it was either Deon Davis or Tyjuan Sloan.
Q. Do you know how to spell Deon Davis?
A. D-E-O-N D-A-V-I-S. I'm thinking that is his last name.
Q. What is the other person?
A. Tyjuan Sloan. We were the four gentlemen working that day.
Q. Okay. What was Deon doing?
A. It was either between him and Tyjuan doing lowers that day.

Q. You're not sure who was doing lowers that day?
A. I am not sure, but if I'm correct, it probably was Deon. It would had to have been Deon.
Q. You're not 100 percent, but if you had to guess, would you guess it would be Deon that was working lowers?
A. Yes.
Q. And lowers would mean underneath the car in the pit?
A. Yes.
Q. Okay. What would Tyjuan have been doing?
A. Tyjuan was not working on the vehicle. One of them was not working on the vehicle.
Q. So was it -- would it be fair to say there was only two people working on the vehicle for the majority of the time?
A. No, that is not accurate because a third person has to be up under the vehicle, so it always has to be -- at that point in time it was three people.
Q. Okay. By the way, who pulled the Jeep Wrangler in?
A. The customer was guided in by one of us.
Q. Okay. I have been to these things before. Typically the customer drives it in, and the

customer drives it out.
A. Not always.
Q. Okay. Well, what was the intention of this situation? Was the customer going to --
A. It all depends because after the vehicle was being worked on --
Q. All right.
A. -- if the customer is standing there with us, of course he would then drive it off, but if he is in the lobby, usually we'll go in the lobby and get him and take him outside to his vehicle.
Q. Was the customer standing outside this vehicle when the accident occurred?
A. If I can remember he was.
Q. So if everything went smooth, the customer would have gotten back in the car and drove out?
A. What do you --
Q. If there wasn't the accident and you finished the job.
A. If I would have finished the job?
Q. Typically the customer would have gotten in the car then.
A. I'm not sure because I don't know if the customer would have stayed there during the whole period of time while we were working on the vehicle.

Q. You were working on hoods?
A. Yes.
Q. You're not sure who was working down low, right?
A. I'm not sure.
Q. It was either Deon or --
A. If I'm not mistaken, it was Deon.
Q. And the other possibility would have been?
A. I'm almost sure it was Deon because Tyjuan was upstairs.
Q. Okay. How many people were servicing the vehicle then, just two?
A. Three.
Q. Who was the third?
A. Me, Brandon, and it had to be Deon.
Q. Okay.
A. Doing lowers.
Q. What was Brandon doing before the accident?
A. Brandon was doing courtesies.
Q. What is that?
A. Courtesies is starting the vehicle, vacuuming the inside, washing the outside windows, checking the tire pressure.
Q. What does courtesies entail, checking tire pressure, vacuuming?
A. Vacuuming the inside, washing the outside windows,

checking the tire pressure and starting the vehicle.
Q. Now, are you positive he was doing that or would -- how many stalls were there at that place? Was there more than one place for people to work?
A. Actually Deon was doing lowers because Tyjuan was still working on another vehicle because there was two vehicles in there at the time. It was a black Suburban if I'm not mistaken.
Q. So who was working lowers?
A. Deon.
Q. Okay. Who was -- was Brandon working on other vehicles other than the Jeep Wrangler?
A. No, actually the Suburban was finished and I believe was getting billed out at the time, and Tyjuan was taking care of that.
Q. Are you positive about that?
A. I'm almost positive.
Q. So if -- why don't you tell me then how long you were working on the car before the incident occurred.
A. On which car?
Q. The Wrangler?
A. It does not take long to change the oil, so it takes about 10 to 15 minutes to do a car if there

is no other jobs being done to the vehicle. If it is basic oil change, 10 to 15 minutes to do it.
Q. Do you recall what the job was that you were performing on the Jeep Wrangler?
A. Yes, we were doing a radiator flush and an oil change.
Q. Okay. And from the moment that that vehicle was pulled into the garage by the customer, who firs started working on the vehicle?
A. There is a procedure when a car is pulled in. Everybody knows their role. Whoever is doing hoods attack the hoods. Whoever is doing the courtesies attack the courtesies, and whoever is doing lower attack lower.
Q. Okay. And there is only four people working there?
A. At the time, yes.
Q. And there is two cars in the stall at the same time?
A. Yes.
Q. So sometimes you have the teams working two cars, or how does that work?
A. Well, we finish one car and then go to the next.
Q. Okay. So how long had you been working on th vehicle up until the time the accident occurred?

A. I don't recall. I don't recall, maybe 10 minutes or so, 15 minutes or so, I'm not sure.
Q. Why don't you tell me in your own words what happened when the incident happened.
A. After hooking up the hoses getting the vehicle to -- prep the vehicle to proceed with the radiator flush, I then asked Brandon while I stood up under the hood to start the vehicle to check and see if the hoses were going correctly. After that I was through a garage door pinned between the Jeep Wrangler and the garage door.
Q. Where was Brandon when you asked him to start the vehicle?
A. Probably to my right.
Q. Do you know that for a fact?
A. Yes.
Q. You were able to see him?
A. Yes, I was able to look out and see if that was Brandon. Brandon started the vehicle.
Q. And were you able to see Brandon the entire time?
A. No, because the hood was up.
Q. Couldn't you see Brandon starting the vehicle even though the hood was up?
A. No, because he was up under the hood checking to see if the hoses was going correctly, making sure

there was no leaks and so forth.
Q. I've been to these oil change places many times, and usually when you start the car, you typically have them turn the car off, too.
A. If there is a problem.
Q. Okay. Well, you're going to keep the car on the whole time?
A. Yes, because when you're doing a radiator flush, the car has to be running for the fluids to drain and re-enter the vehicle.
Q. When you asked Brandon to start the car, there was no intention on your part to have Brandon drive the car?
A. No.
Q. There was no intention of him taking the car onto the road and operating it?
A. He could not possibly do that with the machine hooked up to it.
Q. There was no intention of him even steering the car when you asked him to start it. You just wanted him to start it?
A. Yes. That was part of his job.
Q. Okay. You were not asking him to get in the car and drive it, correct?
A. No.

Q. That is correct?
A. I was not asking him to get in it and drive it, no, he could not go nowhere with the machine hooked up to the vehicle.
Q. Right. And he was not going to even use the brakes. You wanted him to merely start the car?
A. No, the correct way to do the thing is you have to get in the car to start a vehicle. That is policy and procedure.
Q. Okay. All right. We'll get to that in a moment, but my point is, whether he got in the car or not, you did not want him to drive the car, correct?
A. I did not want him to drive the car.
Q. And he was not intending on driving the car as far as you knew?
A. I'm going to say it again, you cannot drive the car while something is hooked up to it unless you want to drag something down the street.
Q. Okay. All right. Now, were you able to understand what happened?
A. Was I able to understand what happened?
Q. Yes.
A. Of course.
Q. What happened?
A. He could not have got -- he could not have

followed the policy and procedures. He must not have followed the policies and procedures because I ended up through a garage door pinned between a Wrangler and a garage.
Q. What are the policies and procedures?
A. Upon starting any vehicle, you have to get in and put your feet on the brakes for emergency -- for like accident purposes, you know, just to make sure everything is safe.
Q. Okay. Now, when you asked him to start the car, did you notice him getting in the car?
A. It's a policy that we go by, so I thought he was following the regular routine.
Q. You did not feel him get into the car?
A. I was actually not paying him no mind because it's like, in order for you to drive your car, in order for you to start your car, you usually get in it, so it's like something that is routinely done.
Q. All right. So is it your testimony that you did not see him start the car from standing outside?
A. I could not see him because I was up under the hood making sure the hoses was not leaking.
Q. And you did not notice him getting in the car because the car would move if someone got in the car, true?

A. It all depends how much he weighed. Some people weigh more, so you would notice if somebody was sitting in there. Some people can tip into a car and you would not know they're there.
Q. All right. Now, whose responsibility was it to teach Brandon what the policies and procedures were?
A. Well, we do it as a shop. Everyone works together.
Q. Okay. But as a manager -- you're the manager at the time, correct?
A. Yes.
Q. And would it be fair to say it was your responsibility to make sure he was properly instructed?
A. Yes.
Q. And did you ever teach him this policy and procedure to get in the car?
A. Yes.
Q. Before the incident?
A. Yes.
Q. Do you know when?
A. I don't know, upon his -- I'm assuming all that is going -- we go over all that when you're hired. You know, we teach you to do -- the do's and the

Conn. Gen. Stat. § 31-293a

LEXISNEXIS (TM) CONNECTICUT ANNOTATED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2006 SUPPLEMENT ***
*** ANNOTATIONS CURRENT THROUGH MAY 18, 2006 ***

TITLE 31 LABOR
CHAPTER 568 WORKERS' COMPENSATION ACT
PART B WORKERS' COMPENSATION

GO TO CONNECTICUT STATUTES ARCHIVE DIRECTORY

Conn. Gen. Stat. § 31-293a (2006)

§ 31-293a. No right against fellow employee; exception.

If an employee or, in case of his death, his dependent has a right to benefits or compensation under this chapter on account of injury or death from injury caused by the negligence or wrong of a fellow employee, such right shall be the exclusive remedy of such injured employee or dependent and no action may be brought against such fellow employee unless such wrong was wilful or malicious or the action is based on the fellow employee's negligence in the operation of a motor vehicle as defined in section 14-1. For purposes of this section, contractors' mobile equipment such as bulldozers, powershovels, rollers, graders or scrapers, farm machinery, cranes, diggers, forklifts, pumps, generators, air compressors, drills or other similar equipment designed for use principally off public roads are not "motor vehicles" if the claimed injury involving such equipment occurred at the worksite on or after October 1, 1983. No insurance policy or contract shall be accepted as proof of financial responsibility of the owner and as evidence of the insuring of such person for injury to or death of persons and damage to property by the Commissioner of Motor Vehicles required by chapter 246 if it excludes from coverage under such policy or contract any agent, representative or employee of such owner from such policy or contract. Any provision of such an insurance policy or contract effected after July 1, 1969, which excludes from coverage thereunder any agent, representative or employee of the owner of a motor vehicle involved in an accident with a fellow employee shall be null and void.

NOTES:
1969 act clarified provisions re actions against fellow employees and added provisions re insurance policies and contracts; P.A. 83-297 provided that contractor's mobile equipment designed for use principally off public roads are not "motor vehicles" for purposes of this section if the injuries involving the equipment occur at the worksite; P.A. 84-22 made clear that the exclusions from the definition of "motor vehicle" established in P.A. 83-297 apply only to injuries which occur on or after October 1, 1983.

Chapter Notes:

*See Sec. 38a-470 re liens on workers' compensation awards in favor of insurers, hospital or medical service corporations or employee welfare benefit plans.

Theory of the workmen's compensation act. 89 Conn. 145; Id., 160; 93 Conn. 428; 105 Conn. 299; 120 Conn. 546. Act should be broadly construed to effectuate its purpose. 89 Conn. 146. It covers injury received out of state under a contract of employment made here. Id., 374; 111 Conn. 695. Liability rests on contract. Id., 682; 90 Conn. 220. Statute in force when the injury was received controls. 90 Conn. 220. One employed in another state but received injury here. 91 Conn. 524; 92 Conn. 371. Contracts made elsewhere for work wholly or partly done here considered. 99 Conn. 457; 103 Conn. 107. Proceedings for compensation are purely statutory. 101 Conn. 358. Affecting interstate commerce. 109 Conn. 97. Underlying purpose to protect employee, even to the extent of rendering nugatory his own agreement. 128 Conn. 579. See note to Sec. 31-322. Cited. 154 Conn. 48, 51. No change was made by 1961 act in previously existing determination of when employer is subject to act. 156 Conn. 276. Payments of awards hereunder should be made only in accordance with express statutory authority. 159 Conn. 53. Procedural avenue for bringing claims under Sec. 7-433c is the Workmen's Compensation Act. 165 Conn. 615. "Employer," within the meaning of this chapter, entitled to summary judgment when sued by an employee who had claimed and been awarded benefits under this chapter. 167 Conn. 621. Cited. 168 Conn. 84. Lack of a definitive diagnosis does not preclude recovery under the act. 175 Conn. 392. Cited. Id., 424. Cited. 176 Conn. 547. Cited. 178 Conn. 664. Where employee is injured by the negligence of a fellow employee the sole remedy is under this chapter except where the negligence is in the operation of a motor vehicle. 180 Conn. 469. Where personal injuries sustained in another state applicable law is the law of the place of the employment relation; discussion of contract choice of law, tort choice of law and workers' compensation choice of law. 182 Conn. 24. Cited. 185 Conn. 616. Cited. 186 Conn. 623. Cited. 187 Conn. 53. Cited. 189 Conn. 550. These statutes are not the exclusive remedy for injuries arising out of and in the course of employment where injuries claimed are compensable under Sec. 7-433c. 193 Conn. 59. Cited. 193 Conn. 297. Cited. 194 Conn. 139. Cited. 196 Conn. 91. Where case clearly within scope of Workers' Compensation Act there is no basis for action under Sec. 31-49. Id., 529. Workers' Compensation Act cited. 200 Conn. 562. Sec. 31-275 et seq. cited. 201 Conn. 632. Workers' Compensation Act cited. 203 Conn. 34. Meritorious workers' compensation claim by a minor illegally employed when injured not barred by decision permitting common law suit. Id. Workers' Compensation Act cited. Id., 324; 204 Conn. 104. Cited. Id., 563. Workers' Compensation Act cited. 205 Conn. 219; 206 Conn. 242; Id., 495; 207 Conn. 88; Id., 420; Id., 665. Cited. 208 Conn. 576. Workers' compensation act cited. Id. Workers' compensation act, Sec. 31-275 et seq. cited. Id., 589. Court declined to create exception to fellow employee rule of the act. Id. Workers' compensation act or statutes cited. Id., 709. Workers' compensation act cited. 209 Conn. 59; Id., 219. Cited. 210 Conn. 423. Workers' compensation act cited. Id. Workers' compensation act cited. Id., 580; Id., 626; 212 Conn. 138; Id., 427. Cited. 213 Conn. 54. Sec. 31-275 et seq., workers' compensation act cited. Id. Does not apply to members of judiciary. Id. Cited. 214 Conn. 181; Id., 189; Id., 394; Id., 552; 215 Conn. 206; workers' compensation act cited. Id. Workers' compensation act cited. 216 Conn. 29; Id., 237. Sec. 31-275 et seq., workers' compensation act cited. 217 Conn. 42. Cited. Id., 50. Sec. 31-275 et seq., workers' compensation act cited. Id. Workers' compensation act cited. 218 Conn. 9; Id., 19; Id., 46. Workers' compensation act, Sec. 31-275 et seq. cited; application of law to workers' firm out of state discussed. Id., 181. Cited. Id., 531. The workers' compensation act cited. Id. Workers' compensation act cited. 219 Conn. 28. Workers' compensation act cited; public policy prohibiting double recovery discussed. Id., 439. Workers' compensation act cited. Id., 581. Sec. 31-275 et seq. cited. Id. Workers' compensation act cited. Id., 674. Cited. 220 Conn. 721. Workers' compensation act, Sec. 31-275 et seq. cited. 221 Conn. 29. Cited. Id., 41. Workers' compensation act, Sec. 31-275 et seq. cited. Id. Workers' compensation act cited. 221 Conn. 336; Id., 465; 222 Conn. 78. Cited. Id., 744. Workers' compensation act cited. Id.; Id., 769. Workers' compensation act, Sec. 31-275 et seq. cited. 223 Conn. 336. Workers' compensation act cited. Id., 492; 224 Conn. 8; Id., 382; 225 Conn. 165. Workers' compensation act, Sec. 31-275 et seq. cited. 226 Conn. 282. Workers' compensation act cited. Id., 404. Workers' compensation act, Secs. 31-275-31-355a cited. Id., 508. Workers' compensation act cited. Id., 569. Plaintiff's

estate entitled to permanent partial disability award. Judgment of appellate court in McCurdy v. State, 26 Conn. App. 469 reversed. 227 Conn. 261. Workers' compensation act cited. Id.; Id., 333. Workers' compensation act, Sec. 31-275 et seq. cited. 228 Conn. 1. Workers' compensation act cited. Id., 358. Cited. Id., 401. Connecticut workers' compensation act cited. Id. Connecticut's act cited. Id. "Act" cited. Id. Workers' compensation act cited. 229 Conn. 99. Workers' Compensation Act cited. 231 Conn. 287. Cited. Id., 370. Workers' Compensation Act Sec. 31-275 et seq. cited. Id.; Id., 381; Id., 469. Judgment of appellate court in Muldoon v. Homestead Insulation Co., 33 Conn. App. 695, reversed and case remanded for further proceedings. Id. Workers' Compensation Act cited. Id., 529; Id., 690; 232 Conn. 91; Id., 311; Id., 758; Id., 780; 233 Conn. 14; Id., 251; 234 Conn. 51; 235 Conn. 185; Id., 778; 236 Conn. 330. Sec. 31-275 et seq. cited. Id. Workers' Compensation Act, Sec. 31-275 et seq. cited. 237 Conn. 1. A medical provider does not have standing before commission to initiate a claim in absence of claim by injured employee for benefits under the act. Id. Workers' Compensation Act Sec. 31-275 et seq. cited. Id., 490. Workers' Compensation Act cited. 238 Conn. 285. Workers' Compensation Act Sec. 31-275 et seq. cited. Id., 637; 239 Conn. 19. Workers' Compensation Act cited. Id., 408. Cited. Id., 676. Workers' Compensation Act, Secs. 31-275-31-355a cited. Id. Workers' Compensation Act Sec. 31-275 through 31-355a cited. 240 Conn. 788. Workers' Compensation Act, Sec. 31-275 et seq. cited. 241 Conn. 170; Id., 282; Id., 692; 242 Conn. 255; Id., 375. Workers' Compensation Act cited. Id., 432; Id., 570; 243 Conn. 66. Purpose of Workers' Compensation Act. 245 Conn. 66. Workers' Compensation Act to be construed broadly in order to serve its remedial purpose. 252 Conn. 641. Collateral estoppel applies to bar employer and its insurers from contesting cause of employee's death in action under Workers' Compensation Act which was preceded by judgment under the federal Longshore and Harbor Workers' Compensation Act, where same burden of proof applied in both proceedings. 255 Conn. 762.

Cited. 1 Conn. App. 58; Id., 264. Cited. 2 Conn. App. 255. Cited. 3 Conn. App. 40. Cited. Id., 162. Cited. Id., 246. Cited. Id., 450. Cited. Id., 547. Cited. 5 Conn. App. 369. Cited. 6 Conn. App. 60. Cited. Id., 265. Cited. 7 Conn. App. 19. Cited. Id., 142. Cited. Id., 296. Cited. Id., 575. Workers' Compensation Act cited. 11 Conn. App. 391; 12 Conn. App. 138; 13 Conn. App. 208. Cited. 14 Conn. App. 178. Cited. 15 Conn. App. 84. Connecticut workers' compensation act, Secs. 31-275-31-355a cited. 15 Conn. App. 615. Relationship of benefits awards under federal and state compensation laws arising from same injury discussed. Id. Workers' compensation act, law or statutes cited. 16 Conn. App. 65; Id., 121; Id., 437; Id., 660; Id., 676; 19 Conn. App. 273. Workers' compensation act cited. 21 Conn. App. 9; judgment reversed, see 218 Conn. 46; Id., 20; Id., 107; Id., 610; 22 Conn. App. 88. Worker' compensation act cited. 22 Conn. App. 539; judgment reversed, see 219 Conn. 439. Workers' compensation act cited. 23 Conn. App. 325. Sec. 31-275 et seq. cited; Workers' compensation act cited. 24 Conn. App. 234. Workers' compensation act Sec. 31-275 et seq. cited. Id., 362. Workers' compensation act cited. Id., 719; Id., 739. Workers' compensation act, Sec. 31-275 et seq. cited. 25 Conn. App. 350. Workers' compensation act cited; Sec. 31-275 et seq. cited. Id., 492. Cited. 26 Conn. App. 194. Workers' compensation act Sec. 31-275 et seq. cited. Id. Workers' compensation act cited. 27 Conn. App. 800. Workers' compensation act, Secs. 31-275-31-355a cited. 28 Conn. App. 113. Workers' compensation act, Sec. 31-275 et seq. cited. Id., 226. Connecticut workers' compensation act, Sec. 31-275 et seq. cited. Id., 660. Workers' compensation act, Sec. 31-275 et seq. cited. 29 Conn. App. 249. Workers' compensation statutes cited. Id., 441. Workers' compensation act cited. Id., 618; 30 Conn. App. 295; Id., 630; Id., 729. Workers' compensation act, Sec. 31-275 et seq. cited. 32 Conn. App. 16. Workers' compensation act cited. Id., 595; 33 Conn. App. 99. Cited. Id., 667. Workers' compensation act, Secs. 31-275-31-355a cited. 34 Conn. App. 521. Workers' compensation act cited. Id., 708. Workers' Compensation Act cited. 36 Conn. App. 150; Id., 635; judgment reversed, see 236 Conn. 330. Workers' Compensation Act, Sec. 31-275 et seq. cited. 37 Conn. App. 392. Cited. Id., 835. Workers' Compensation Act, Sec. 31-275 et seq. cited. Id. Cited. 38 Conn. App. 1. Workers' Compensation Act cited. Id.; Id., 73; 39 Conn. App. 28; 40 Conn. App. 278; Id., 409. Workers' Compensation Act cited. 41 Conn. App. 430; Id., 664. Workers' Compensation Act Sec. 31-275 et seq. cited. 42 Conn. App.

147. Workers' Compensation Act cited. Id., 200. Workers' Compensation Act Sec. 31-275 et seq. cited. Id., 542. Workers' Compensation Act cited. Id., 803; 44 Conn. App. 1; Id., 771. Cited. 45 Conn. App. 324. Workers' Compensation Act Sec. 31-275 et seq. cited. Id.; Id., 441; 46 Conn. App. 298. Connecticut Workers' Compensation Act, Sec. 31-275 et seq. cited. Id., 596. Cited. Id., 699. Workers' Compensation Act cited. Id. Workers' Compensation Act Sec. 31-275 et seq. cited. Id., 712. Workers' Compensation Act does not permit double compensation. 49 Conn. App. 66. Employer not required to prove existence and breach of an independent legal duty in seeking indemnification from third party under circumstances of case. 53 Conn. App. 72. Workers' Compensation Act should be broadly construed but its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries. Id. Board properly found that commissioner could reconsider prior findings and that the record supported conclusions. Id., 671. One purpose of workers' compensation statute is the avoidance of two independent compensations for an injury. 57 Conn. App. 406. Chapter imposes a form of strict liability on the employer. Id., 472. Workers' Compensation Act discussed re whether employee's injury occurred within the scope of employment. 58 Conn. App. 109.

Cited. 9 Conn. Supp. 471. Minor employed in violation of child-labor statute is entitled to workmen's compensation. 12 Conn. Supp. 304. Employee's return to work does not relieve employer from liability under the act. Id., 453. Cited. 23 Conn. Supp. 55. Cases under this act are on a different basis than actions between ordinary litigants. 31 Conn. Supp. 331. Cited. 38 Conn. Supp. 331. Where plaintiff brought action under both this statute and Sec. 7-433c he was not required to assume greater burden of proving compensability under this section. Id., 359. Cited. 39 Conn. Supp. 102. Cited. Id., 250. Cited. 40 Conn. Supp. 165. Cited. Id., 253. Workers' compensation act cited. 41 Conn. Supp. 115; Id., 326; 42 Conn. Supp. 168. Workers' Compensation Act cited. 44 Conn. Supp. 510. Employer's motion for summary judgment denied under substantial certainty doctrine where employer failed to provide money carrier with bullet-proof vest despite employer's mandate that employees wear such vests. 47 Conn. Supp. 30.

Part Notes:

*Sec. 31-291 et seq. cited. 242 Conn. 375.

Workers' compensation act, Secs. 31-291-31-355a cited. 15 Conn. App. 381; 21 Conn. App. 270; judgment reversed, see 218 Conn. 19.

Cited. 167 Conn. 499. Cited. 169 Conn. 630. Fact that employer worked with plaintiff did not change his status to "fellow employee" to come within statute provisions. 178 Conn. 371. Employee has no right of action against fellow employee who directed operation of truck's hydraulic hoist since actions did not constitute "the operation of a motor vehicle". 180 Conn. 469. Cited. 182 Conn. 24. Cited. 183 Conn. 508. Specific language of Sec. 4-165 prevails over general language of this statute as applied to fellow state employees. 185 Conn. 616. This section, which permits an action against a fellow employee for injuries arising out of the negligent operation of a motor vehicle, does not supersede the more specific provisions of Sec. 7-308. 187 Conn. 53. Term "operation of a motor vehicle" construed as not including activities unrelated to movement of the vehicle. 189 Conn. 354. Cited. Id., 550. Cited. 193 Conn. 59. Cited. 196 Conn. 91. Cited. 203 Conn. 34. Cited. 206 Conn. 495. Cited. 208 Conn. 589. "Motor vehicle" exception discussed. 215 Conn. 55. Cited. 220 Conn. 721. Cited. 221 Conn. 356. Cited. 222 Conn. 744. Cited. 237 Conn. 1. Cited. 242 Conn. 375. Tort actions for emotional injuries that are not compensable under the act are not barred by exclusivity provisions of the act. 259 Conn. 729. When read in conjunction with Sec. 31-275, statute plainly states that emotional distress not arising from physical injury is not compensable through workers' compensation. 265 Conn. 21.

Cited. 2 Conn. App. 174. Cited. 3 Conn. App. 40. Exception under the statute is concerned only with those engaged in any activity related to driving or moving a vehicle or related to a circumstance resulting from the movement of a vehicle. Id., 246. Cited. 7 Conn. App. 296. Cited. Id., 575. Cited. 9 Conn. App. 290. Cited. 10 Conn. App. 18. Cited. Id., 618. Cited. 20 Conn. App. 619. Cited. 22 Conn. App. 88. Definition of "motor vehicle" for purposes of the exception in this section is controlled by Sec. 14-1(a)(47) definition as further refined by Sec. 14-165(i). 30 Conn. App. 263. Cited. 41 Conn. App. 664. Golf cart not a "motor vehicle" for purposes of the "motor vehicle" exception to exclusivity provision of Workers' Compensation Act. 54 Conn. App. 479. Statute does not authorize plaintiff's action against his employer arising out of a fellow employee's negligent operation of a motor vehicle. 56 Conn. App. 325. Defendant's operation of a payloader to jump start plaintiff's dump truck did not constitute "operation of a motor vehicle" so as to bring the incident within the exception contained in this section. 64 Conn. App. 409.

Cited. 30 Conn. Supp. 233. Cited. 36 Conn. Supp. 101. Cited. 39 Conn. Supp. 102. Cited. 40 Conn. Supp. 165. "Motor vehicle" exception discussed. 41 Conn. Supp. 326. Cited. 41 Conn. Supp. 391. Cited. 44 Conn. Supp. 148. Legislature did not treat or intend to treat golf carts differently from any other non-highway-type mechanism for purposes of this section. 46 Conn. Supp. 24.

History:

(1967, P.A. 842, S. 5; 1969, P.A. 696, S. 4; P.A. 83-297; P.A. 84-22, S. 1, 2.)

LexisNexis (R) Notes:

Case Notes:

Business & Corporate Law > Closely Held Corporations > Management Duties & Liabilities
Business & Corporate Law > Sole Proprietorships
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Affirmative Defenses
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Strike > General Overview
Civil Procedure > Parties > Intervention > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Trials > Judgment as Matter of Law > General Overview
Governments > Legislation > Interpretation
Governments > State & Territorial Governments > Claims By & Against
Governments > State & Territorial Governments > Employees & Officials
Insurance Law > Motor Vehicle Insurance > Coverage > Compulsory Coverage > General Overview
Insurance Law > Motor Vehicle Insurance > Exclusions > General Overview
Real Property Law > Landlord & Tenant > Lease Agreements > Commercial Leases > General Overview
Torts > Damages > General Overview

Service: **Get by LEXSTAT®**
TOC: General Statutes of Connecticut, Constitution, Court Rules & ALS, Combined > / . . . / > PART I DEFINITIONS > **§ 14-1. Definitions.**
Citation: **Conn. Gen. Stat. 14-1**

Conn. Gen. Stat. § 14-1

LEXISNEXIS (TM) CONNECTICUT ANNOTATED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2006 SUPPLEMENT ***
*** ANNOTATIONS CURRENT THROUGH MAY 18, 2006 ***

TITLE 14 MOTOR VEHICLES. USE OF THE HIGHWAY BY VEHICLES. GASOLINE
CHAPTER 246 MOTOR VEHICLES
PART I DEFINITIONS

GO TO CONNECTICUT STATUTES ARCHIVE DIRECTORY

Conn. Gen. Stat. § 14-1 (2006)

Legislative Alert:

LEXSEE 2006 Ct. ALS 130 -- See section 15.

§ 14-1. Definitions.

(a) Terms used in this chapter shall be construed as follows, unless another construction is clearly apparent from the language or context in which the term is used or unless the construction is inconsistent with the manifest intention of the General Assembly:

(1) "Activity vehicle" means a student transportation vehicle that is used to transport students in connection with school-sponsored events and activities, but is not used to transport students to and from school;

(2) "Agricultural tractor" means a tractor or other form of nonmuscular motive power used for transporting, hauling, plowing, cultivating, planting, harvesting, reaping or other agricultural purposes on any farm or other private property, or used for the purpose of transporting, from one farm to another, agricultural implements and farm products, provided the agricultural tractor is not used on any highway for transporting a pay load or for some other commercial purpose;

(3) "Antique, rare or special interest motor vehicle" means a motor vehicle twenty years old or older which is being preserved because of historic interest and which is not altered or modified from the original manufacturer's specifications;

(4) "Apparent candle power" means an illumination equal to the normal illumination in foot candles produced by any lamp or lamps, divided by the square of the distance in feet between the lamp or lamps and the point at which the measurement is made;

(5) "Authorized emergency vehicle" means (A) a fire department vehicle, (B) a police vehicle, or (C) a public service company or municipal department ambulance or emergency vehicle designated or authorized for use as an authorized emergency vehicle by the commissioner;

(6) "Auxiliary driving lamp" means an additional lighting device on a motor vehicle used primarily to supplement the general illumination in front of a motor vehicle provided by the motor vehicle's head lamps;

(7) "Bulb" means a light source consisting of a glass bulb containing a filament or substance capable of being electrically maintained at incandescence;

(8) "Camp trailer" includes any trailer designed and used exclusively for camping or recreational purposes;

(9) "Camper" means any motor vehicle designed or permanently altered in such a way as to provide temporary living quarters for travel, camping or recreational purposes;

(10) "Combination registration" means the type of registration issued to a motor vehicle used for both private passenger and commercial purposes if such vehicle does not have a gross vehicle weight rating in excess of twelve thousand five hundred pounds;

(11) "Commercial driver's license" or "CDL" means a license issued to an individual in accordance with the provisions of sections 14-44a to 14-44m, inclusive, which authorizes such individual to drive a commercial motor vehicle;

(12) "Commercial driver's license information system" or "CDLIS" means the national database of holders of commercial driver's licenses established by the Federal Motor Carrier Safety Administration pursuant to section 12007 of the Commercial Motor Vehicle Safety Act of 1986;

(13) "Commercial motor vehicle" means a vehicle designed or used to transport passengers or property, except a vehicle used within one hundred fifty miles of a farm in connection with the operation of such farm, fire fighting apparatus or other authorized emergency vehicles, or a recreational vehicle in private use, which (A) has a gross vehicle weight rating of twenty-six thousand and one pounds or more; (B) is designed to transport sixteen or more passengers, including the driver, or is designed to transport more than ten passengers, including the driver, and is used to transport students under the age of twenty-one years to and from school; or (C) is transporting hazardous materials and is required to be placarded in accordance with 49 CFR 172, Subpart F, as amended;

(14) "Commercial registration" means the type of registration required for any motor vehicle designed or used to transport merchandise, freight or persons in connection with any business enterprise, unless a more specific type of registration is authorized and issued by the commissioner for such class of vehicle;

(15) "Commercial trailer" means a trailer used in the conduct of a business to transport freight, materials or equipment whether or not permanently affixed to the bed of the trailer;

(16) "Commissioner" includes the Commissioner of Motor Vehicles and any assistant to the Commissioner of Motor Vehicles who is designated and authorized by, and who is acting for, the Commissioner of Motor Vehicles under a designation; except that the deputy commissioners of motor vehicles and the Attorney General are deemed, unless the Commissioner of Motor Vehicles otherwise provides, to be designated and authorized by, and acting for, the Commissioner of Motor Vehicles under a designation;

(17) "Controlled substance" has the same meaning as in section 21a-240 and the federal laws and regulations incorporated in chapter 420b;

(18) "Conviction" means an unvacated adjudication of guilt, or a determination that a person

has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended or probated;

(19) "Dealer" includes any person actively engaged in buying, selling or exchanging motor vehicles or trailers who has an established place of business in this state and who may, incidental to such business, repair motor vehicles or trailers, or cause them to be repaired by persons in his or her employ;

(20) "Disqualification" means a withdrawal of the privilege to drive a commercial motor vehicle, which occurs as a result of (A) any suspension, revocation, or cancellation by the commissioner of the privilege to operate a motor vehicle; (B) a determination by the Federal Highway Administration, under the rules of practice for motor carrier safety contained in 49 CFR 386, as amended, that a person is no longer qualified to operate a commercial motor vehicle under the standards of 49 CFR 391, as amended; or (C) the loss of qualification which follows any of the convictions or administrative actions specified in section 14-44k;

(21) "Drive" means to drive, operate or be in physical control of a motor vehicle, including a motor vehicle being towed by another;

(22) "Driver" means any person who drives, operates or is in physical control of a commercial motor vehicle, or who is required to hold a commercial driver's license;

(23) "Driver's license" or "operator's license" means a valid Connecticut motor vehicle operator's license or a license issued by another state or foreign jurisdiction authorizing the holder thereof to operate a motor vehicle on the highways;

(24) "Employee" means any operator of a commercial motor vehicle, including full-time, regularly employed drivers, casual, intermittent or occasional drivers, drivers under contract and independent, owner-operator contractors, who, while in the course of operating a commercial motor vehicle, are either directly employed by, or are under contract to, an employer;

(25) "Employer" means any person, including the United States, a state or any political subdivision thereof, who owns or leases a commercial motor vehicle, or assigns a person to drive a commercial motor vehicle;

(26) "Farm implement" means a vehicle designed and adapted exclusively for agricultural, horticultural or livestock-raising operations and which is not operated on a highway for transporting a pay load or for any other commercial purpose;

(27) "Felony" means any offense as defined in section 53a- 25 and includes any offense designated as a felony under federal law;

(28) "Fatality" means the death of a person as a result of a motor vehicle accident;

(29) "Foreign jurisdiction" means any jurisdiction other than a state of the United States;

(30) "Fuels" means (A) all products commonly or commercially known or sold as gasoline, including casinghead and absorption or natural gasoline, regardless of their classification or uses, (B) any liquid prepared, advertised, offered for sale or sold for use, or commonly and commercially used, as a fuel in internal combustion engines, which, when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products by "American Society for Testing Materials

Method D-86", shows not less than ten per cent distilled (recovered) below 347 Fahrenheit (175 Centigrade) and not less than ninety-five per cent distilled (recovered) below 464 Fahrenheit (240 Centigrade); provided the term "fuels" shall not include commercial solvents or naphthas which distill, by "American Society for Testing Materials Method D-86", not more than nine per cent at 176 Fahrenheit and which have a distillation range of 150 Fahrenheit, or less, or liquefied gases which would not exist as liquids at a temperature of 60 Fahrenheit and a pressure of 14.7 pounds per square inch absolute, and (C) any liquid commonly referred to as "gasohol" which is prepared, advertised, offered for sale or sold for use, or commonly and commercially used, as a fuel in internal combustion engines, consisting of a blend of gasoline and a minimum of ten per cent by volume of ethyl or methyl alcohol;

(31) "Garage" includes every place of business where motor vehicles are, for compensation, received for housing, storage or repair;

(32) "Gross vehicle weight rating" or "GVWR" means the value specified by the manufacturer as the maximum loaded weight of a single or a combination (articulated) vehicle, or its registered gross weight, whichever is greater. The GVWR of a combination (articulated) vehicle commonly referred to as the "gross combination weight rating" or GCWR is the GVWR of the power unit plus the GVWR of the towed unit or units;

(33) "Gross weight" means the light weight of a vehicle plus the weight of any load on the vehicle, provided, in the case of a tractor-trailer unit, "gross weight" means the light weight of the tractor plus the light weight of the trailer or semitrailer plus the weight of the load on the vehicle;

(34) "Hazardous materials" has the same meaning as in Section 103 of the Hazardous Materials Transportation Act, 49 USC 1801 et seq.;

(35) "Head lamp" means a lighting device affixed to the front of a motor vehicle projecting a high intensity beam which lights the road in front of the vehicle so that it can proceed safely during the hours of darkness;

(36) "High-mileage vehicle" means a motor vehicle having the following characteristics: (A) Not less than three wheels in contact with the ground; (B) a completely enclosed seat on which the driver sits; (C) a single or two cylinder, gasoline or diesel engine or an electric-powered engine; and (D) efficient fuel consumption;

(37) "Highway" includes any state or other public highway, road, street, avenue, alley, driveway, parkway or place, under the control of the state or any political subdivision of the state, dedicated, appropriated or opened to public travel or other use;

(38) "Imminent hazard" means the existence of a condition that presents a substantial likelihood that death, serious illness, severe personal injury or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury or endangerment;

(39) "Intersecting highway" includes any public highway which joins another at an angle whether or not it crosses the other;

(40) "Light weight" means the weight of an unloaded motor vehicle as ordinarily equipped and ready for use, exclusive of the weight of the operator of the motor vehicle;

(41) "Limited access highway" means a state highway so designated under the provisions of section 13b-27;

(42) "Local authorities" includes the board of aldermen, common council, chief of police, warden and burgesses, board of selectmen or other officials having authority for the enactment or enforcement of traffic regulations within their respective towns, cities or boroughs;

(43) "Maintenance vehicle" means any vehicle in use by the state or by any town, city, borough or district, any state bridge or parkway authority or any public service company, as defined in section 16-1, in the maintenance of public highways or bridges and facilities located within the limits of public highways or bridges;

(44) "Manufacturer" means (A) a person, whether a resident or nonresident, engaged in the business of constructing or assembling new motor vehicles of a type required to be registered by the commissioner, for operation upon any highway, except a utility trailer, which are offered for sale in this state, or (B) a person who distributes new motor vehicles to new car dealers licensed in this state;

(45) "Median divider" means an intervening space or physical barrier or clearly indicated dividing section separating traffic lanes provided for vehicles proceeding in opposite directions;

(46) "Minibike" or "minicycle" means any two or three wheel motorcycle having one or more of the following characteristics: (A) Ten inches (254 mm) or less nominal wheel rim diameter; (B) forty inches or less wheel base; (C) twenty- five inches or less seat height measured at the lowest point on the top of the seat cushion without rider; (D) a propelling engine having a piston displacement of 50 c.c. or less;

(47) "Modified antique motor vehicle" means a motor vehicle twenty years old or older which has been modified for safe road use, including, but not limited to, modifications to the drive train, suspension, braking system and safety or comfort apparatus;

(48) "Motor bus" includes any motor vehicle, except a taxicab, as defined in section 13b-95, operated in whole or in part on any street or highway in a manner affording a means of transportation by indiscriminately receiving or discharging passengers, or running on a regular route or over any portion of a regular route or between fixed termini;

(49) "Motor home" means a vehicular unit designed to provide living quarters and necessary amenities which are built into an integral part of, or permanently attached to, a truck or van chassis;

(50) "Motorcycle" means a motor vehicle, with or without a side car, having not more than three wheels in contact with the ground and a saddle or seat on which the rider sits or a platform on which the rider stands and includes bicycles having a motor attached, except bicycles propelled by means of a helper motor as defined in section 14-286, but does not include a vehicle having or designed to have a completely enclosed driver's seat and a motor which is not in the enclosed area;

(51) "Motor vehicle" means any vehicle propelled or drawn by any nonmuscular power, except aircraft, motor boats, road rollers, baggage trucks used about railroad stations or other mass transit facilities, electric battery-operated wheel chairs when operated by physically handicapped persons at speeds not exceeding fifteen miles per hour, golf carts operated on highways solely for the purpose of crossing from one part of the golf course to another, golf cart type vehicles operated on roads or highways on the grounds of state institutions by state employees, agricultural tractors, farm implements, such vehicles as run only on rails or tracks, self-propelled snow plows, snow blowers and lawn mowers, when used for the purposes for which they were designed and operated at speeds not exceeding four miles per hour, whether or not the operator rides on or walks behind such equipment,

bicycles with helper motors as defined in section 14-286, special mobile equipment as defined in subsection (i) of section 14-165 and any other vehicle not suitable for operation on a highway;

(52) "National Driver Registry" or "NDR" means the licensing information system and database operated by the National Highway Traffic Safety Administration and established pursuant to the National Driver Registry Act of 1982, as amended;

(53) "New motor vehicle" means a motor vehicle, the equitable or legal title to which has never been transferred by a manufacturer, distributor or dealer to an ultimate consumer;

(54) "Nonresident" means any person whose legal residence is in a state other than Connecticut or in a foreign country;

(55) "Nonresident commercial driver's license" or "nonresident CDL" means a commercial driver's license issued by a state to an individual who resides in a foreign jurisdiction;

(56) "Nonskid device" means any device applied to the tires, wheels, axles or frame of a motor vehicle for the purpose of increasing the traction of the motor vehicle;

(57) "Number plate" means any sign or marker furnished by the commissioner on which is displayed the registration number assigned to a motor vehicle by the commissioner;

(58) "Officer" includes any constable, state marshal, inspector of motor vehicles, state policeman or other official authorized to make arrests or to serve process, provided the officer is in uniform or displays the officer's badge of office in a conspicuous place when making an arrest;

(59) "Operator" means any person who operates a motor vehicle or who steers or directs the course of a motor vehicle being towed by another motor vehicle and includes a driver as defined in subdivision (22) of this section;

(60) "Out-of-service order" means a temporary prohibition against driving a commercial motor vehicle or any other vehicle subject to the federal motor carrier safety regulations enforced by the commissioner pursuant to the commissioner's authority under section 14-8;

(61) "Owner" means any person holding title to a motor vehicle, or having the legal right to register the same, including purchasers under conditional bills of sale;

(62) "Parked vehicle" means a motor vehicle in a stationary position within the limits of a public highway;

(63) "Passenger and commercial motor vehicle" means a motor vehicle used for private passenger and commercial purposes which is eligible for combination registration;

(64) "Passenger motor vehicle" means a motor vehicle used for the private transportation of persons and their personal belongings, designed to carry occupants in comfort and safety, with a capacity of carrying not more than ten passengers including the operator thereof;

(65) "Passenger registration" means the type of registration issued to a passenger motor vehicle unless a more specific type of registration is authorized and issued by the commissioner for such class of vehicle;

(66) "Person" includes any individual, corporation, limited liability company, association, copartnership, company, firm, business trust or other aggregation of individuals but does not include the state or any political subdivision thereof, unless the context clearly states or

requires;

(67) "Pick-up truck" means a motor vehicle with an enclosed forward passenger compartment and an open rearward compartment used for the transportation of property;

(68) "Pneumatic tires" means tires inflated or inflatable with air;

(69) "Pole trailer" means a trailer which is (A) intended for transporting long or irregularly shaped loads such as poles, logs, pipes or structural members, which loads are capable of sustaining themselves as beams between supporting connections, and (B) designed to be drawn by a motor vehicle and attached or secured directly to the motor vehicle by any means including a reach, pole or boom;

(70) "Recreational vehicle" includes the camper, camp trailer and motor home classes of vehicles;

(71) "Registration" includes the certificate of motor vehicle registration and the number plate or plates used in connection with such registration;

(72) "Registration number" means the identifying number or letters, or both, assigned by the commissioner to a motor vehicle;

(73) "Resident", for the purpose of registering motor vehicles, includes any person having a place of residence in this state, occupied by such person for more than six months in a year, or any person, firm or corporation owning or leasing a motor vehicle used or operated in intrastate business in this state, or a firm or corporation having its principal office or place of business in this state;

(74) "School bus" means any school bus, as defined in section 14-275, including a commercial motor vehicle used to transport preschool, elementary school or secondary school students from home to school, from school to home, or to and from school-sponsored events, but does not include a bus used as a common carrier;

(75) "Second" violation or "subsequent" violation means an offense committed not more than three years after the date of an arrest which resulted in a previous conviction for a violation of the same statutory provision, except in the case of a violation of section 14-215 or 14-224 or subsection (a) of section 14-227a, "second" violation or "subsequent" violation means an offense committed not more than ten years after the date of an arrest which resulted in a previous conviction for a violation of the same statutory provision;

(76) "Semitrailer" means any trailer type vehicle designed and used in conjunction with a motor vehicle so that some part of its own weight and load rests on or is carried by another vehicle;

(77) "Serious traffic violation" means a conviction of any of the following offenses: (A) Speeding in excess of fifteen miles per hour or more over the posted speed limit, in violation of section 14-218a or 14-219; (B) reckless driving in violation of section 14-222; (C) following too closely in violation of section 14-240 or 14-240a; (D) improper or erratic lane changes, in violation of section 14-236; (E) driving a commercial motor vehicle without a valid commercial driver's license in violation of section 14-36a or 14-44a; (F) failure to carry a commercial driver's license in violation of section 14-44a; (G) failure to have the proper class of license or endorsement, or violation of a license restriction in violation of section 14-44a; or (H) arising in connection with an accident related to the operation of a commercial motor vehicle and which resulted in a fatality;

(78) "Service bus" includes any vehicle except a vanpool vehicle or a school bus designed

and regularly used to carry ten or more passengers when used in private service for the transportation of persons without charge to the individual;

(79) "Service car" means any motor vehicle used by a manufacturer, dealer or repairer for emergency motor vehicle repairs on the highways of this state, for towing or for the transportation of necessary persons, tools and materials to and from the scene of such emergency repairs or towing;

(80) "Shoulder" means that portion of a highway immediately adjacent and contiguous to the travel lanes or main traveled portion of the roadway;

(81) "Solid tires" means tires of rubber, or other elastic material approved by the Commissioner of Transportation, which do not depend on confined air for the support of the load;

(82) "Spot lamp" or "spot light" means a lighting device projecting a high intensity beam, the direction of which can be readily controlled for special or emergency lighting as distinguished from ordinary road illumination;

(83) "State" means any state of the United States and the District of Columbia unless the context indicates a more specific reference to the state of Connecticut;

(84) "Stop" means complete cessation of movement;

(85) "Tail lamp" means a lighting device affixed to the rear of a motor vehicle showing a red light to the rear and indicating the presence of the motor vehicle when viewed from behind;

(86) "Tank vehicle" means any commercial motor vehicle designed to transport any liquid or gaseous material within a tank that is either permanently or temporarily attached to the vehicle or its chassis which shall include, but not be limited to, a cargo tank and portable tank, as defined in 49 CFR 383.5, as amended, provided it shall not include a portable tank with a rated capacity not to exceed one thousand gallons;

(87) "Tractor" or "truck tractor" means a motor vehicle designed and used for drawing a semitrailer;

(88) "Tractor-trailer unit" means a combination of a tractor and a trailer or a combination of a tractor and a semitrailer;

(89) "Trailer" means any rubber-tired vehicle without motive power drawn or propelled by a motor vehicle;

(90) "Truck" means a motor vehicle designed, used or maintained primarily for the transportation of property;

(91) "Ultimate consumer" means, with respect to a motor vehicle, the first person, other than a dealer, who in good faith purchases the motor vehicle for purposes other than resale;

(92) "United States" means the fifty states and the District of Columbia;

(93) "Used motor vehicle" includes any motor vehicle which has been previously separately registered by an ultimate consumer;

(94) "Utility trailer" means a trailer designed and used to transport personal property, materials or equipment, whether or not permanently affixed to the bed of the trailer, with a manufacturer's GVWR of ten thousand pounds or less;

(95) "Vanpool vehicle" includes all motor vehicles, the primary purpose of which is the daily transportation, on a prearranged nonprofit basis, of individuals between home and work, and which: (A) If owned by or leased to a person, or to an employee of the person, or to an employee of a local, state or federal government unit or agency located in Connecticut, are manufactured and equipped in such manner as to provide a seating capacity of at least seven but not more than fifteen individuals, or (B) if owned by or leased to a regional ride- sharing organization in the state recognized by the Commissioner of Transportation, are manufactured and equipped in such manner as to provide a seating capacity of at least six but not more than nineteen individuals;

(96) "Vehicle" includes any device suitable for the conveyance, drawing or other transportation of persons or property, whether operated on wheels, runners, a cushion of air or by any other means. The term does not include devices propelled or drawn by human power or devices used exclusively on tracks;

(97) "Vehicle identification number" or "VIN" means a series of Arabic numbers and Roman letters that is assigned to each new motor vehicle that is manufactured within or imported into the United States, in accordance with the provisions of 49 CFR 565, unless another sequence of numbers and letters has been assigned to a motor vehicle by the commissioner, in accordance with the provisions of section 14-149;

(98) "Wrecker" means a vehicle which is registered, designed, equipped and used for the purposes of towing or transporting wrecked or disabled motor vehicles for compensation or for related purposes by a person, firm or corporation licensed in accordance with the provisions of subpart (D) of part III of this chapter;

(99) "Camp vehicle" means any motor vehicle that is regularly used to transport persons under eighteen years of age in connection with the activities of any youth camp, as defined in section 19a-420.

(b) For the purposes of sections 14-39, 14-41, 14-44, 14- 50, 14-273, 14-274, 14-275c, 14-276, 14-276a and 14-281b, "public passenger transportation permit" shall mean, until July 1, 1991, public service motor vehicle operator's license.

NOTES:
1959 acts added Subsecs. (21) and (51); 1961 act redefined "used or secondhand motor vehicle" in and added definitions of "new motor vehicle" and "ultimate consumer" to Subsec. (55); 1963 act redefined "second" or "subsequent" violation in Subsec. (44); 1965 acts added snow and lawn machines to Subsec. (26), "driver" to Subsec. (32) and Subsecs. (6), (14), (23), (39), (48) and (54); 1967 acts added Subsecs. (57) and (58) defining "tractor" or "truck tractor" and "wrecker" or "wrecker vehicle" and redefined "resident" in Subsec. (42) to delete persons carrying on business or engaged in occupation for more than six months a year; 1969 acts redefined "motor vehicle" in Subsec. (26) to exclude golf carts and added Subsec. (59) defining "farm implements"; 1971 acts redefined "gross weight" in Subsec. (14) to include special provision re tractor-trailer units, redefined "officer" in Subsec. (31) to include sheriffs and deputy sheriffs, redefined "manufacturer" in Subsec. (22), redefined "vehicle" in Subsec. (56) to include vehicles operated on cushions of air and to delete requirement that machine be suitable for use on highways and added Subsecs. (60) and (61) defining "tractor-trailer unit" and "limited access highway"; 1972 act redefined "manufacturer" in Subsec. (22) to include distributor of vehicles to new car dealers; P.A. 73-676 added Subsec. (62) defining "minibike" or "minicycle"; P.A. 75-253 redefined "motorcycle" to exclude vehicles with wholly or partially enclosed drivers' seat with motor outside enclosed area; P.A. 76-250 excluded bicycles with helper motors in Subsecs. (25)

defining "motorcycle" and Subsec. (26) defining "motor vehicle"; P.A. 77-67 redefined "motor vehicles" in Subsec. (26) to delete requirement that vehicle be suitable for operation on a highway, to exclude vehicles used at mass transit facilities other than railroads and vehicles not suitable for operation on highway; P.A. 79-25 added Subsecs. (63) and (64) defining "antique, rare or special interest motor vehicle" and "modified antique motor vehicle"; P.A. 79-175 added Subsec. (65) defining "vanpool vehicle"; P.A. 79-244 also added Subsec. (65) re vanpool vehicles and excluded vanpool vehicles from definitions of "public service motor vehicle" and "service bus" in Subsecs. (40) and (46); P.A. 79-627 included gasohol in Subsec. (12) defining "fuels", effective July 1, 1979, and applicable to fuel sold on or after that date; P.A. 80-466 amended definition of "motor vehicle registration" in Subsec. (27) to reflect use of single license plate; P.A. 81-394 added Subdiv. (66) defining "high-mileage vehicle"; P.A. 82-460 redefined "passenger motor vehicle" to specify applicability to vehicles capable of carrying not more than ten passengers, redefined "commercial motor vehicle", deleting limitations re use in business of registrant and propulsion method and redefined "passenger and commercial motor vehicle", deleting requirement that vehicles be "designed for use" for passenger and commercial purposes; P.A. 82-472 made technical corrections in definition of "high-mileage vehicle"; P.A. 83-224 amended Subdiv. (26) to exclude from the definition of a motor vehicle, golf cart type vehicles operated by state employees on state institution grounds; P.A. 83-278 amended Subdiv. (65) to include in definition of "vanpool vehicle" certain vehicles owned by or leased to recognized regional ride-sharing organizations; P.A. 83-431 amended Subdiv. (26) to exclude from the definition of a motor vehicle, special mobile equipment as defined in Sec. 14- 165 (i); P.A. 83-587 made technical change in Subdiv. (12); P.A. 84-429 deleted the definition of "curb" in Subsec. (9), "distributor" in Subsec. (11), "head light" in Subsec. (15), "intersection" in Subsec. (18), "motor vehicle registration" in Subsec. (27), "rotary traffic island" in Subsec. (43), "secondhand motor vehicle" in Subsec. (55) and "wrecker vehicle" in Subsec. (58), transferred definition of "head lamp" from Subsec. (15) to (16), "registration" from Subsec. (27) to (45), "used motor vehicle" from Subsec. (55) to (62), "new motor vehicle" from Subsec. (55) to (31), "ultimate consumer" from Subsec. (55) to (61) and "wrecker" from Subsec. (58) to (65), added Subsec. (4) from Sec. 14-1a, renumbered the remaining Subsecs. as follows: (2) to (3), (3) to (5), (4) to (6), (5) to (7), (6) to (8), (7) to (9), (8) to (10), (10) to (11), (12) to (13), (13) to (14), (14) to (15), (16) to (18), (17) to (19), (19) to (20), (20) to (22), (21) to (23), (22) to (24), (23) to (25), (24) to (28), (25) to (29), (26) to (30), (28) to (32), (29) to (33), (30) to (34), (31) to (35), (32) to (36), (33) to (37), (34) to (38), (35) to (40), (36) to (39), (37) to (41), (38) to (42), (39) to (43), (40) to (44), (41) to (46), (42) to (47), (44) to (48), (45) to (49), (46) to (50), (47) to (51), (48) to (52), (49) to (53), (50) to (54), (51) to (55), (52) to (56), (53) to (59), (54) to (60), (56) to (64), (59) to (12), (60) to (58), (61) to (21), (62) to (2), (63) to (27), (64) to (63) and (66) to (17), and rephrased renumbered Subsec. (10) re definition of "commissioner"; P.A. 84-546 redefined "commissioner" to include deputy commissioner of motor vehicles, attorney general and any assistant to motor vehicles commissioner, but did not take effect, P.A. 84-429 having taken precedence; P.A. 86-383 redefined "commercial motor vehicle" in Subdiv. (9) to include vehicles transporting other passengers with their necessary personal belongings; P.A. 88-245 made technical change to definition of "commissioner" in Subsec. (10); P.A. 90-263 subdivided the section into Subsecs. (a) and (b), (1) amending Subdiv. (7) to substitute recreational for pleasure purposes and to delete phrase "used for the purpose of transporting personal property of the owner"; (2) amending Subdiv. (8) to redefine "camper" as any motor vehicle designed or permanently altered in such a way as to provide temporary living quarters for travel, camping or recreational purposes; (3) amending Subdiv. (9) to delete definition of "commercial motor vehicle" and insert definition of "combination registration"; (4) adding new definitions of "commercial driver's license" in Subdiv. (10), "commercial motor vehicle" in Subdiv. (11), "commercial registration" in Subdiv. (12), "commercial trailer" in Subdiv. (13), "controlled substance" in Subdiv. (15), "conviction" in Subdiv. (16), "disqualification" in Subdiv. (18), "drive" in Subdiv. (19), "driver" in Subdiv. (20), "driver's license" in Subdiv. (21), "employee" in Subdiv. (22), "employer" in Subdiv. (23), "felony" in Subdiv. (25), "foreign jurisdiction" in Subdiv. (26), "gross weight rating" in Subdiv. (29),

"hazardous materials" in Subdiv. (31), "motor home" in Subdiv. (45), "nonresident commercial driver's license" in Subdiv. (50), "out-of-service order" in Subdiv. (55), "passenger registration" in Subdiv. (60), "recreational vehicle" in Subdiv. (64), "serious traffic violation" in Subdiv. (70), "state" in Subdiv. (76), "tank vehicle" in Subdiv. (79), "United States" in Subdiv. (85), and "utility trailer" in Subdiv. (87) and renumbering the other Subdivs. accordingly; (5) amending definition of "motor bus" in Subdiv. (44), formerly Subdiv. (28), to include any motor vehicle, except a taxicab, deleting reference to public service motor vehicle; (6) amending definition of "operator" in Subdiv. (54), formerly Subdiv. (36), to include a driver; (7) amending definition of "passenger and commercial motor vehicle" in Subdiv. (58), formerly Subdiv. (39), to include vehicles eligible for combination registration; (8) amending definition of "passenger motor vehicle" in Subdiv. (59), formerly Subdiv. (40), to delete former provisions and insert new provisions concerning use, design and capacity; (9) amending definition of "person" in Subdiv. (61), formerly Subdiv. (41), to specifically exclude the state or any political subdivision thereof; (10) amending definition of "pole trailer" in Subdiv. (63), formerly Subdiv. (43), to delete reference to commercial motor vehicle; and (11) deleting definition of "public service motor vehicle" in Subdiv. (44); and inserting new language in Subsec. (b) re meaning of term "public passenger transportation permit"; P.A. 91-272 amended exception to definition of "commercial motor vehicle" in Subdiv. (11)(B) of Subsec. (a) to include vehicles designed to transport "more than" ten passengers and used to transport students under twenty-one to and from school; P.A. 93-341 amended definition of "commercial driver's license" by deleting the reference to a "Class 1" license and reference to Sec. 14-36a, redefined "commercial motor vehicle" to exclude vehicles used "within one hundred fifty miles of a farm in connection with the operation of such farm" and recreational vehicles "in private use", redefined "serious traffic violation" to add a new Subpara. (E) re accident resulting in death, redefined "service bus" to include "school bus" and added definition of "school bus", renumbering previously existing Subdivs. of Subsec. (a) as necessary and made technical change in Subsec. (b), effective July 1, 1994; P.A. 95-79 amended Subsec. (a)(61) by redefining "person" to include a limited liability company, effective May 31, 1995; P.A. 95-314 amended Subsec. (a)(69) to provide that a "second" or "subsequent" violation is one committed within "three" years after date of arrest resulting in a previous conviction for the same offense, in lieu of five years, and to redefine term in the case of a violation of Sec. 14-215, 14-224 or Subsec. (a) of Sec. 14-227a; P.A. 97-236 redefined "service bus" to require that school bus be "regularly used" to carry eight or more persons, effective June 24, 1997; P.A. 99-268 redefined "motorcycle" in Subsec. (a)(46) to exclude a vehicle "designed to have" a completely enclosed driver's seat in lieu of a vehicle having a completely "or partially" enclosed driver's seat, redefined "serious traffic violation" in Subsec. (a)(71) by changing from a violation of "sections 14-230 to 14- 237, inclusive" to a violation of "section 14-236" in Subpara. (D) and redefined "service bus" in Subsec. (a)(72) to increase the minimum number of persons such vehicle may carry from "eight or more persons" to "ten or more passengers"; P.A. 00-35 redefined "wrecker" in Subsec. (a)(91) to delete "exclusively" following "equipped and used" and to add "by a person, firm or corporation licensed in accordance with the provisions of subdivision (D) of part III of this chapter"; P.A. 00-99 replaced reference to sheriff and deputy sheriff in Subsec. (a)(53) with state marshal, effective December 1, 2000; P.A. 00- 169 redefined "person" in Subsec. (a)(61) to include a business trust and revised effective date of P.A. 99-268 but without affecting this section; P.A. 02-70 amended Subsec. (a) to add "rating" in Subdiv. (9), to substitute "place of residence" for "legal residence" and provide that such residence be occupied for more than six months in a year in Subdiv. (67), added new Subdiv. (91) re definition of "vehicle identification number" or "VIN", redesignated existing Subdiv. (91) as Subdiv. (92) and made technical changes in Subdivs. (4), (17), (40), (53) and (55), effective July 1, 2002, and amended Subsec. (a)(40) to add "new" and replace "under section 14-12, who offers the motor vehicles" with "by the commissioner, for operation upon any highway, which are offered" in Subpara. (A) and to make a technical change in Subpara. (B) (Revisor's note: The reference in Subsec. (a)(92) to "subdivision (D)" was changed editorially by the Revisors to "subpart (D)" for clarity of reference); P.A. 03-265 redefined "passenger motor vehicle" in Subdiv. (59); P.A. 04-199 defined "pick-up truck", made

*49 Conn. Supp. 351, *; 881 A.2d 554, **;*
*2005 Conn. Super. LEXIS 1131, ****

DANIEL KUHAR v. STEPHEN PHILLIPS ET AL. *

* An appeal to the Appellate Court by the plaintiff was filed on May 6, 2005; Appellate Court Docket No. AC 26544.

File No. CV-03 0481998S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW HAVEN, AT NEW HAVEN

49 Conn. Supp. 351; 881 A.2d 554; 2005 Conn. Super. LEXIS 1131

April 26, 2005, Decided
April 26, 2005, Filed

SUBSEQUENT HISTORY: [*1]** As Corrected September 13, 2005.

DISPOSITION: The named defendant's motion for summary judgment is, therefore, granted.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee sued defendants, a fellow employee and their employer, after an unusual motor vehicle accident that occurred on the premises of the employer's motor vehicle service station. The fellow employee moved for summary judgment. The motion claimed that the action was barred by the immunity provision of Conn. Gen. Stat. § 31-293a.

OVERVIEW: The fellow employee was examining the employer's motor vehicle's lock cylinder when the vehicle was being repaired at the service station, and turned the key. Although the fellow employee believed that the vehicle would not move, the vehicle lurched forward and injured the employee. The determining factor to decide whether the exclusivity provision of Conn. Gen. Stat. § 31-293a of the Workers' Compensation Act, Conn. Gen. Stat. §§ 31-291 to 31-355a, applied was whether the accident had a distinct relationship to the hazards of the employment. Where the accident was a common danger to which the general public was exposed, the exclusivity provision did not apply. An example of a common danger was an ordinary motor vehicle accident. However, the court found that the accident that occurred in the instant case was not such a "common danger" motor vehicle accident because it occurred in a work place and occurred because of the special hazards of that particular work place. The employee and fellow employee were paid to repair motor vehicles in the employer's garage. Under these circumstances, the exclusivity provision applied, and the fellow employee was immune from suit.

OUTCOME: The court granted the motion.

CORE TERMS: hazard, work place, general public, motor vehicle, motor vehicle accident, summary judgment, happened, immunity provision, motor vehicles, exposed, garage, immune, fellow, tree

statute by contrasting "the special hazards of the work place" with "the risk of a motor vehicle accident," which "is a common danger to which the general public is exposed." *Id.* at 359. With this distinction in mind, the court must consider a motion for summary judgment involving an unusual motor vehicle accident that occurred on the premises of the C&G Gulf service station (C&G) in Milford.

[*352] Both the plaintiff, Daniel Kuhar, and the named defendant, Stephen Phillips, were employees of another defendant, Gaetano **[***2]** Vitti, who did business as C&G. On December 23, 2002, Phillips was in a motor vehicle being repaired on the premises, examining the vehicle's lock cylinder. He turned the key, believing that the vehicle would not move. Phillips was wrong. The vehicle, which was in gear, lurched forward and injured Kuhar.

On September 8, 2003, Kuhar commenced this action by service of process against Phillips, Vitti, and the owner of the vehicle in question. The first count of Kuhar's amended complaint (the only count in question here) claims that Kuhar's injuries were caused by the negligence of Phillips in operating the vehicle and its ignition.

On February 9, 2005, Phillips filed the motion for summary judgment now before the court. The motion claims that the action is barred by the immunity provision of § 31-293a. The motion was argued on April 25, 2005.

HN2 While the text of § 31-293a is arguably broad enough to exclude any claim of a "fellow employee's negligence in the operation of a motor vehicle" from the immunity provision of that statute, the exception in question has been more narrowly construed by the Supreme Court. As mentioned, the court, in *Dias v. Adams, supra*, referred **[***3]** to the "special hazards of the work place." *Dias* explains that: "The intention was to distinguish 'simple negligence on the job' from negligence in the operation of a motor vehicle. Unlike the special hazards of the work place, the risk of a motor vehicle accident is a common danger to which the general public is exposed. Particular occupations may subject some employees to a greater degree of exposure to that risk. The nature of the risk remains unchanged, however, **[*353]** and in many employments, it is no greater than for the general public. The legislature has chosen, therefore, not to extend the immunity given to fellow employees by 31-293a to accidents having a less distinct relationship to the hazards of the employment."189 Conn. at 359-60. (Footnote omitted.)

Dias involved a construction worker who was installing sewer pipes in a trench. The worker was struck by a backhoe and fatally injured. The court held that this accident was attributable to "the special hazards of the work place." Id., 359. Similarly, in ***Fields v. Giron*, 65 Conn.App. 771, 783 A.2d 1097**, cert. denied, 258 Conn. 936, 785 A.2d 230 (2001), an employee **[***4]** of a tree care company was injured by a block and tackle attached to a truck pulling a fallen tree. The Appellate Court held that "this accident clearly had a 'distinct relationship to the hazards of employment.'" ***Id.* at 776**. Because the accidents at issue in *Dias and Fields* involved "the special hazards of the work place," the statutory immunity of the assertedly negligent employees remained intact, notwithstanding their arguable negligence in the operation of motor vehicles. The determining factor was the "distinct relationship to the hazards of the employment."

Kuhar states in his affidavit that "friends and customers" often socialized in **[**556]** the garage and work bay areas of C&G. The possibility of the public intruding on the work place is not, however, determinative. A hiker doubtless could have walked into the outdoor work areas at issue in *Dias and Fields.* The crucial distinction was indicated by Judge Corradino in a decision subsequently affirmed by the Supreme Court. The person injured "was not facing the hazards encountered by the general public as motorists or even pedestrians walking on or alongside a highway open to the public." *Ferreira v. Pisaturo*, 41 Conn. Supp. 326, 351-52, 574 A.2d 1324 (1989), **[***5]** aff'd on other grounds, 215 Conn. 55, 573 A.2d 1216 (1990).

LEXSEE 189 CONN. 354

Virginia Dias, Administratrix (Estate of Jose Dias) v. Joseph Adams

No. 10845

Supreme Court of Connecticut

189 Conn. 354; 456 A.2d 309; 1983 Conn. LEXIS 450

December 3, 1982, Argued
March 1, 1983, Decided

PRIOR HISTORY: [***1]
Action by the plaintiff's decedent to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant, brought to the Superior Court in the judicial district of Fairfield at Bridgeport and tried to the jury before *Herman, J.;* verdict and judgment for the plaintiff and appeal by the defendant to this court.

DISPOSITION:

Error; judgment directed.

COUNSEL:

Paul E. Pollock, for the appellant (defendant).

Robert R. Sheldon, with whom, on the brief, was *T. Paul Tremont,* for the appellee (plaintiff).

JUDGES:

Peters, Healey, Parskey, Shea and Grillo, Js.

OPINIONBY:

SHEA

OPINION:

[*354] [**310] The defendant has appealed from a judgment upon a verdict for the plaintiff administratrix awarding damages for the death of Jose [*355] Dias, which occurred after he was struck by the shovel of a backhoe being operated by the defendant, Joseph Adams. Both the decedent and the defendant were employed by the same construction company. In a special defense the defendant pleaded the applicability of *General Statutes § 31-293a,* n1 which generally bars suits against fellow employees where workers' compensation is available to the injured [***2] employee. In her reply the plaintiff admitted that the accident was covered by the Workers' Compensation Act and that the defendant was a co-employee of the decedent. She claimed that her action could be maintained, nevertheless, under the exception in § 31-293a which permits a suit against a fellow employee "for negligence in the operation of a motor vehicle as defined in section 14-1." The trial court, in denying the motion of the defendant to set aside the verdict, held that the plaintiff's suit fell within this exception. This determination is the subject of the present appeal, in which the sole issue raised by the [*356] defendant is whether at the time of the accident he was operating a motor vehicle as contemplated by § 31-293a. We conclude that he was not so engaged and find error.

n1 "[*General Statutes] Sec. 31-293a.* NO RIGHT AGAINST FELLOW EMPLOYEE; EXCEPTION. If an employee or, in case of his death, his dependent has a right to benefits or compensation under this chapter on account of injury or death from injury caused by the negligence or wrong of a fellow employee, such right shall be the exclusive remedy of such injured employee or dependent and no action may be brought against such fellow employee except for negligence in the operation of a motor vehicle as defined in section 14-1 or unless such wrong was wilful or malicious. No insurance policy or contract shall be accepted as proof of financial responsibility of the owner and as evidence of the insuring of such person for injury to or death of persons and damage to property by the commissioner of motor vehicles required by chapter 246 if it excludes from coverage under such policy or contract any agent, representative or employee of such owner from such policy or contract. Any provision of such an insurance policy or contract effected after July 1, 1969, which excludes from coverage thereunder any agent, representative or employee of the owner of a motor vehicle in-

We did say in *Davey* that "[t]here is nothing to suggest that the use of any mechanical or electrical device not an integral part of the motor vehicle being driven can be considered operation of a motor vehicle." *Id., 472* [*359] *n.1.* It does not follow, however, that the use of controls which have a dual purpose constitutes operation of a motor vehicle at a time when those controls cannot function to propel the backhoe, but are being used for a different purpose. The differences between the backhoe and the truck hoist in *Davey* may be significant in respect to whether the [**312] statutory definition of a "motor vehicle" has been met, a question we leave unresolved. It is plain, nevertheless, that at the time of the accident each of these machines was performing a function unrelated to movement of the vehicle itself.

Although the legislative history of § 31-293a is not especially revealing, there is some evidence that the intention was to distinguish "simple negligence on the job" from negligence in the operation of a motor vehicle. n3 Unlike the special hazards of the work place, the risk of a motor vehicle accident is a common danger to which [***8] the general public is exposed. Particular occupations may subject some employees to a greater degree of exposure to that risk. The nature of the risk remains unchanged, however, and in many employments it is no greater than for the general public. The legislature has chosen, therefore, not to extend the immunity given to fellow employees by § 31-293a to accidents having a less distinct relationship to the hazards of the [*360] employment. At the same time it has accorded the injured employee, in addition to workers' compensation, the same remedy he would have against a member of the general public who caused a motor vehicle accident. Our decision to construe the term "operation of a motor vehicle" in § 31-293a as not including activities unrelated to movement of the vehicle comports with this policy of the legislature.

n3 12 H. R. Proc., Pt. 9, 1967 Sess., pp. 3813, 4035, remarks of Representative Paul Pawlak: "Section 5. This section stops third party suits against fellow employees since such employee usually is unable to meet any judgment involving serious injuries. However, the section specifically permits suits against fellow employees where the injury or death was the result of wilful or malicious wrong by such fellow employee or involves the operation of a motor vehicle. We are here trying to make sure that a fellow employee cannot ordinarily be sued for simple negligence on the job, but we do not believe that he should be protected against wilful or malicious wrong, nor do we believe he should be protected if the employee is injured as a result of a motor vehicle accident."

[***9]

There is error, the judgment is vacated and the case is remanded with direction to render a judgment for the defendant.

In this opinion the other judges concurred.

SUPREME COURT OF WISCONSIN

KARL McNEIL,

Plaintiff-Appellant,

-vs- Case No. 05-0423

BRANDON HANSEN and
MARYLAND CASUALTY COMPANY,

Defendants-Respondents.

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

**APPEAL OF A JUDGMENT DATED 2/23/05,
CIRCUIT COURT OF MILWAUKEE COUNTY,
JUDGE JOSEPH DONALD, PRESIDING**

John A. Becker
Becker, French & DeMatthew
Attorneys for Plaintiff-Appellant
822 Wisconsin Avenue
Racine, WI 53403
(262) 633-7530
State Bar No. 01009488

TABLE OF CONTENTS

LIST OF AUTHORITIES CITED

INTRODUCTION

McNeil interprets Hansen's arguments as follows:

1. The term "operation" is ambiguous;

2. Because the claim here falls within an exclusion to the exclusive remedy of the worker's compensation statutes, the term operation must be narrowly construed; and

3. If operation is narrowly construed, it will exclude Hansen's conduct in the present case.

4. Alternatively, Hansen suggests that the Court disregard the statute completely, and create a totally new statute limiting the exception to a claim where the injury is caused by "special circumstances of employment".

I. THE TERM "OPERATION", AS USED IN THE CONTEXT OF THIS CASE, IS NOT AMBIGUOUS.

A. The term "operation" is not ambiguous.

Hansen begins his brief with the argument that the term "operation of a motor vehicle" must be narrowly

construed. However, before determining whether a term should be narrowly or broadly construed, it first must be determined that the term is ambiguous.

" 'Statutory interpretation begins with – and absent ambiguity, is confined to – the language of the statute' and statutory words and phrases, unless technical in nature or carrying a peculiar legal meaning, are construed according to common and ordinary usage." Burg v. Cincinnati Casualty, 2000 Wis. 76, ¶ 16 (citations omitted). For example, in discussing the term "examination," the court stated that examination was not defined in the statute, "so we turn to ordinary dictionary definitions to determine the word's common and ordinary meaning." State v. Denis, 2005 Wis. 110, ¶ 40. The term operate is not technical in nature and does not have a peculiar legal meaning. The definition of "operate" in the Merriam Webster Online Dictionary is "to cause to function." (App. p. 1).

In Burg, the Supreme Court discussed the term operate for purposes of operating a snowmobile. The defendant had parked a snowmobile on a path that was used by other snowmobilers. " 'Operate' means 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. . . . **The statute is not ambiguous**." Burg, 2000 Wis. 76 at ¶ 19-20, (emphasis added). There is no reason to look for a convoluted definition of operate. In common and ordinary language it means, "to cause to function." The turning of a key to start a car comes within the definition of operate, and the term is not ambiguous.

B. §102.03, Stats., is not ambiguous in the context of this case.

Hansen relies heavily upon the case of Hake v. Zimmerlee, 178 Wis.2d 417, 504 N.W.2d 411 (Ct. App.

1993). In Hake, an employee closed a car door on the hand of a co-employee. The Hake court held that the word operation, in the context of that case, was ambiguous and that the closing of the door on the co-employee's hand did not constitute operation of a motor vehicle.

A term can be ambiguous under one set of facts and not ambiguous when applied to a different set of facts. Welin v. Pryzyski, 204 AP. 2386 @ ¶ 12, citing *State Farm Mut. Ins. Co. v. Gillette*, 2001 WI App 123, ¶¶ 20-21, 246 Wis. 2d 561, 630 N.W.2d 527, *aff'd on other grounds*, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662. The fact that the Hake court held that the term "operation" was ambiguous in the context of closing a door, does not mean that the term is ambiguous in all contexts.

If Hansen had been driving the vehicle into the garage, Hansen certainly could not argue that the term "operation" is ambiguous and does not include the driving of an automobile.

However, the term operation includes more than just driving an automobile. As noted in State v. Modory, 204 Wis. 2d 538, 555 NW 2d 399 (Ct. App. 1986) "operation of a motor vehicle merely requires the manipulation or activation of the controls of a vehicle 'necessary to put it in motion'. . . . Had the legislature intended to require vehicular movement as an ingredient of operating a vehicle, it would have so stated. . . ." Modory, 204 Wis.2d at p. 544-545.

When considering the meaning of "operation" in the context of the facts of this case, the term is not ambiguous.

C. Considering the language in context with other Wisconsin Statutes, the term operate is not ambiguous.

Generally, language is given its ordinary and accepted meaning. State v. Denis, 205 Wis. 110 ¶ 35. Language is considered "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to

avoid absurd or unreasonable results." State v. Denis, 205 Wis. 110 ¶ 35. (Citations omitted). If this process does not yield an ambiguity, the inquiry ends. Id., at ¶ 35.

Hansen argues that the term "operation" must be construed within the meaning of the Worker's Compensation Act, and only statutes containing the same subject matter are to be construed together. (Hansen Brief, pp. 11-12).

Laws in "pari materia" are laws concerning the same subject matter; laws pari material must be construed with reference to each other. Black's Law Dictionary, 4th Ed. Statutes must be read together in pari materia to avoid any conflicts. State v. Denis, 205 Wis. 110 (footnote 21). In State v. Denis the Court concluded that although §§ 146.82 and 905.04 were in different chapters, they both address the confidential status of health care information, and the doctrine of pari materia was applied.

Operate can mean a variety of things – to perform surgery, a military maneuver, or to run a business. The term operation, as used in the Worker's Compensation Act, relates to the operation of a motor vehicle. Therefore, the Court can look to other statutes that address "operate" as it relates to a motor vehicle.

The legislature has defined the term operate in four other statutes as it applies to motorized vehicles. The definitions have been virtually identical and include the activation or manipulation of any of the controls necessary to put the vehicle in motion.

When considering the term operate, not in isolation, but in context of the use of a motor vehicle, the turning of the key to start the car constitutes the operation of a motor vehicle.

II. IF THE COURT DETERMINES THAT THE STATUTE IS AMBIGUOUS, THE CONDUCT OF HANSEN IN THIS CASE STILL COMES WITHIN THE DEFINITION OF OPERATE UNDER THE WORKER'S COMPENSATION ACT.

A. Rather than choose between a narrow or broad construction, the Court can apply a reasonable interpretation of the term operate.

If the term operate is not ambiguous, or if resorting to the dictionary definition of the word renders it not ambiguous, or if when looking at the statute in context with other statutes the term is unambiguous, the inquiry ends. Only if, after completing the above analysis the Court determines that the term is ambiguous, is it necessary to determine the standard of review.

Prior to the passage of the Worker's Compensation Act, the common law rule was that an employee had the right to sue an employer or co-employee for negligence. After the passage of the Worker's Compensation Act, an employee's

remedy against the employer was limited to workers compensation, but he or she still had the right to sue a co-employee for negligence. This was true up until 1977 when Sec. 102.03(2) was amended. This section abrogated the common law right to sue a co-employee. In contrast, the general public policy of Wisconsin is that a person should be liable for negligently inflicting injury. LePoidivin v. Wilson, 111 Wis. 2d 116, 129, 330 NW 2d 255 (1983). "Statutes in derogation of the common law must be strictly construed." LePoidivin v. Wilson, at 129.

McNeil also acknowledges that the rule in 102.03(2) is an exception to the exclusivity of the Worker's Compensation Act, and in that sense the term could be narrowly construed against the exclusion.

Rather than applying a broad or narrow construction, it is suggested that the Court merely apply a reasonable standard and common sense definition to the term operate. A

reasonable person would conclude that starting a car is an element of operating the vehicle.

B. The term "operate" has been narrowly construed by the Court.

Hansen claims that the Court must narrowly construe the term operation under Wis. Stats. Sec. 102.03(2) and that under the drunk driving statute the courts had to broadly construe the term "operate." Hansen is wrong.

In spite of public policy of deterring drunk driving, operating a motor vehicle while intoxicated can be a criminal offense. "It is a well known cannon of construction that a criminal statute must be strictly construed in favor of the accused." State v. Worobel, 24 Wis. 2d 270, 275, 128 NW 2d 629 (1964). Therefore, Court was required to narrowly construe the term operate when applied to drunk driving.

From the time this country was established, America has been recognized for valuing individual freedoms. The

deprivation of one's individual liberties is not to be taken lightly. Hansen suggests that the Court should interpret the term "operation" even more narrowly in a civil case than in a criminal case when a person's liberty may be at stake.

C. Legislative history shows that the intent of the statute was meant to allow an employee to sue a co-employee when it is likely that the employee will be covered by automobile liability insurance.

As Hansen pointed out, the legislative history suggests that an exception was made for an employee operating a motor vehicle that is not owned or leased by the employer because it was presumed that the vehicle would be insured and have coverage for the claim. Auto insurance will provide coverage for a particular insured or for the operator of a vehicle. Hansen may be covered under the insurance policy of the owner of the vehicle, Hansen could have had his own insurance coverage, if he lived at his parents' home he may have been covered under his parents' policy, or, as in this

case, coincidentally the employer's insurance also provides coverage. The definition of "operation" is not going to change just because Hansen may not have had his own private insurance in this case.

Hansen seems to agree that "operate" includes more than just driving. Curiously, he does not suggest a definition of how it should be interpreted, he only concludes that it should not include starting the ignition.

In all of the cases that have interpreted "operate" when dealing with motor vehicles, and in all of the statutes that define "operate" or "operation", the definition has been virtually the same, "the manipulation or activation of the controls of a vehicle necessary to put it in motion." The Defendant now suggests that starting a car in a worker's compensation case is not operating a motor vehicle.

Regardless of the context, operation of a motor vehicle means operation of a motor vehicle. The defendant wants it

to mean one thing for drunk driving, something else for worker's compensation, and arguably it could have a third meeting in some other context. We have a definition of "operation of a motor vehicle" as established by the courts and the legislature. Regardless of the construction given, starting a car is the operation of a motor vehicle.

III. ADOPTING A "SPECIAL HAZARDS TEST" WOULD BE REWRITING THE STATUTE.

Hansen suggests that the statute should be interpreted as allowing recovery for the negligent operation of a motor vehicle only when the injured employee was not facing "the special hazards of the workplace." Hansen cites to Kuhar v. Phillips, 49 Conn. Supp. 351, 881 A. 2nd 554, 205, in support for such assertion.

It should be pointed out that Kuhar was decided by the Superior Court of Connecticut, which is equivalent to Wisconsin's Circuit Courts. Cases are then appealed to the

Connecticut Appellate Court, and then the Connecticut Supreme Court. The Kuhar decision is currently on appeal in Connecticut.

Secondly, the decision in Kuhar does not clarify the statute, but merely complicates it. Even after applying its "special hazards" test, the court in Kuhar never defined "operate". The decision in Kuhar would merely create additional ambiguity as to what constitutes a special hazard of the employment.

In Gorzalski v. Frankenmuth Mut. Ins. Co., 145 Wis. 2d 794, 429 NW 2d 537, the plaintiff worked for Bob Tolkan. A co-employee was driving an automobile that was owned by a customer and had been left for repair at Bob Tolkan's garage. The plaintiff was injured when the co-employee drove the automobile into him.

In Rocker v. USAA, 2006 Wis. 26, the plaintiff was working at a car wash. A co-employee accidentally drove a customer's vehicle into the plaintiff.

In Gorzalski the issue was whether the vehicle was owned or leased by the employer, and in Rocker there was an issue as to insurance coverage. However, neither case suggested that because the accident occurred on the grounds of the employer that the claim would be barred due to the "special hazards of employment".

The only way to reach the result proposed by Hansen is to totally disregard the wording of the Wisconsin Statute. It is quite clear that the Wisconsin Courts have not adopted the position that was taken by the court in Kuhar. If Wisconsin Courts had done so, they would not have been concerned with the definition of "operate" (Hake), or the definition of "motor vehicle not owned or leased by the employer" (Gorzalski), or the nature of the insurance

coverage (Rocker), they merely would have disallowed the plaintiffs' claims based upon the "special circumstances of employment".

Based upon the facts of Rocker and Gorzalski, even Hansen would have to concede that the co-employee was operating a motor vehicle at the time of the accident. Based upon those facts, the statute would be unambiguous, but Hansen's "special circumstances" test, they would not have been operating a motor vehicle. Hansen is asking the Court to disregard the clear language of the statute and create an ambiguous court made rule.

When the Wisconsin legislature amended the worker's compensation statutes to bar a claim against co-employees, an exception was provided for a co-employee operating a motor vehicle. Wisconsin legislative history indicates that the legislature anticipated there would be automobile insurance coverage. The exception was not based in any way in

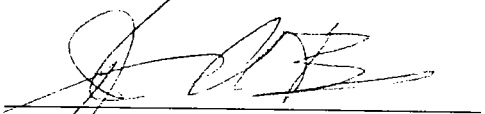
whether or not the accident was a "special hazard of employment," but on the expectation that the vehicle would be insured.

CONCLUSION

For the reasons set forth above, McNeil asks that the decision of the trial court be reversed.

Respectfully submitted this 5th day of July, 2006.

Becker, French & DeMatthew



John A. Becker
Attorney for Plaintiff-Appellant
State Bar No. 01009488

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

Desk Top Publishing or Other Means (proportional serif font, min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max. of 60 char. pr line). The text is 13 point type and the length of the brief is 2,456 words.

Dated this 5th day of July, 2006.

John A. Becker
State Bar No. 01009488

A P P E N D I X

APPENDIX TABLE OF CONTENTS

Merriam-Webster Online Dictionary

Thesaurus

operate

One entry found for **operate**.

Main Entry: **op·er·ate**
Pronunciation: 'ä-pə-"rAt, 'ä-"prAt
Function: *verb*
Inflected Form(s): **-at·ed**; **-at·ing**
Etymology: Latin *operatus*, past participle of *operari* to work, from *oper-*, *opus* work; akin to Old English *efnan* to perform, Sanskrit *apas* work
intransitive senses
1 : to perform a function : exert power or influence <factors *operating* against our success>
2 : to produce an appropriate effect <the drug *operated* quickly>
3 a : to perform an operation or a series of operations **b** : to perform surgery **c** : to carry on a military or naval action or mission
4 : to follow a course of conduct that is often irregular <crooked gamblers *operating* in the club>
transitive senses
1 : BRING ABOUT, EFFECT
2 a : to cause to function : WORK **b** : to put or keep in operation
3 : to perform an operation on; *especially* : to perform surgery on

For **More Information on "operate" go to Britannica.com**
Get the **Top 10 Search Results for "operate"**

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5th day of July, 2006.

John A. Becker
State Bar No. 01009488

IN SUPREME COURT
STATE OF WISCONSIN

KARL MCNEIL,

Plaintiff-Appellant,

v.

BRANDON HANSEN and MARYLAND CASUALTY COMPANY,

Defendants-Respondents.

Appeal No. 05-0423

APPEAL FROM A FEBRUARY 23, 2005 JUDGMENT OF THE MILWAUKEE COUNTY CIRCUIT COURT, HON. MARTIN JOSEPH DONALD PRESIDING

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE WIS. STAT. § (Rule) 809.19(7)

James A. Friedman
State Bar No. 1020756
Linda S. Schmidt
State Bar No. 1054943
LaFollette Godfrey & Kahn
One E. Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609

Attorneys for Wisconsin Manufacturers & Commerce

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION

Wisconsin Manufacturers & Commerce ("WMC"), by its attorneys, LaFollette Godfrey & Kahn, offers the following, pursuant to Wis. Stat. § 809.19(7) and the Court's July 3, 2006 Order, as its non-party brief in this appeal. WMC is a statewide, non-profit association representing Wisconsin businesses. WMC has nearly 4,600 members, including large and small manufacturers, service companies, local chambers of commerce, and specialized trade associations.

WMC has a unique perspective on this case because it represents the interests of such a broad spectrum of businesses, all of whom are Wisconsin employers and virtually all of whom are subject to Wisconsin's worker's compensation law. WMC also has a unique perspective on this case based on its long-standing representation on the Wisconsin Worker's Compensation Council. *See* Wis. Stat. §§ 15.227(4) (creating council on worker's compensation),

102.14(2) (requiring council to regularly submit to legislature recommendations on amendments to the Worker's Compensation Act and report its views upon pending bills relating the Act).

The narrow issue in this case is whether flushing a radiator constitutes "operation of a motor vehicle" under the exception to the exclusivity provision of the Wisconsin Worker's Compensation Act (the "WCA" or the "Act"), Wis. Stat. § 102.03(2). Common sense – as well as the Court's prior precedent – dictates the answer. No. Any oil and lube business customer would be incredulous to hear that his or her vehicle is *being operated* by an employee who starts the engine to flush a radiator. *See Gullickson v. Western Cas. & Surety Co.*, 17 Wis. 2d 220, 224, 116 N.W.2d 121 (1962) ("We do not think the servicing of the motorist's automobile is a 'use' of the car by ... [the service station] employee.").

WMC supports applying a case-by-case, common-sense approach to this appeal; rather than the mechanical rule

advocated by plaintiff-appellant Karl McNeil. *Cf.* Reply Br. of Pl.-Appellant ("Appellant's Reply"), p. 9. When defendant-appellant Brandon Hansen started the engine, that act was integral to completing maintenance on the customer's vehicle, not to operating it. *See Graf v. Bloechl*, 36 Wis. 2d 635, 643, 154 N.W.2d 340 (1967) ("'Maintenance' of an automobile has never been considered a part of operation ....") (internal quotations omitted). As such, McNeil's injuries were a product of the special risks directly attendant on his workplace and fall squarely within the intended scope of the WCA and its co-employee immunity rule.

The WCA is intended to protect employees from the (often costly) burden of litigation for employment-related injuries, which burden the Act ultimately shifts to the consuming public. *See Hake v. Zimmerlee*, 178 Wis. 2d 417, 422-23, 504 N.W.2d 411 (Ct. App. 1993) (discussing the WCA's legislative history). Interpreting "operation" to simply require the turning of a key would erode the strong

public policy goals of the statute and would be contrary to the courts' practice of narrowly construing exceptions to the co-employee immunity rule. *See Hake*, 178 Wis. 2d at 423 (Because of the WCA's strong public policy goals, exceptions are to be narrowly construed.).

WMC, therefore, strongly urges the Court to find that flushing a radiator, including starting a vehicle's engine as part of the process, does not constitute "operation of a motor vehicle" for purposes of Wis. Stat. § 102.03(2), and it asks the Court to affirm the judgment of the Milwaukee County Circuit Court to that effect.

ARGUMENT

I. THE COURT SHOULD NARROWLY CONSTRUE THE TERM "OPERATION" TO ADVANCE THE PURPOSES OF THE WORKER'S COMPENSATION ACT.

A. The Meaning Of "Operation" Is Ambiguous In The Context Of The WCA.

Courts have held that "[t]he word 'operation' has different meanings depending on the context in which it is

used." *Hake*, 178 Wis. 2d at 421; *see also Lukaszewicz v. Concrete Research, Inc.*, 43 Wis. 2d 335, 342, 168 N.W.2d 581 (1969) (citing *State Farm Mut. Auto. Ins. Co. v. Coughran*, 303 U.S. 485 (1938)). Courts further have determined that the meaning of the phrase "operation of a motor vehicle," as used in Wis. Stat. § 102.03(2), is not readily discernable and, in fact, is ambiguous. *Hake*, 178 Wis. 2d at 421.

McNeil runs from *Hake*'s unequivocal holding on this point and suggests that the Court consider facts not present here to find the term unambiguous. McNeil asserts, for example, that if Hansen had been driving the car into the garage, there would be no argument that "operation" encompassed his actions. Appellant's Reply, pp. 4-5. That may be. *See, e.g., Rocker v. USAA Cas. Ins. Co.*, 2006 WI 26, ¶ 53, 711 N.W.2d 634 (stating in dicta that exclusion to co-employee immunity rule would apply where car wash

employee was struck by co-employee driving customer's vehicle).

As McNeil's argument recognizes, however, Hansen was *not* driving the vehicle that injured him. Moreover, the statutes, the Court's prior precedent, and McNeil's brief demonstrate that what constitutes "operation of a motor vehicle" outside of "driving" is indeed subject to differing interpretations. *Compare* Wis. Stat. § 340.01(41) (defining "operator" for purposes of vehicle code as "a person who *drives or is in actual physical control of a vehicle*") (emphasis added) *and Graf*, 36 Wis. 2d at 643 (Starting engine as part of repairs is not "operation."), *with* Appellant's Reply, pp. 4-5 (citing, *inter alia*, Wis. Stat. §§ 23.33(1)(ir), 346.63(3)(b), 350.01(9r), 943.23(1)(c) for proposition that "operate" in this context should mean "to physically manipulate or activate any of the controls necessary to put the vehicle in motion").

Unlike the statutes governing conservation, drunken driving, snowmobiles, and ATV's on which McNeil relies, the WCA does not define "operation." *See generally* Wis. Stat. § 102.03. The *Hake* Court, therefore, was correct to hold that, in the context of the WCA's co-employee immunity rule, "operation of a motor vehicle" is "subject to 'more than one reasonable, although not necessarily correct,' interpretation." *Hake*, 178 Wis. 2d at 421.

B. To Advance The Purposes Of The WCA, Courts Should Narrowly Construe Exceptions To The Co-Employee Immunity Rule.

Because the term "operation" is ambiguous, courts assume that the legislature intended an interpretation that advances the purposes of the statute. *Hake*, 178 Wis. 2d at 423.

The WCA embodies "an evolving public policy decision arrived at by the legislature after weighing the competing policy considerations" presented by members of the Worker's Compensation Advisory Council. *Peterson v.*

Arlington Hospitality Staffing, Inc., 2004 WI App 199, ¶ 14, 276 Wis. 2d 746, 689 N.W.2d 61. In 1977, the statute was repealed and recreated to extend the Act's immunity provisions to the majority of work-related suits against co-employees. *See* Laws of 1977, ch. 195, § 2. As the courts have explained,

> [i]njuries caused by a negligent coemployee ... *are directly related to the employment*, and pursuant to the stated purpose or objective of the Worker's Compensation Act, the costs should be passed on to the consuming public.

Oliver v. Travelers Ins. Co., 103 Wis. 2d 644, 648, 309 N.W.2d 383 (Ct. App. 1981) (emphasis added). Indeed, to allow work-related injury suits between co-employees "would be inconsistent with the theory of the [WCA]," placing the burden of litigation on the shoulders of workers. *Id.*

In light of these strong policy concerns that underlie the rule of co-employee immunity, the courts construe exceptions to the statutory rule narrowly. *See Hake*, 178 Wis. 2d at 423.

II. FLUSHING A RADIATOR DOES NOT CONSTITUTE "OPERATION" UNDER A NARROW CONSTRUCTION OF THAT TERM.

A. Common Sense And Precedent Dictate That Acts Integral To Flushing A Radiator Do Not Constitute "Operation Of A Motor Vehicle" Under the WCA.

McNeil's injuries arose in this case when he asked a junior, relatively new employee to start the engine of a customer's vehicle so that he could flush that vehicle's radiator. *See* R. 12, pp. 20-22; Supp. App. of Defs.-Resp'ts ("S. App.") 7-9. Hansen, the other employee, did as he was asked. R. 12, p. 7; App. of Pl.-Appellant ("A. App.") 11. Hansen was not inside the vehicle either when he started its engine or when it lurched forward, injuring McNeil. R. 12, pp. 7-8; A. App. 11; S. App. 8. Hansen had no intention to drive the vehicle, move it, steer it, accelerate it, or apply its brakes. R. 12, p. 22; S. App. 9. Rather, Hansen simply initiated a flushing process that was part of the vehicle's

maintenance and the reason the vehicle was at the oil and lube station.

Maintenance of an automobile, however, "has never been considered a part of operation." *Graf*, 36 Wis. 2d at 643. In *Graf*, the Court considered whether an attempt to start an automobile to make ignition and timing adjustments was an act of "operation, management or control" within the statute permitting direct action by an injured party against the negligent party's insurer. *Id.* at 640-41. The Court determined that it was not. *Id.* at 643.

In reaching its conclusion, the *Graf* Court emphasized the purpose for which the motor was started.

> "It is difficult to believe that it was [the defendant's] intention to drive the car when he attempted to start it in view of the work remaining .... It is highly probable that the car would have been turned off after the adjustments were made ...."

Id. at 641-42. The defendant's primary intention and purpose was, instead, to complete necessary repairs. *Id.* In such circumstances, "[t]he attempted starting of the car ... cannot

be considered to be a 'use' or 'operation, management or control' of the motor vehicle." *Id.* at 642.

The *Graf* Court reached its holding despite a requirement that it liberally construe the direct action statute before it. *See id.* at 641 (The court has adopted a rule of liberal construction of the direct action statute.). At least one other case has held similarly. *See Gullickson*, 17 Wis. 2d at 224 (servicing of vehicle, including attempt to start the motor, not a "use" under defendant's insurance policy); *see also Hake*, 178 Wis. 2d at 426 ("using" is broader than "operation").

Graf, Gullickson and *Hake* all point the way toward a reasonable approach to the co-employee immunity rule's exception for motor vehicle injuries. Courts should not willy-nilly find an exclusion to co-employee immunity simply because a worker turned the key to a vehicle's ignition. *Cf. Rocker*, 2006 WI 26, ¶ 53 (stating in dicta that car wash employee's suit against co-employee who accidentally *drove*

customer's car into him would not be barred by the WCA). The intent and purpose behind the employee's actions should remain part of the calculus to ensure that the cost of injuries directly related to employment are not foisted upon Wisconsin's workers, in contravention of the Act's purpose.

B. The Statutes Support The Conclusion That Acts Taken To Flush A Radiator Do Not Constitute "Operation Of A Motor Vehicle" Under the WCA.

McNeil has presented the Court with several statutory provisions that he contends should be used to define the term operation under § 102.03(2). *See* Pl.-Appellant's Br. ("Appellant's Br."), pp. 3-5; Appellant's Reply, pp. 6-7. Curiously absent from that list are any general definitions that effect the entire vehicle code. *See, e.g.,* Wis. Stat. § 340.01.

Not surprisingly, the statutory definitions of "operate" and "operation" that McNeil offers are found in sections where one would expect the definition to be broadly-framed and interpreted to protect the public against injurious behaviors. *See* Wis. Stat. §§ 23.33 (conservation), 346.63

(operating under influence of intoxicant or other drug), 350.01 (snowmobiles),[1] 943.23 (operating vehicle without owner's consent). In fact, McNeil relies on *State v. Modory*, 204 Wis. 2d 538, 555 N.W.2d 399 (Ct. App. 1996), to support his interpretation of "operation." *See, e.g.*, Appellant's Br., pp. 3-4. Contrary to McNeil's assertions, however, the *Modory* Court made clear that it was construing "operation" broadly:

> [T]he purpose of the statute is to deter a person who is intoxicated from getting behind the wheel of a motor vehicle in the first instance, rather than to have a court or jury make a fine distinction later whether the person was in a position to cause harm.

Modory, 204 Wis. 2d at 544; *but see* Appellant's Reply, p. 10 (contending, without citation, that *Modory* narrowly construed Wisconsin's drunken driving statute). That approach runs counter to the narrow construction courts apply with respect to § 102.03(2). *See Hake*, 178 Wis. 2d at 423.

---

[1] This section is also an inappropriate guide because it was not present in the statutes at the time the co-employee immunity rule was enacted. *See generally* Wis. Stat. ch. 350 (1977).

Moreover, McNeil completely ignores Wis. Stat. § 340.01, which provides a general definition of "operator" for the entire vehicle code, "unless a different meaning is expressly provided or the context clearly indicates a different meaning." Under subsection (41) of that statute, "'[o]perator' means a person who *drives* or is in *actual physical control* of a vehicle." (Emphasis added). Section 340.01(41) provides a definition of "operation" that comports with the Court's own, previously-cited holdings – and the construction advocated by WMC here. *See, e.g., Frye v. Angst*, 28 Wis. 2d 575, 582, 137 N.W.2d 430 (1965) ("Operation, management or control" connote manipulation of a moving vehicle and/or refer to the manner of the vehicle's use.); *see also Graf*, 36 Wis. 2d at 643 (largely following *Frye*).

C. At Least One Other State With A Similar Immunity Rule Exception Has Rejected The Simple "Turn-The-Key" Approach Suggested By McNeil.

Only a few states' statutes include an exception to the co-employee immunity for motor vehicle injuries. 1 Modern

Workers Compensation § 103:9 (1993). Connecticut, like Wisconsin, is one such state. *Id.* n. 62. Its exception is similar to Wisconsin's, providing that

> "no action may be brought against [a] fellow employee unless ... the action is based on the fellow employee's negligence in the *operation of a motor* vehicle as defined in section 14-1."

Conn. General Stat. §§ 31-293a (2005) (emphasis added); *see also* § 14-1 (defining "operator" as a person who "operates a motor vehicle" or who "drives, operates or is in physical control of" a vehicle).

The Connecticut courts have refused to apply an exception to the co-employee immunity rule when a worker simply turned the ignition key to a vehicle's motor. Discussing the motor vehicle injury exception to the immunity rule, the Connecticut Supreme Court has emphasized that

> [u]nlike the special hazards of the work place, the risk of a motor vehicle accident is a common danger to which the general public is exposed. Particular occupations may subject some employees to a greater degree of exposure to

> that risk. The nature of the risk remains unchanged, however ....

Dias v. Adams, 456 A.2d 309, 312 (Conn. 1983). Thus, where the injury arises from a special work place hazard, co-employee immunity applies. *See id.* at 311 (immunity applies where defendant, who accidentally struck co-worker with back-hoe shovel, "was doing nothing related to driving or moving the vehicle itself."); *see also Kuhar v. Phillips*, 881 A.2d 554 (Conn. Super. Ct. 2005) (Immunity applies where service station employee turned ignition key while examining vehicle's lock cylinder, causing vehicle to unexpectedly lurch forward and injure co-employee.).

McNeil implores the Court to reject Connecticut's approach, suggesting that to construe "operation of a motor vehicle" in a manner that accounts for the special hazards of the workplace would "merely complicate" the WCA. Appellant's Reply, p. 14. McNeil is unable to explain, however, why a definition of "operation," which simply asks whether an employee turned the ignition key, conforms to and

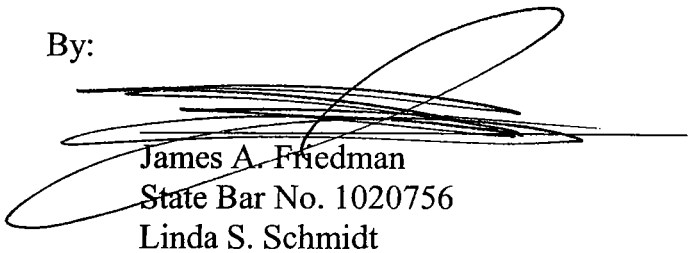
advances the goals of the Act. *See Oliver*, 103 Wis. 2d at 648 (Pursuant to the WCA, the costs of injuries that are directly work-related should be passed on to the consuming public.). An approach like Connecticut's, which inquires into the special hazards of the workplace, certainly would.

CONCLUSION

For the reasons stated above and based on the entire record in this action, Wisconsin Manufacturers & Commerce asks the Court to affirm the decision of the Milwaukee County Circuit Court and hold that flushing a radiator, including starting an engine for that purpose, does not constitute "operation of a motor vehicle" under Wis. Stat. § 102.03(2).

Dated this 24th day of July, 2006.

LA FOLLETTE GODFREY & KAHN

By: 

James A. Friedman
State Bar No. 1020756
Linda S. Schmidt
State Bar No. 1054943

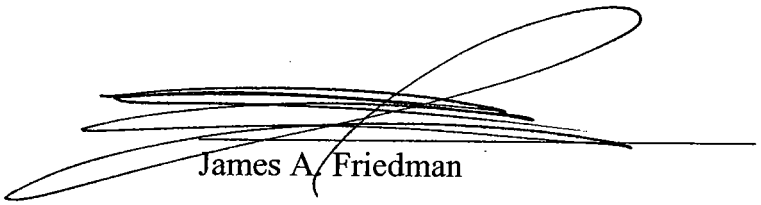
Attorneys for Wisconsin Manufacturers & Commerce

LaFollette Godfrey & Kahn
an office of Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(Phone) (608) 257-3911
(Fax) (608) 257-0609

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), Stats., for an amicus brief produced with a proportional font. The length of this brief is 2,661 words.

Dated: July 24, 2006.



James A. Friedman

mn282480_1

05-0423

COURT OF APPEALS OF WISCONSIN
DISTRICT I

KARL McNEIL,

Plaintiff-Appellant,

-vs-

Case No. 05-0423

BRANDON HANSEN and
MARYLAND CASUALTY COMPANY,

Defendants-Respondents.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

APPEAL OF A JUDGMENT DATED 2/23/05, CIRCUIT COURT OF MILWAUKEE COUNTY, JUDGE JOSEPH DONALD, PRESIDING

John A. Becker
Becker, French & DeMatthew
Attorneys for Plaintiff-Appellant
822 Wisconsin Avenue
Racine, WI 53403
(262) 633-7530
State Bar No. 01009488

TABLE OF CONTENTS

LIST OF AUTHORITIES CITED

ISSUE

WHEN A PERSON TURNS THE KEY TO START AN AUTOMOBILE, DOES THAT CONSTITUTE "THE OPERATION OF A MOTOR VEHICLE" UNDER THE WORKER'S COMPENSATION STATUTES (WIS. STATS. § 102.03(2))?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

McNeil does not believe that oral argument is necessary. With respect to publication, there are no cases specifically addressing this fact situation, so publication would be warranted.

FACTS

Karl McNeil and Brandon Hansen were co-employees. They worked together at Fast Track Oil Change. R. 12, p. 3; App. p. 1 (depo. pp. 4-5).

On April 12, 2003, McNeil was servicing a Jeep Wrangler. McNeil was in front of the Jeep and he requested that Hansen start the vehicle. R. 12, p. 7; App. p. 3 (depo. pp. 18-19).

The keys were not in the ignition, so Hansen got the keys from the customer. Hansen reached through the window with the keys and started the Jeep. R. 12; App. p. 3 (depo. pp. 19-20).

The vehicle had a manual transmission and it lurched forward. McNeil was pinned between the Jeep and the garage door, and sustained injuries. R. 12; App. p. 3 (depo. pp. 20-21).

The trial court ruled that the act of starting the car did not constitute "the operation" of a vehicle for purposes of the worker's compensation statute. (R. 24, pp. 13-14, App. pp. 4-5).

APPLICABLE LAW

> . . . the 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 co-employee . . . for negligent operation of a motor vehicle not owned or leased by the employer . . ..

Wis. Stats. § 102.03(2).

ARGUMENT

MANIPULATING OR ACTIVATING ANY OF THE CONTROLS OF A VEHICLE NECESSARY TO PUT IT IN MOTION CONSTITUTES OPERATION OF A MOTOR VEHICLE.

It is undisputed that Hansen and McNeil were co-employees, and that the Jeep was not owned or leased by the employer. The argument raised by Hansen, and accepted by the trial court, was that turning the key and starting the Jeep did not constitute "the operation" of a motor vehicle under the statute.

The Appellate Courts in Wisconsin have addressed this issue in the context of the OWI statute. In State v. Modory, 204 Wis. 2d 538, 555 NW 2d 399 (Ct. App. 1986), the defendant was in a vehicle that was running but was stuck on the side of the road. The defendant claimed that because the vehicle could not be moved, he could not be operating a motor vehicle.

The Court stated "operation of a motor vehicle merely requires the manipulation or activation of the controls of a vehicle 'necessary to put it in motion'." Modory, 204 Wis.

2d at 544 *citing* Wis. Stats. 346.63(3)(b). The Court indicated that if the legislature intended to require vehicular movement as an ingredient of operating the vehicle, such a requirement would have been placed in the statute. Modory, 204 Wis. 2d at 544, 545.

In Burg v. Cincinnati Casualty, 2002 WI 76, the Court had to determine the scope of the term "operate" for purposes of operating a snowmobile. Operate was defined in the statutes 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." Burg, ¶ 19, quoting Wis. Stats. § 350.01(9r).

There is no question that turning the key to start the engine is an activation of the controls necessary to put the vehicle into motion. It has never been held, by any Court in any context, that the starting of a motor vehicle is not included within "the operation" of the vehicle.

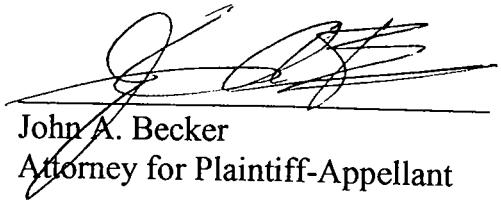
CONCLUSION

Hansen's turning the key to start the motor vehicle constitutes the operation of a motor vehicle, and therefore this

action is not precluded by the exclusive remedy provisions of the Worker's Compensation Act.

Respectfully submitted this 26th day of May, 2005.

Becker, French & DeMatthew



John A. Becker
Attorney for Plaintiff-Appellant

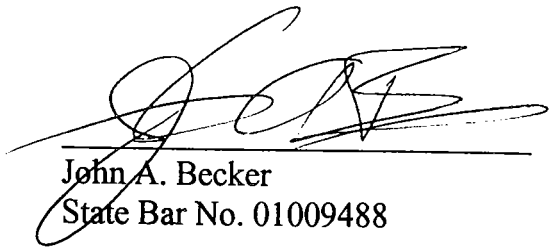
Post Office Address:
822 Wisconsin Avenue
Racine, WI 53405
262/633-7530

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

Desk Top Publishing or Other Means (proportional serif font, min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max. of 60 char. pr line). The text is 13 point type and the length of the brief is 678 words.

Dated this 26th day of May, 2005.



John A. Becker
State Bar No. 01009488

APPENDIX

APPEARANCES

BECKER, FRENCH & DeMATTHEWS, S.C., by
MR. JOHN A. BECKER,
822 Wisconsin Avenue,
Racine, Wisconsin 53403,
appeared on behalf of the Plaintiff.

LOWE & ASSOCIATES, by
MR. EDWARD W. STEWART,
20935 Swenson Drive, Suite 310,
Waukesha, Wisconsin 53186,
appeared on behalf of the Defendants.

* * * * *

INDEX

Exhibits: (None) Marked ID

TRANSCRIPT OF PROCEEDINGS

BRANDON HANSEN, called as a witness herein, having been first duly sworn on oath, was examined and testified as follows:

EXAMINATION

BY MR. BECKER:

Q Please state your name for the record, please.
A Brandon Scott Hansen, H-A-N-S-E-N.
Q Your address?
A 2621 South 86th Street.
Q Are you working now?
A Yeah.
Q Where do you work now?
A Squared Away Builders.
Q And what do you do there?
A Carpentry.
Q Now, you know we're here because of an accident which occurred back in April of last year, right?
A Um-hum.
Q You have to answer out loud.
A Yes.
Q And if you don't understand any of my questions, let me know. I want to make sure we have an accurate record here. All right?
A Okay.

Q You were working for who at the time?
A For Fast Track.
Q How long had you worked there?
A I worked there four months.
Q What was your job there?
A Lube tech, I guess was the title.
Q What were your duties?
A Most often I was in the pit, which is underneath the car, doing the -- changing the oil, filter. Other duties were vacuuming, cleaning the windows, checking tire pressure. Then we did coolant flushes and transmission flushes, sold wipers, accessories.
Q So you started there what, about the first of the year, approximately?
A No, it was I'd say about the 20th of February. It was like a week after my birthday.
Q So you had been there about two months when this happened?
A About, yeah, two, three months.
Q Well, if it happened in April and you started in February, it would be about two months?
A Yeah.
Q Prior to that time, had you ever worked at any type of -- had you had any type of employment which

involved working on cars?
A No.
Q What's your date of birth?
A 2/9/82.
Q And you started February 20th of '03, correct?
A Somewhere around there.
Q Who hired you, do you know, I mean what individual did you talk to?
A Karl McNeil.
Q And how did that go? Did you come in and fill out an application, did you have to go in for an interview, did he call you on the phone and say come in?
A I went down there -- I found out about the job from a friend, and I went down there and -- well, I was -- my friend knows Dan Beth, the district manager, and Dan referred me to Karl, so Karl called me in for an interview. I filled out an application, he gave me an interview and he hired me then.
Q First of all, who is your friend?
A John Ranthum.
Q R-A-M --
A R-A-N-T-H-U-M.
Q And he said, geez, I know

for Fast Track, and they might be looking for somebody?
A Yes. I was looking for a job, and he knew that.
Q And you called Dan Beth, and he said you need to call the manager of the store call Karl?
A Um-hum.
MR. STEWART: Is that a yes?
THE WITNESS: Yes.
BY MR. BECKER:
Q And then you called Karl before filling out an application?
A I talked to -- yeah, I called in and then I got a call back like a few days later, and he called me with the day and the time, and I went for an interview.
Q So you called about the job, he said come in -- whenever he got back to you, he said come on in for an interview, and at that time you filled out the application also?
A Filled out the application, then he gave me the interview and hired me and told me to start that week.
Q During the interview process, did you go over with him any aspects of the job?
A Well, I told him that I had automotive in high

school, and I've changed oil before, but that was about as far as it went. Like a coolant machine or transmission flushes or that, I didn't know anything about.
Q Did he hire you on the spot?
A Yeah.
Q So after talking to him, how long did the interview last?
A I'd say maybe 15 minutes.
Q So you talked a little bit about what the job involved, what your duties would involve, and he said okay you're hired basically?
A Um-hum.
Q Yes?
A Yes.
Q Now you told him what experience you had, that you had changed oil on a car and that you had automotive in high school. Did he then explain to you what the job involved?
A Yes.
Q What did he explain to you?
A Well, he told us like that we do coolant flushes and transmission flushes and the courtesies like vacuuming the car out, washing the windows, checking the tire pressure, and that was about it.

Q And did you start that day?
A No, it was a few days later.
Q And when you came in the first day, was he there or was that his day off, by any chance, so that you talked to an assistant manager?
A No, he was there.
Q And what instruction did you get, either at the interview or when you came in, about how to do the job?
A Like, well, when you start, the first thing he had me do is like courtesies. He just said, you know, this is what we do, vacuum the car out, wash the windows, check the tires. That's one person's job. That's called courtesies, and then there is the pit. You're down -- you're supposed to be down in there the whole day. You don't have to come upstairs. You're just down in the pit, changing filters, draining oil, draining transmission fluid or whatever has to be done underneath the car. And then there is hoods, where you're under the hood, you're checking all the fluids under the hood, and filling the oil, filling the transmission fluid, the coolant, topping everything off, opening the hood, closing the hood and getting them in and out of the door, guiding people in.

Q It sounds like there is basically three different jobs, the courtesies, the pits and the hoods?
A Um-hum.
Q Yes?
A Yes.
Q We'll remind you if you forget.
A I'm sorry.
Q Don't worry about it. So the first day you come in, I assume you start with courtesies?
A Um-hum.
Q Yes?
A Yes.
Q That's the simplest of the three jobs?
A Yes.
Q And did he show you what to do or did he just say go vacuum cars and wash the windows?
A No, he did not tell me what to do, because I was doing too good of a job, and he's like, no, you don't spend all day doing this. Just get it done. Don't get it perfect.
Q So when you started doing courtesies you were very conscientious about doing a very good job?
A Um-hum.
MR. STEWART: Is that a yes?
THE WITNESS: Yes

Page 18

car from me, on the passenger side.
Q Was the passenger door open?
A No, both doors were closed.
Q So he didn't have the door open and was vacuuming inside or anything like that?
A No, I'm sure he didn't even get to that point.
Q Do you know exactly -- was he just standing next to the car, or was he wiping the windows down or do you remember what he was doing?
A I don't remember. He was on that side of the car. He was helping Karl.
Q That was a -- what kind of a car was it?
A It was a Jeep Wrangler.
Q And on the passenger side was the window open?
A Yeah, I'm assuming. The windows don't roll down. They're flaps, they're zip down, but yeah, I remember it was open.
Q Did you have to open the door to start the car or did you reach through the window?
A Reached through the window.
Q Had you ever -- so after you let this other vehicle out, you walked over by the Jeep where Karl was working asked if there was anything else you could do?
A Um-hum.

Page 19

Q Yes?
A Yes.
Q And he said could you start the car?
A Yes.
Q And what would be the purpose of starting the car while somebody is working on the hoods?
A You have to start it to -- the coolant machine, it pumps out the old coolant and replaces it with clean coolant, so the engine has to be running.
Q And what happened; you said you reached inside, reached through the window to start the car?
A Yeah, yes.
Q And then what happened?
A I reached through the window to start the car, and the keys weren't in the ignition, there was no keys. I told Karl, I said where is the customer, and the customer was standing on the opposite side of the car, on the passenger side, and he tossed the keys to me over the hood, so I put the key in the ignition, turned the key, it started, and then it -- there was like a second pause, like it lasted a second, and then it started rolling.
Q Let's back up. The customer tossed you the keys, tossed them over the Jeep?
A Um-hum.

Page 2

Q Yes?
A Yes.
Q And then again you reached in or opened up the door at that time?
A No, I reached in through the window. The door is only about this high on a Wrangler.
Q And then you started the car, correct, by turning the key?
A Yeah, yes.
Q And then did it lurch forward, did it roll forward; explain what the car did.
A It rolled. It just started rolling, not very fast, it picked up a little speed, but it was only like from the front bumper to the door is maybe six feet.
Q So when you started the car, you knew Karl was in front of it?
A Yes.
Q And Karl was in front of it, at least as far you know, he knew you were starting it?
A Yes, he did know.
Q Then when the car started forward, can you tell me what happened with Karl?
A I don't know. I couldn't see him. The Jeep went -- it hit the door and went maybe a

Page 21

foot through. I turned it off as fast as I could, but I don't know how to drive a stick, so I couldn't get it out of gear. I'm like -- well, I'm pulling on the Jeep to pull it off of him, so the owner came around and he's the one that took it out of gear, and we all pulled it off of him.
Q So the Jeep went forward and hit Karl?
A Um-hum.
Q Yes?
A Yes.
Q And pinned Karl against --
A And went through the door maybe two feet with Karl in between.
Q What kind of door, is it like an aluminum door?
A An overhead aluminum.
Q And is this something where you pull in from one side and drive out the other?
A Yes.
Q Now, you said you've never driven a stick before?
A No.
Q In any of the cars that had come in, did you ever have to start a stick shift before?
A Yes, sometimes.
Q Did you get in the car to do it?
A Yes, you have to

mini lube, working with his co-worker when the car engaged.

This is an everyday type of occurrence. That act, I believe, was meant to have the Worker's Compensation be the exclusive remedy, and therefore, this case is barred here today.

THE COURT: All right. I've heard arguments from the parties, and, Mr. Becker, although I have to say, I find your position an interesting one, and I understand why you're arguing it the way you are, but in order to get to that exception under the Worker's Comp Act, you have to take a very broad and general definition of operation. And generally, under the Rules of the Road, you're correct; that merely reaching in and manipulating the controls of the vehicle is, in essence, operating the vehicle. However, this Court has to take a very narrow approach under the Worker's Compensation Statute, in that the exceptions to this whole employee immunity law are to be narrowly construed. And under the Hake case where they went into a discussion with respect to trying to explain what operation is, they ruled that it was ambiguous. And although the facts of the Hake case, you are correct, is one in which we have

closing a door, in this situation, this employee is directed to, in essence, start the vehicle, and at that direction, he reaches in and turns the ignition on, and that's when the vehicle lurches forward. It's clearly an accident that occurred at the workplace. Both employees were engaged in work-related activity.

And given those facts in this case, the Court is going to grant the defendant's motion for summary judgment because the scope of operation as that term is used under 102.03(2) is to be narrowly construed, and Court finds in this case that he was not in fact operating the vehicle for purposes of an exception to the Worker's Comp Act. Court is going to grant the motion for summary judgment in favor of the defendant.

MR. STEWART: Thank you, Judge

THE COURT: Mr. Stewart, would you draft an order?

MR. STEWART: Yes, I will.

THE COURT: All right.

(End of proceedings.)

COURT OF APPEALS OF WISCONSIN
DISTRICT I

KARL McNEIL,

Plaintiff-Appellant,

-vs- Case No. 2005AP423

BRANDON HANSEN and
MARYLAND CASUALTY COMPANY,

Defendants-Respondents.

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS

**APPEAL OF A JUDGMENT DATED 2/23/05,
CIRCUIT COURT OF MILWAUKEE COUNTY,
JUDGE MARTIN J. DONALD**

Edward W. Stewart
State Bar No. 1019253
Danielle R. McCollister
State Bar No. 1045749
LOWE & ASSOCIATES
Attorneys for Defendants-Respondents
20935 Swenson Drive
Suite 310
Waukesha, WI 53186
(262) 798-8253

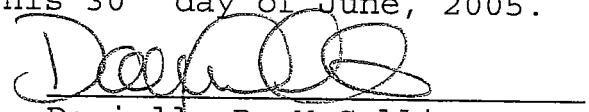
TABLE OF CONTENTS

LIST OF AUTHORITIES CITED

CERTIFICATION

I certify that this brief meets the requirements of Wis. Stat. § 809.19(8)(b) and (c) in that it is monospaced font (Courier New, font size 13), 10 characters per inch, double-spaced with a 1.5 inch margin on the left and 1 inch margins on all other sides. The portions of this brief referred to in § 809.19(1)(d), (e) and (f) are 18 pages long. I also certify that the Supplemental Appendix meets the requirements of Wis. Stats. §809.19(2).

Dated this 30th day of June, 2005.



Danielle R. McCollister
State Bar No. 1045749

ISSUE

DOES THE ACT OF TURNING THE KEY IN THE IGNITION OF AN AUTOMOBILE WHILE STANDING OUTSIDE OF THE AUTOMOBILE CONSTITUTE "THE OPERATION OF A MOTOR VEHICLE" UNDER THE WISCONSIN WORKER'S COMPENSATION STATUTE § 102.03(2)?

The trial court held that it does not.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Brandon Hansen ("Hansen") and Maryland Casualty Company do not believe oral argument is necessary. Hansen and Maryland Casualty Company do request that this opinion be published because there are no other published decisions factually on point.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case arises out of an incident involving coworkers servicing a vehicle at Fast Track Oil Change on April 12, 2003, which resulted in personal injuries to Karl McNeil ("McNeil"). Hansen was not operating a motor vehicle within the context of section 102.03(2) and all claims are barred by the exclusive remedy provision of the Worker's Compensation Act.

PROCEDURAL STATUS AND DISPOSITION IN THE TRIAL COURT

The Honorable M. Joseph Donald granted Hansen's motion for summary judgment and dismissed all of the

claims against Hansen and Maryland Casualty Company pursuant to the exclusivity provision of the Worker's Compensation Act. Judge Donald ruled that this case does not fit within the narrow exception to the Worker's Compensation exclusivity provision, Wis. Stat. § 102.03(2) which allows an injured employee to sue a co-employee "for negligent operation of a motor vehicle not owned or leased by the employer. . ." McNeil appeals Judge Donald's ruling on this issue.

FACTS

This case involves an incident that occurred at Fast Track Oil Change on April 12, 2003. (R. 12, ¶ 2; Supp. App. McNeil Depo. p. 8-9.) At that time, McNeil was the manager of Fast Track Oil Change and Hansen was a relatively new hire and a co-employee of McNeil. (Id.; Supp. App. Hansen Depo. p. 4.) While in the scope of employment and while on the employer's premises, McNeil was performing a radiator flush on a Jeep Wrangler in a service bay at Fast Track. (Id.; Supp. App. McNeil Depo. pp. 25-26.) In order to perform the radiator flush, McNeil hooked the Jeep Wrangler up to a machine that flushes the radiator.

(Id.) The Jeep Wrangler's engine had to be turned on before the machine could flush the radiator. (Id.; McNeil Depo. p. 34.) McNeil thus asked Hansen, who had just come up from the pit, to activate the Jeep Wrangler's engine. (Id.; McNeil Depo. pp. 33-34.) Because McNeil had to determine whether the hoses that were being used to flush the radiator were leaking, he remained in front of the Jeep Wrangler while Hansen reached through the Jeep's window and turned the key to the ignition. (Id.; McNeil Depo. pp. 40-41.) The Jeep Wrangler unexpectedly lurched forward and struck McNeil. (Id.; McNeil Depo. p. 33.)

Several facts relevant to this case are undisputed:

(1) Hansen and McNeil were co-employees and subject to the provisions of the Worker's Compensation Act. (Id.; McNeil Depo. pp.9, 13-14.)

(2) McNeil ordered Hansen to activate the Jeep Wrangler's engine in order to perform the radiator flush. (Id.; McNeil Depo. pp. 33-34.)

(3) Hansen did not, at any time, enter the vehicle. Hansen remained standing outside of the Jeep

Wrangler and reached into it through its window to turn the ignition on. (Id.; Hansen Depo. pp. 18-19.)

(4) The Jeep Wrangler was hooked up to a radiator flush machine when the engine was turned on. (Id.; McNeil Depo. pp. 25-26.)

(5) Hansen did not, nor never intended, to drive the vehicle, steer it, move it, accelerate it, brake it or do anything other than turn on the engine, as his boss requested, to perform the radiator flush. (Id.; McNeil Depo. pp. 34-35.)

(6) As the Jeep moved forward nobody was inside the Jeep. (Id.; Hansen Depo. pp. 18-19.)

(7) Hansen did not have any automobile liability insurance and his defense is being provided via a rider on his former employers' workers compensation insurance through Maryland Casualty. (R. 13, ¶ 1.)

INTRODUCTION

This is a workers' compensation case, it is not a drunk driving case. Hansen's conduct did not

constitute, "operation of a motor vehicle", within the context of section 102.03.

The Appellant's position in this case is inherently flawed and without a legal basis because he argues that the drunk driving laws should apply. The Appellant fails to address and completely ignores the law as it pertains to section 102.03(2) which requires this Court to narrowly construe the meaning of the phrase, "operation of a motor vehicle".

This case must therefore be dismissed.

ARGUMENT

HANSEN'S ACT OF TURNING THE KEY TO THE IGNITION OF THE JEEP WRANGLER DOES NOT CONSTITUTE "OPERATION OF A MOTOR VEHICLE" UNDER THE NARROW EXCEPTION OF THE WORKER'S COMPENSATION ACT.

I. The Worker's Compensation Act's exclusions are to be narrowly construed or the purpose of the Worker's Compensation Act will be destroyed.

In 1977, the legislature amended the Worker's Compensation Act to prohibit employees injured on the job from suing negligent co-employees. Hake v. Zimmerlee, 178 Wis. 2d 417, 422, 504 N.W.2d 411 (Ct. App. 1993). An explanation of the Worker's Compensation advisory bill included the following statement:

"The Advisory Council recommends amendment to

> Wisconsin Statute 102.03(2) to prohibit most suits by employee against a co-employee. It would permit a suit where there was an assault by the co-employee or where there was negligent operation of a motor vehicle not owned or leased by the employer. It is a fact that all insurance policies issued to employers for public liability or for fleet coverage on employer owned or leased vehicles exclude payment of damages where the claim of an employee is against a co-employee. The result is that the employee who is being sued is left without protection and the little person is the one who gets hurt. The attention of the Advisory Council has been called to cases where . . . [the co-employee] who was sued was placed in a financial position[,] because of the cost of defending or because of the judgment for damages that was recovered[,] that the employee would not be able to recover from financially for many years or for the balance of his life."

The Hake court also stated that:

> It is apparent that the main concern of the Advisory Council was the financial burden that co-employee suits imposed upon workers. Thus the Council advised the legislature to recreate the statute so that coemployee immunity would be the rule, and coemployee liability would be the exception to that rule. In examining the purpose behind co-employee immunity this court has explained: "Injuries caused by a negligent coemployee are everyday occurrences. Such injuries are directly related to the employment, and pursuant to the stated purpose or objective of the Worker's Compensation Act, the costs should be passed on to the consuming public. ***Because of the strong policy concerns that underlie the rule of co-employee immunity, we construe exceptions to that statutory rule narrowly.*** ("When a statute is ambiguous, the legislature

> is presumed to have intended an interpretation that advances the purposes of the statute.") (Citations omitted.)

Id. At 422-424. (Emphasis Added.)

This Court must narrowly construe the term "operation" as used in Wis. Stat. 102.03(2) to avoid making a decision that could effectively negate the worker's compensation exclusivity provision for other employees and for Hansen.

II. Brandon Hansen's Act of Turning the Key in the Ignition Pursuant to His Manager's Orders Does Not Constitute "Operation of a Motor Vehicle" Under the Narrowly Construed Worker's Compensation Exclusivity Exclusion.

Wis. Stats. Sec. 102.03(2) provides in part as follows:

> The right to recovery of compensation under this statute 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 co-employee for an assault intended to cause bodily harm or against the co-employee for negligent operation of a motor vehicle not owned or leased by the employer . . .

In this case, Hansen was not operating a motor vehicle. He was merely turning a motor vehicle on as he was standing outside of it. He had no intentions of

driving it, he had no intentions of steering it, he had no intentions of braking it and he had no intention of accelerating it. In fact, the vehicle was attached to a radiator flush machine and could not be driven at the time the incident occurred. Hansen had to turn the motor vehicle on to flush the radiator as part of his job pursuant to his boss' request.

Hake v. Zimmerlee, 178 Wis. 2d at 421, is the only published case that has specifically discussed the term "operation" as used in Wis. Stat. § 102.03(2). In Hake, an employee, Zimmerlee, closed a vehicle door on the hand of a co-employee, Hake, while Hake was entering the vehicle to go to a work-related luncheon. The Court held that closing the door on a co-employee's hand did not constitute "operation" of a motor vehicle. Id. at 426. The Court determined that the term "operation" as used in Wis. Stat. Sec. 102.03(2) is ambiguous:

> The word "operation" has different meanings depending on the context in which it is used. The meaning of the phrase "operation of a motor vehicle" as used in Sec. 102.03(2) Stats., however, cannot be readily discerned by its context. Even in that context the phrase is ambiguous, i.e., subject to "more than one reasonable although not necessarily

> correct," interpretation. To find the meaning of a phrase or word that is ambiguous, we must determine the intent of the legislature through an examination of the statutes, "scope, history, context, subject matter and object to be accomplished."

Id. at 421. According to Hake, the intent of the legislature was to protect coemployees from lawsuits in most instances because work-related injuries resulting from a co-employee's negligence occur all of the time and the co-employee, unlike the employer, is not insured. Id. at 421-423. As such, the legislature wanted to keep co-employees from sustaining the financial burden associated with lawsuits and judgments:

> "The legislative history does not expressly provide a reason for allowing suits for negligent operation of a motor vehicle and it does not explain why the vehicle in question cannot be owned or leased by the employer; ***presumably, the legislature believed that were the vehicle not owned or leased by the employer, the vehicle would be privately insured and have coverage for the claim.***" (Emphasis added.)

Id. at 424. Hansen does not have private insurance. Ironically, his employer's workers' compensation carrier is providing him with a defense.

You will note that McNeil does not address nor cite in his brief any cases which discuss the specific statutory provision at issue in this case. Instead, McNeil relies on two cases that deal with drunk drivers. This case is not a drunk driving case, but McNeil wants this Court to make a ruling of law as if it were a drunk driving case. McNeil completely ignores the relevant case law, the legislative history of section 102.03(2) and the fact that this Court must narrowly construe the meaning of the phrase, "operation of a motor vehicle," to promote the legislature's intent of providing a co-employee like Hansen immunity from a lawsuit.

The Modory case relied upon by McNeil interpreted the meaning of the phrase, "operation of a motor vehicle", within the meaning of Wis. Stat. § 346.63, the drunk driving statute. State v. Modory, 204 Wis.2d 538, 555 N.W.2d 399 (Ct. App. 1996). Wis. Stat. § 346.63 is not an exception to a statutory provision that ***restricts*** a particular policy like the statute at issue in this case. Rather, section 346.63 provides broad coverage for purposes of Wisconsin's policy of

deterring intoxicated individuals from getting behind the wheel of a vehicle "in the first place rather than to have a court or jury make a fine distinction later whether the person was in a position to cause harm." State v. Modory, 204 Wis.2d 538, 544-545, 555 N.W.2d 399, (Ct. App. 1996).

Applying drunk driving laws to the Worker's Compensation Act does not advance the purpose of the exclusive remedy provision and is an inappropriate method of statutory construction. A primary and basic rule of statutory construction is that a phrase must be defined within the context of the statute in which it is used. Pulsfus Farms v. Town of Leeds, 149 Wis. 2d 797, 804, 440 N.W.2d 329 (1989). McNeil does not discuss the context and distinguishing characteristics of the two statutes. The purposes and policies behind the drunk driving laws are not consistent with the purposes of the Worker's Compensation Act. The drunk driving laws require a broad construction and the Worker's Compensation Act requires a narrow construction in order to advance the purposes of their respective laws.

Wisconsin's drunk driving statutes do not encompass the strong public policy concerns that underlie the rule of co-employee immunity, which is to allocate the costs of work injuries to the public and to avoid putting a financial burden on a coworker such as Hansen that lawsuits of this kind impose on co-employees. Hake, 178 Wis.2d at 423-424. A primary purpose of Sec. 102.03 was to create a rule of co-employee immunity. Id. Co-employee liability is an exception to the rule because, "injuries caused by a negligent co-employee are everyday occurrences" and "such injuries are directly related to the employment and pursuant to the stated purpose or objective of the Worker's Compensation Act the cost should be passed on to the consuming public." Hake, 178 Wis.2d at 422.

The purpose of Wisconsin's drunk driving statute is to promote safe highways and the compelling public interest includes requiring the diligent pursuit and punishment of drunk drivers. Bammert v. Don's Super Value, 254 Wis. 2d 347, 646 N.W.2d 365 (2002). With good reason, there is a strong public policy of safety behind the drunk driving statutes to ensure there is a very broad definition of the phrase, "operation of a motor vehicle".

In fact, to promote the purposes of Wisconsin's drunk driving statute Courts are provided with the benefit of having the term "operate" statutorily defined under section 346.63. Wis. Stat. § 346.63(3)(b). The word "operation" is not, however, defined under section 102.03. Yet, rather than borrow the definition of "operate" from the drunk driving or road rules statutes, the Hake court held that the term "operation" is ***ambiguous*** under section 102.03(2) and, therefore, that the meaning of the term must advance the intent and purpose of the Worker's Compensation legislation. Hake 178 Wis.2d at 421 and 425-426.

The Hake Court also considered and rejected looking at insurance policy cases for a definition of the term "operate." The Court decided that it would be inappropriate to rely on those cases because the rule in insurance coverage disputes is to construe ambiguities broadly and in favor of coverage whereas in the context of sec. 102.03(2) cases, the term "operation" has to be construed narrowly and within the intent of the Worker's Compensation exclusivity provision. Hake 178 Wis.2d at 424-425. By the same

reasoning, it is inappropriate for McNeil to rely on cases interpreting Wis. Stat. § 346.63 in this case.

It is also a fundamental rule of statutory construction that "[l]aws must be interpreted, considering the legal and practical consequences, to avoid unreasonable and absurd results." Strenke v. Hogner, 2005 WI 25, P48 (2005) citing State v. Jennings, 2003 WI 10, P11 (2003). It would be an absurd and unreasonable result to find that Hansen was operating a motor vehicle within the context of the Worker's Compensation Act. In the case at hand, Hansen does not have private insurance coverage as the vehicle belonged to his employer's customer. Hansen never entered the vehicle. He had no intention of driving, steering, braking, changing its speed or direction, or in any way moving the vehicle. He was merely following his boss's instruction to turn the Jeep on while it was being serviced. If one were to accept McNeil's argument, all auto shop employees and other automobile service employees would be subject to liability never intended by the legislature when it enacted 102.03(2) and this would be an unreasonable and absurd result.

The narrow construction of the Worker's Compensation exclusivity provision was applied in Ross v. Foote, 154 Wis. 2d 856, 862 (Wis. Ct. App., 1990). The Ross case involved a motor vehicle accident that occurred in Italy. Several co-employees were in Italy for a work-related conference. Id at 858. When their flight was cancelled, the co-employees decided to rent a vehicle to travel to the closest airport with a flight available. Id. The driver/employee, Foote, leased a vehicle in his own name with the intention of being reimbursed for the expense by his employer at a later time. Id. at 858-859. The co-employees were involved in a car accident. Id. at 858. Co-employee, Ross, was injured in the accident and sued Foote. Id. at 859. Ross claimed that the exception to the Worker's Compensation exclusivity provision regarding the "negligent operation of a motor vehicle not owned or leased by the employer. . . ." applied to the facts of his case because the vehicle at issue had not been "leased by the employer." Id. at 857 and 860-861. The Court disagreed with Ross's interpretation. The fact that Foote had leased the vehicle for employment

purposes was enough to grant Foote protection under the Worker's Compensation exclusivity rule. Id. at pp. 862-864. The Court thus upheld the trial court's dismissal of the case.

The Ross Court also made the following statements and admonishments concerning the Worker's Compensation exclusivity exception:

> The Worker's Compensation Act is the product of competing interests and represents a political compromise. This legislation represents a "delicate balancing" of the interests represented in our industrial society. The exclusivity provisions are an integral part of the political compromise reached. Our supreme court has said that if an injury falls within the coverage of the act, the worker's compensation remedy is exclusive.
>
> This same logic applies to claims against co-employees. "Although an injured employee gives up the right to sue a negligent coemployee, if the injured employee were placed in the same position as the negligent coemployee, he, too, would receive the benefit of being immune from suit." We properly bear in mind the admonition of our supreme court in Jenkins v. Sabourin, 104 Wis. 2d 309, 323, 311 N.W.2d 600, 607 (1981):
>
> > ***New liabilities on employers or employees should not be imposed by courts without compelling and well understood reasons. While a tort remedy could be beneficent [sic] and just in a particular case, such precedent, unless carefully considered from the viewpoint***

> ***of general state policy, could well gut the Workers Compensation Act, create injustice, and substantially impair the exclusivity-of-remedy provision, which has made the Workers Compensation Act tolerable to employers.*** (Citations omitted.) (Emphasis added.)

Ross 154 Wis.2d at 861-862.

CONCLUSION

A narrow construction that comports with the policies of the Worker's Compensation Act in the case at hand requires this Court to rule as a matter of law that Mr. Hansen was not operating a motor vehicle within the context of the worker's compensation statute.

Respectfully submitted this 30th day of June, 2005.

LOWE & ASSOCIATES
Attorneys for Defendants-Respondents

By: _____
Edward W. Stewart
State Bar No. 1019253
Danielle R. McCollister
State Bar No. 1045749

POST OFFICE ADDRESS

20935 Swenson Drive, Suite 310
Waukesha, WI 53186
(262) 798-8888

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS
OF SUPPLEMENTAL APPENDIX

BRANDON HANSEN'S DEPOSITION TRANSCRIPT PAGES 4, 18 AND 19

APPEARANCES

BECKER, FRENCH & DeMATTHEWS, S.C., by
MR. JOHN A. BECKER,
822 Wisconsin Avenue,
Racine, Wisconsin 53403,
appeared on behalf of the Plaintiff.

LOWE & ASSOCIATES, by
MR. EDWARD W. STEWART,
20935 Swenson Drive, Suite 310,
Waukesha, Wisconsin 53186,
appeared on behalf of the Defendants.

* * * * *

INDEX

Exhibits: (None) Marked ID

TRANSCRIPT OF PROCEEDINGS

BRANDON HANSEN, called as a witness herein, having been first duly sworn on oath, was examined and testified as follows:

EXAMINATION

BY MR. BECKER:

Q Please state your name for the record, please.
A Brandon Scott Hansen, H-A-N-S-E-N.
Q Your address?
A 2621 South 86th Street.
Q Are you working now?
A Yeah.
Q Where do you work now?
A Squared Away Builders.
Q And what do you do there?
A Carpentry.
Q Now, you know we're here because of an accident which occurred back in April of last year, right?
A Um-hum.
Q You have to answer out loud.
A Yes.
Q And if you don't understand any of my questions, let me know. I want to make sure we have an accurate record here. All right?
A Okay.

Q You were working for who at the time?
A For Fast Track.
Q How long had you worked there?
A I worked there four months.
Q What was your job there?
A Lube tech, I guess was the title.
Q What were your duties?
A Most often I was in the pit, which is underneath the car, doing the -- changing the oil, filter. Other duties were vacuuming, cleaning the windows, checking tire pressure. Then we did coolant flushes and transmission flushes, sold wipers, accessories.
Q So you started there what, about the first of the year, approximately?
A No, it was I'd say about the 20th of February. It was like a week after my birthday.
Q So you had been there about two months when this happened?
A About, yeah, two, three months.
Q Well, if it happened in April and you started in February, it would be about two months?
A Yeah.
Q Prior to that time, had you ever worked at any type of -- had you had any type of employment which

involved working on cars?
A No.
Q What's your date of birth?
A 2/9/82.
Q And you started February 20th of '03, correct?
A Somewhere around there.
Q Who hired you, do you know, I mean what individual did you talk to?
A Karl McNeil.
Q And how did that go? Did you come in and fill out an application, did you have to go in for an interview, did he call you on the phone and say come in?
A I went down there -- I found out about the job from a friend, and I went down there and -- well, I was -- my friend knows Dan Beth, the district manager, and Dan referred me to Karl, so Karl called me in for an interview. I filled out an application, he gave me an interview and he hired me then.
Q First of all, who is your friend?
A John Ranthum.
Q R-A-M --
A R-A-N-T-H-U-M.
Q And he said, geez, I know a guy, Dan Beth who works

Page 18

car from me, on the passenger side.
Q Was the passenger door open?
A No, both doors were closed.
Q So he didn't have the door open and was vacuuming inside or anything like that?
A No, I'm sure he didn't even get to that point.
Q Do you know exactly -- was he just standing next to the car, or was he wiping the windows down or do you remember what he was doing?
A I don't remember. He was on that side of the car. He was helping Karl.
Q That was a -- what kind of a car was it?
A It was a Jeep Wrangler.
Q And on the passenger side was the window open?
A Yeah, I'm assuming. The windows don't roll down. They're flaps, they're zip down, but yeah, I remember it was open.
Q Did you have to open the door to start the car or did you reach through the window?
A Reached through the window.
Q Had you ever -- so after you let this other vehicle out, you walked over by the Jeep where Karl was working asked if there was anything else you could do?
A Um-hum.

Page 19

Q Yes?
A Yes.
Q And he said could you start the car?
A Yes.
Q And what would be the purpose of starting the car while somebody is working on the hoods?
A You have to start it to -- the coolant machine, it pumps out the old coolant and replaces it with clean coolant, so the engine has to be running.
Q And what happened; you said you reached inside, reached through the window to start the car?
A Yeah, yes.
Q And then what happened?
A I reached through the window to start the car, and the keys weren't in the ignition, there was no keys. I told Karl, I said where is the customer, and the customer was standing on the opposite side of the car, on the passenger side, and he tossed the keys to me over the hood, so I put the key in the ignition, turned the key, it started, and then it -- there was like a second pause, like it lasted a second, and then it started rolling.
Q Let's back up. The customer tossed you the keys, tossed them over the Jeep?

Page 20

Q Yes?
A Yes.
Q And then again you reached in or opened up the door at that time?
A No, I reached in through the window. The door is only about this high on a Wrangler.
Q And then you started the car, correct, by turning the key?
A Yeah, yes.
Q And then did it lurch forward, did it roll forward; explain what the car did.
A It rolled. It just started rolling, not very fast, it picked up a little speed, but it was only like from the front bumper to the door is maybe six feet.
Q So when you started the car, you knew Karl was in front of it?
A Yes.
Q And Karl was in front of it, at least as far you know, he knew you were starting it?
A Yes, he did know.
Q Then when the car started forward, can you tell me what happened with Karl?
A I don't know. I couldn't see him. The Jeep went -- it hit the door and went maybe a

Page 21

foot through. I turned it off as fast as I could, but I don't know how to drive a stick, so I couldn't get it out of gear. I'm like -- well, I'm pulling on the Jeep to pull it off of him, so the owner came around and he's the one that took it out of gear, and we all pulled it off of him.
Q So the Jeep went forward and hit Karl?
A Um-hum.
Q Yes?
A Yes.
Q And pinned Karl against --
A And went through the door maybe two feet with Karl in between.
Q What kind of door, is it like an aluminum door?
A An overhead aluminum.
Q And is this something where you pull in from one side and drive out the other?
A Yes.
Q Now, you said you've never driven a stick before?
A No.
Q In any of the cars that had come in, did you ever have to start a stick shift before?
A Yes, sometimes.
Q Did you get in the car to do it?

KARL McNEIL'S
DEPOSITION TRANSCRIPT
PAGES 8-9, 13-14, 25-26, 33-35 AND 40-41

restrictions is my understanding when you left Fast Track?
A. Yes.
Q. And you do not have any restrictions of any kind today, do you?
A. No.
Q. What does your job entail? Do you have to -- why don't you describe your typical day's work and what you have to do today.
A. Marketing.
Q. Okay. Well --
A. Marketing a lot of -- basically educating people how to utilize their equipment.
Q. What type of equipment do you sell?
A. Motorized wheelchairs, Motorized scooters, diabetic supplies, all that type of stuff, home medical equipment.
Q. Do you ever have to deliver it?
A. Not really, you know, maybe. I may have to deliver a nebulizer or something like that. That is the most I've ever delivered.
Q. Do you have a company vehicle?
A. No.
Q. How do you get to and from your appointments?
A. Drive.

Q. Your own car?
A. Yes.
Q. Okay. Taking a look at your responses to written discovery, it appears I asked you a question in interrogatory number 11. Please identify all of your employers over the past ten years setting forth the name, address, nature of business, position held and dates of employment; and the response you provided was Lubricant Specialists, LLC, 4296 South 27th Street in Milwaukee.
A. Um-hm.
Q. Was that Fast Track?
A. Yes.
Q. Okay. And the date of these discovery responses was May 6th, 2004.
A. Um-hm.
Q. So that information on that discovery response was not up to date?
A. What do you mean by that?
Q. Well, that was your last employer. It was not your current employer, correct?
A. Yeah, before I got hired on with Branc Mobility.
Q. And on May 6th, 2004 you were working for Branc Mobility, right?
A. Yes.

Q. Who is your boss at Branc?
A. Dwight McTilic.
Q. How do you spell his name?
A. D-W-I-G-H-T M-C-T-I-L-I-C.
Q. Have you known him for awhile, or did you just meet him?
A. Known him for awhile.
Q. Before you started working there?
A. Yes.
Q. Are you making a claim for future loss of earning capacity or not?
MR. BECKER: No.
MR. STEWART: We can stipulate on the record?
MR. BECKER: At least not on this point. We have no basis to claim it at this point.
MR. STEWART: All right.
Q. Where did you work before -- let me ask you this, at Fast Track who was your boss?
A. Dan Beth.
Q. What was your job title at Fast Track?
A. Which time?
Q. How about when you left?
A. Lube tech.
Q. Lube tech?

A. Yes.
Q. What other job titles did you hold there?
A. Manager.
Q. Do you recall the date of the incident that is at issue in this lawsuit?
A. April 12th, 2003.
Q. And on that date were you a lube tech or were you a manager?
A. Manager.
Q. Were you demoted?
A. I took a demotion, yes.
Q. Who demoted you, and why did you take a demotion?
A. Because of my condition.
Q. Explain.
A. Dan Beth demoted me actually.
Q. Okay, Dan Beth did?
A. Yes.
Q. Was there a reason for it?
A. Because I could not handle the store anymore.
Q. Why is that?
A. Because of my accident.
Q. How did that affect your ability to manage the store?
A. Because I was not there as frequent as I should be being a manager.

Q. Was that the only reason?
A. Yes.
Q. There was no other reasons that you can think of why you were demoted from manager to lube tech?
A. No.
Q. Okay. When did you start working for we'll call it Fast Track?
A. I started actually working at Fast Track when I was working for Jiffy Lube. It was -- it had to be June or July of '02. I'm not sure. I don't remember the accurate date.
Q. Were you working there about a year or maybe ten months to a year then like when the incident at issue occurred?
A. Yes.
Q. And when you were initially hired, were you hired as a manager?
A. No.
Q. At what point did you become a manager?
A. I believe the first part of 2000 -- the end of 2002, the first part of 2003.
Q. December of 2002 and/or January of 2003 you became manager?
A. Yes.
Q. Would it be fair to say by the end of January of

2003 you're most certain you were a manager at that point?
A. Yes.
Q. How did your job duties change as manager from just being a lube tech and I'm -- before I ask you that, were you a lube tech when you were hired?
A. Yes.
Q. Then when you became manager, how did your job duties change?
A. I now held responsibility for making a schedule, making sure the store ran properly, ordering supplies.
Q. Anything else?
A. Going to the bank, to and from the bank, taking inventory, going to managers' meetings.
Q. Where would the managers' meetings be held?
A. Hales Corners.
Q. Is that a store?
A. Yes.
Q. Where was your store located that you worked at?
A. 62nd and what is that street? 62nd and -- 6207, I can't even remember the street name.
Q. That is all right.
A. 6207 is the address though.
Q. Which city, which town, Milwaukee?

A. Yes, Milwaukee, 6207.
Q. Did you only work at one store there, or did you work at a variety of different stores when you were working for Fast Track slash Jiffy Lube?
A. As -- are you talking about as a lube tech or a manager?
Q. All right. How about the whole way through. You started working for them in June of 2002 approximately to the best of your recollection; is that right?
A. Yes, yes.
Q. Did you only work at the same store your whole tenure there, or did you change stores?
A. I'm trying to see, did we do any promotions with any other store that I worked at -- that I may have did a promotion? No, I worked at Hales Corners when I first started there.
Q. How long?
A. Up until I became a manager.
Q. Okay. And then when you became a manager, you moved to this other store?
A. North Avenue. That is the store.
Q. 6207 North Avenue?
A. Yes.
Q. All right. And then that was your store that you

were the manager at?
A. Yes.
Q. In addition to ordering supplies and doing inventory and attending managers' meetings and managing the store, did you have to hire employees?
A. Well, we have the general -- the district manager really does approve the hiring and firing.
Q. Who was that, Dan Beth?
A. Yes.
Q. Who was responsible for training employees that worked under you as the manager?
A. Well, we all were responsible for training.
Q. Okay. And as a manager of a store, it would be part of your duties to manage or -- Strike that. As the manager of a store, it would be part of your duties to go ahead and train employees?
A. Yes.
Q. And one of the employees you had the responsibility of training was Brandon Hansen?
A. Yes.
Q. Were you the primary person that was responsible for training Brandon?
A. While under my care.
Q. Okay. My understanding is that Brandon started

working -- do you know when Brandon started working at the store?
A. I don't remember the date.
Q. Do you know how long he had been working there?
A. I don't remember.
Q. My understanding is that he was -- had been working there for a month or two prior to the incident. Does that sound like it might be accurate?
A. It may be.
Q. Okay. And during that time period that he was working there, would it be fair to say that you were the one as the manager of the store that was responsible for training Brandon as to how to perform his job?
A. Yes.
Q. All right. Prior to working for Fast Track or Jiffy Lube we'll call it, where did you work before that?
A. I've worked for Porters of Racine.
Q. Where are they?
A. Actually right over there.
Q. Is that where you worked right before going to Fast Track?
A. No, actually I was incarcerated before I became an

employee of Fast Track.
Q. Okay. Where were you incarcerated?
A. Racine, Wisconsin.
Q. House of corrections or is it --
A. No, actually --
Q. County jail?
A. Well, they sent me to -- I mean, you want to know everywhere I was at when I was incarcerated? The City of Racine took care of all that to kind of generalize it.
Q. You were incarcerated for a period of time?
A. Yes.
Q. The first job you had before you got out of jail --
A. After that.
Q. -- was Fast Track?
A. After I got out.
Q. Okay.
A. I obtained a job at Fast Track.
Q. Okay. How long were you incarcerated?
A. Over two years.
Q. Obviously you were convicted of some crimes?
A. Yes.
Q. Were you convicted of felonies?
A. Yes.

Q. How many felonies have you been convicted of?
A. I'm not sure.
Q. More than three?
A. I'm not sure.
Q. More than one?
A. I've been convicted of a felony.
Q. And you do not know if it is more than five or less than five?
A. No, I don't know.
Q. Okay. Does it all stem from the same incident or the convictions, or are they unrelated?
A. Related.
Q. What were you convicted of?
A. Drugs.
Q. What do you mean?
A. I was convicted of party to delivery of a controlled substance.
Q. What was it?
A. Cocaine.
Q. So all of your convictions, all of your felony convictions you're aware of only pertain to the cocaine drug charge? There might be more than one charge that relates to that? Is that your understanding?
A. Yes.

Q. Are you aware of any other -- go ahead. I thought I might have cut you off.
A. No, go ahead.
Q. Are you aware of any other crimes you've been convicted of?
A. I've been convicted of possession of marijuana, driving without a license.
Q. Anything else?
A. Having sex with a minor.
Q. Anything else?
A. No, not that I know of.
Q. And your incarceration had to do with just the drugs or all of the others you just mentioned?
A. Well, it led up to that, the incarceration.
Q. All right. Before -- what date did you -- the only place you were ever incarcerated was somewhere in Racine County?
A. No.
Q. Okay. Where else were you incarcerated?
A. Meaning while -- you have to allow me -- you have to give me --

MR. BECKER: For the record I guess I'm going to object to any continuing questions along this line. Obviously how many times he's been convicted and discovery you can get what for, but

A. My wrist was injured and my neck and my back.
Q. And I'm kind of repeating myself, but I've read some of your medical records. It is my understanding now you do not have any medical restrictions of any kind on you, true?
A. True.
Q. And it's also my understanding that you have not had any treatment of any kind since November of 2003?
A. As far as?
Q. As far as anything.
A. No, that is not true.
Q. When was the last time you had some treatment?
A. Last month.
Q. With whom?
A. Dr. Mawn.
Q. How do you spell that?
A. M-O-N -- I don't know.
MR. BECKER: M-A-W-N.
A. He was treating me for my neck and back.
Q. Is your neck and back 100 percent now?
A. No, I still have popping in my neck from time to time. I still have a lot of pain in my shoulder.
Q. What about your back?
A. That is part of my back right up in here.

Q. What about your low back, is that fine?
A. It does not hurt as much as my upper.
Q. But you do not have any restrictions that prevent you from working at all?
A. No.
Q. Okay. You saw Dr. Mawn last month. Was he the last person you ever treated with?
A. Yes.
Q. When was the last time you had any treatment prior to that?
A. Probably November like you said with Dr. Anderson.
Q. Okay. Dr. Anderson performed surgery on your wrist?
A. Yes.
Q. Which wrist is it?
A. My right wrist.
Q. Can I see? Do you have a scar?
A. Yes.
Q. Okay. How is your right wrist today?
A. It still is not like it used to be.
Q. What type of limitations, if any, do you have?
A. What do you mean by limitations?
Q. Well, what kind of things do you have problems doing?
A. I have problems doing my regular exercises. I

usually do push-ups and stuff like that. I can't bend my hands all the way back or all the way forward or to each side. I can't have a lot of pressure on it, put it that way.
Q. Are you right handed or left handed?
A. Right handed.
Q. Did you play any sports at Horelick?
A. No.
Q. What type of -- do you still do push-ups?
A. I can't do push-ups.
Q. How many push-ups were you doing before the incident?
A. Probably 700 a day.
Q. How long have you been doing that?
A. A long time.
Q. Since you were a kid?
A. Awhile, at least for the past five years I should say.
Q. Okay. And you do not do any push-ups at all anymore?
A. No, I can't. If I do anything, it would have to be on my -- I can't do them.
Q. I'm sorry, I might have asked you this, are you right handed or left handed?
A. Right handed.

Q. Does it affect your ability to write at all?
A. No, I can still write.
Q. Does it affect your ability to drive a car at all?
A. Yes, in fact, when I'm trying to turn, you know, I can feel it in my wrist.
Q. All right. Why don't you -- do you recall what time of day this accident occurred?
A. I think it was around 3 o'clock. If I'm not mistaken, it was around 3 o'clock. It was close to closing.
Q. What time do you close?
A. It was a Saturday, so we closed at five.
Q. What was the date again? You know it.
A. April 12th.
Q. Okay. And what kind -- were you working on the car when this accident occurred?
A. It was three of us. Actually it was four of us there. I believe it was three of us on the car.
Q. What were you doing?
A. I was doing hoods.
Q. And what does that mean?
A. Making sure the oil had -- the car has oil in it, making sure the fluids are topped off and you talking about -- explain to me what do you mean by hoods so I can know how to answer your question so

Q. You were working on hoods?
A. Yes.
Q. You're not sure who was working down low, right?
A. I'm not sure.
Q. It was either Deon or --
A. If I'm not mistaken, it was Deon.
Q. And the other possibility would have been?
A. I'm almost sure it was Deon because Tyjuan was upstairs.
Q. Okay. How many people were servicing the vehicle then, just two?
A. Three.
Q. Who was the third?
A. Me, Brandon, and it had to be Deon.
Q. Okay.
A. Doing lowers.
Q. What was Brandon doing before the accident?
A. Brandon was doing courtesies.
Q. What is that?
A. Courtesies is starting the vehicle, vacuuming the inside, washing the outside windows, checking the tire pressure.
Q. What does courtesies entail, checking tire pressure, vacuuming?
A. Vacuuming the inside, washing the outside windows,

checking the tire pressure and starting the vehicle.
Q. Now, are you positive he was doing that or would -- how many stalls were there at that place? Was there more than one place for people to work?
A. Actually Deon was doing lowers because Tyjuan was still working on another vehicle because there was two vehicles in there at the time. It was a black Suburban if I'm not mistaken.
Q. So who was working lowers?
A. Deon.
Q. Okay. Who was -- was Brandon working on other vehicles other than the Jeep Wrangler?
A. No, actually the Suburban was finished and I believe was getting billed out at the time, and Tyjuan was taking care of that.
Q. Are you positive about that?
A. I'm almost positive.
Q. So if -- why don't you tell me then how long you were working on the car before the incident occurred.
A. On which car?
Q. The Wrangler?
A. It does not take long to change the oil, so it takes about 10 to 15 minutes to do a car if there

is no other jobs being done to the vehicle. If it is basic oil change, 10 to 15 minutes to do it.
Q. Do you recall what the job was that you were performing on the Jeep Wrangler?
A. Yes, we were doing a radiator flush and an oil change.
Q. Okay. And from the moment that that vehicle was pulled into the garage by the customer, who first started working on the vehicle?
A. There is a procedure when a car is pulled in. Everybody knows their role. Whoever is doing hoods attack the hoods. Whoever is doing the courtesies attack the courtesies, and whoever is doing lower attack lower.
Q. Okay. And there is only four people working there?
A. At the time, yes.
Q. And there is two cars in the stall at the same time?
A. Yes.
Q. So sometimes you have the teams working two cars, or how does that work?
A. Well, we finish one car and then go to the next.
Q. Okay. So how long had you been working on the vehicle up until the time the accident occurred?

A. I don't recall. I don't recall, maybe 10 minutes or so, 15 minutes or so, I'm not sure.
Q. Why don't you tell me in your own words what happened when the incident happened.
A. After hooking up the hoses getting the vehicle to -- prep the vehicle to proceed with the radiator flush, I then asked Brandon while I stood up under the hood to start the vehicle to check and see if the hoses were going correctly. After that I was through a garage door pinned between the Jeep Wrangler and the garage door.
Q. Where was Brandon when you asked him to start the vehicle?
A. Probably to my right.
Q. Do you know that for a fact?
A. Yes.
Q. You were able to see him?
A. Yes, I was able to look out and see if that was Brandon. Brandon started the vehicle.
Q. And were you able to see Brandon the entire time?
A. No, because the hood was up.
Q. Couldn't you see Brandon starting the vehicle even though the hood was up?
A. No, because he was up under the hood checking to see if the hoses was going correctly, making sure

there was no leaks and so forth.
Q. I've been to these oil change places many times, and usually when you start the car, you typically have them turn the car off, too.
A. If there is a problem.
Q. Okay. Well, you're going to keep the car on the whole time?
A. Yes, because when you're doing a radiator flush, the car has to be running for the fluids to drain and re-enter the vehicle.
Q. When you asked Brandon to start the car, there was no intention on your part to have Brandon drive the car?
A. No.
Q. There was no intention of him taking the car onto the road and operating it?
A. He could not possibly do that with the machine hooked up to it.
Q. There was no intention of him even steering the car when you asked him to start it. You just wanted him to start it?
A. Yes. That was part of his job.
Q. Okay. You were not asking him to get in the car and drive it, correct?
A. No.

Q. That is correct?
A. I was not asking him to get in it and drive it, no, he could not go nowhere with the machine hooked up to the vehicle.
Q. Right. And he was not going to even use the brakes. You wanted him to merely start the car?
A. No, the correct way to do the thing is you have to get in the car to start a vehicle. That is policy and procedure.
Q. Okay. All right. We'll get to that in a moment, but my point is, whether he got in the car or not, you did not want him to drive the car, correct?
A. I did not want him to drive the car.
Q. And he was not intending on driving the car as far as you knew?
A. I'm going to say it again, you cannot drive the car while something is hooked up to it unless you want to drag something down the street.
Q. Okay. All right. Now, were you able to understand what happened?
A. Was I able to understand what happened?
Q. Yes.
A. Of course.
Q. What happened?
A. He could not have got -- he could not have

followed the policy and procedures. He must not have followed the policies and procedures because I ended up through a garage door pinned between a Wrangler and a garage.
Q. What are the policies and procedures?
A. Upon starting any vehicle, you have to get in and put your feet on the brakes for emergency -- for like accident purposes, you know, just to make sure everything is safe.
Q. Okay. Now, when you asked him to start the car, did you notice him getting in the car?
A. It's a policy that we go by, so I thought he was following the regular routine.
Q. You did not feel him get into the car?
A. I was actually not paying him no mind because it's like, in order for you to drive your car, in order for you to start your car, you usually get in it, so it's like something that is routinely done.
Q. All right. So is it your testimony that you did not see him start the car from standing outside?
A. I could not see him because I was up under the hood making sure the hoses was not leaking.
Q. And you did not notice him getting in the car because the car would move if someone got in the car, true?

A. It all depends how much he weighed. Some people weigh more, so you would notice if somebody was sitting in there. Some people can tip into a car and you would not know they're there.
Q. All right. Now, whose responsibility was it to teach Brandon what the policies and procedures were?
A. Well, we do it as a shop. Everyone works together.
Q. Okay. But as a manager -- you're the manager at the time, correct?
A. Yes.
Q. And would it be fair to say it was your responsibility to make sure he was properly instructed?
A. Yes.
Q. And did you ever teach him this policy and procedure to get in the car?
A. Yes.
Q. Before the incident?
A. Yes.
Q. Do you know when?
A. I don't know, upon his -- I'm assuming all that is going -- we go over all that when you're hired. You know, we teach you to do -- the do's and the

don'ts.
Q. And you taught him that?
A. We teach you the do's and the don'ts.
MR. BECKER: Let him finish his question. She's got to take it down, okay?
BY MR. STEWART:
Q. All right. You're the one that taught him the do's and the don'ts, right?
A. I can't say I taught him everything.
Q. Well, as manager, who else would teach him?
A. We do it as a team. When you work at an oil change place, it is a team of people.
Q. Is there any policy with respect to standing in front of a vehicle when a car is being started?
A. No, there is no policy because we follow certain rules and guidelines to prevent any accident.
Q. Okay. And my question for you is this, when somebody is told to start a car from somebody from the hood position let's say, is the person in the hood position supposed to remove themselves from the front of the car?
A. No.
Q. So it is your testimony under oath that there is no policy at the Fast Track that you needed to remove yourself from the front of the car when

somebody is starting it?
A. No.
Q. That is not policy?
A. No, not to my knowledge.
Q. Have you ever been in a situation such as Brandon's where you were requested to start a car for somebody?
A. Um-hm.
Q. Is that a yes?
A. Yes.
Q. And had you prior to the incident at issue ever started the car from outside of the car?
A. No.
Q. Never once?
A. No, policy is you must get in. You can get fired for starting a car outside of the vehicle.
Q. Okay. Prior to the incident at issue, had you ever been reprimanded as the manager for failing to follow proper procedure?
A. No.
Q. Never once?
A. No.
Q. Are you 100 percent positive about that?
A. Yes.
Q. Had you ever been warned that you should not be

starting cars from outside of the vehicle?
A. I've been instructed to stress to the other employees that there should not be no starting the cars outside of the vehicle.
Q. If some of the other employees of the shop were to say while you were the manager it was common practice for the employees to start the vehicle from outside, from standing outside of the vehicle, would you agree or disagree with that?
A. Disagree.
Q. Prior to the incident at issue during your time at the Fast Track Jiffy Lube, had you ever seen anybody other than Brandon Hansen start a vehicle from outside of the vehicle?
A. Probably other stores I've seen a lot of stuff when people do not follow policy and procedures.
Q. If you were not in front of the Jeep Wrangler when Brandon started it, do you think you would have been injured?
A. Not if I was not in front of the vehicle.
Q. What was the purpose of Brandon starting the vehicle?
A. So that we can do the radiator flush.
Q. Basically to check to make sure it is working?
A. To make sure -- well, the car has to run before

you can do that.
Q. Okay.
A. But, however, you still must -- you know, you still have to the check the hoses and make sure there is no leaks. I may have to tell him, turn it off, there is leaking.
Q. Have you ever given a statement to anybody regarding this incident?
A. A statement as far as?
Q. A statement, a recorded statement, a written statement?
A. I could not write out the statement to give to my manager because I'm right handed, and my hand was in a cast, so he probably did the statement himself.
Q. Did you give a recorded statement to somebody?
A. Maybe to my attorney, I'm not sure.
Q. You do not recall giving a statement to anybody else?
A. Well, the police, the hospital.
Q. What about anybody from your worker's comp. insurance company?
A. Yes, them, too, yes. Yes, a recorded statement to them as well.
Q. Have you ever had any previous health problems of

COURT OF APPEALS OF WISCONSIN
DISTRICT I

KARL McNEIL,

Plaintiff-Appellant,

-vs-

Case No. 05-0423

BRANDON HANSEN and
MARYLAND CASUALTY COMPANY,

Defendants-Respondents.

REPLY BRIEF OF PLAINTIFF-APPELLANT

**APPEAL OF A JUDGMENT DATED 2/23/05,
CIRCUIT COURT OF MILWAUKEE COUNTY,
JUDGE JOSEPH DONALD, PRESIDING**

John A. Becker
Becker, French & DeMatthew
Attorneys for Plaintiff-Appellant
822 Wisconsin Avenue
Racine, WI 53403
(262) 633-7530
State Bar No. 01009488

TABLE OF CONTENTS

LIST OF AUTHORITIES CITED

STANDARD OF REVIEW

Wis. Stats. s. 102.03 must be narrowly construed to allow a claim against a co-employee.

Prior to the passage of the Worker's Compensation laws, the common law rule was that an employee had the right to sue an employer or co-employee for negligence. After the passage of the Worker's Compensation statutes, an employee still had the right to sue a co-employee for negligence. The rule passed in 1977, which prevents an employee from suing a co-employee except in certain circumstances, is in derogation of common law. "Statutes in derogation of the common law must be strictly construed." Ervin v. City of Kenosha, 159 Wis. 2d 473, 464 NW 2d 654 (1991), quoting LePoidevin v. Wilson, 111 Wis. 2d 116, 129, 330 NW 2d 555 (1983). Therefore, the statute should be strictly construed to allow a claim against a co-employee unless specifically prohibited by the statute.

Further, as will be discussed later, the term "operation" has been strictly construed in the cases that have dealt with the issue.

Regardless of the standard of review that is applied, Hansen's conduct in this case constitutes the operation of a motor vehicle.

A. The statute is not ambiguous in the context of this case.

The Defendants in this case rely heavily upon the case of Hake v. Zimmerlee, 178 Wis.2d 417, 504 N.W.2d 411 (Ct. App. 1993). In Hake, an employee closed a car door on the hand of a co-employee. The Hake court held that the word operation, in the context of that case, was ambiguous and that the closing of the door on the co-employee's hand did not constitute operation of a motor vehicle.

A term can be ambiguous under one set of facts and not ambiguous when applied to a different set of facts. Welin v. Pryzyski, 204 AP. 2386 @ ¶ 12, citing *State Farm Mut. Ins. Co. v. Gillette*, 2001 WI App 123, ¶¶ 20-21, 246 Wis. 2d 561, 630 N.W.2d 527, *aff'd on other grounds*, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662..

The fact that the Hake court held that the term "operation" was ambiguous in the context of closing a door, does not mean that the term is ambiguous in all contexts.

If Hansen had been driving the vehicle into the garage, the Defendants certainly could not argue that the term "operation" is ambiguous and does not include the driving of an automobile. However, the term operation includes more than just driving an automobile. As noted in Modory, "operation of a motor vehicle merely requires the manipulation or activation of the controls of a vehicle 'necessary to put it in motion'. . . . Had the legislature intended to require vehicular movement as an ingredient of operating a vehicle, it would have so stated. . . ." Modory, 204 Wis.2d at p. 544-545.

In Burg, the Supreme Court discussed the term operate for purposes of operating a snowmobile. "'Operate' means 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. Wis. Stats. Sec. 350.01(9)(r). The statute is not ambiguous." Burg, 2002 WI 76 at Para. 19-20. This definition applies to all aspects of operating a snowmobile, and not just as it relates to drunk driving.

The term operate clearly encompasses more than just driving a vehicle. If there is no definition in the worker's compensation statutes, we must look elsewhere in Wisconsin law for a definition. The definition used by both the court in drunk driving cases and the legislature in the snowmobile statutes includes any manipulation necessary to activate the vehicle or put it in motion.

B. The term "operate" has been narrowly construed by the Court.

Hansen claims that the Court must narrowly construe the term operation under Wis. Stats. Sec. 102.03(2) and that under the drunk driving statute the courts had to broadly construe the term "operate." Hansen is wrong. Operating a motor vehicle while intoxicated can be a criminal offense. "It is a well known cannon of construction that a criminal statute must be strictly construed in favor of the accused." State v. Worobel, 24 Wis. 2d 270, 275, 128 NW 2d 629 (1964). Therefore, Court was required to narrowly construe the term operate when applied to drunk driving.

Hansen seems to agree that "operate" includes more than just driving. Curiously, he does not suggest a definition

or how it should be interpreted, he only concludes that it should not include starting the ignition.

Hansen also brings up several factors that are totally irrelevant to this case, including the fact that Hansen did not have insurance and he was merely following his boss' instructions.

Whether he was following his boss' instructions is an issue that goes to contributory negligence, and is not relevant to the legal question of whether or not he was operating a vehicle under the terms of the statute.

Hansen states that he did not have private insurance at the time of the accident. Again, this is not relevant to the interpretation of the statute.

As Hansen pointed out, the legislative history suggests that an exception was made for an employee operating a motor vehicle that is not owned or leased by the employer because it was presumed that the vehicle would be insured and have coverage for the claim. Auto insurance will provide coverage for a particular insured or for the operator of a vehicle. Hansen may be covered under the insurance policy of the owner of the vehicle, Hansen could have had his own

insurance coverage, if he lived at his parents' home he may have been covered under his parents' policy, or, as in this case, coincidentally the employer's insurance also provides coverage. The definition of "operation" is not going to change just because Hansen may not have had his own private insurance in this case.

In all of the cases that have interpreted "operation of a motor vehicle", and in all of the statutes that define "operation of a vehicle (snowmobile)", the definition has been virtually the same, "the manipulation or activation of the controls of a vehicle necessary to put it in motion." The Defendant now suggests that starting a car in a worker's compensation case is not operating a motor vehicle.

From the time this country was established, America has been recognized for valuing individual freedoms. The deprivation of one's individual liberties is not to be taken lightly. Hansen suggests that the Court should interpret the term "operation" even more narrowly in a civil case than in a criminal case when a person's liberty may be at stake.

Regardless of the context, operation of a motor vehicle means operation of a motor vehicle. Defendants want it to

mean one thing for drunk driving, something else for worker's compensation, and arguably it could mean something else in some other context. We have a definition of "operation of a motor vehicle" as established by the courts and the legislature. The term is not ambiguous in this context.

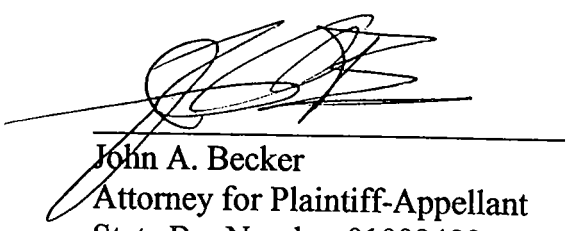
CONCLUSION

The courts and the legislature have defined the term operation of a motor vehicle, and, as used in this context, the term is not ambiguous. Further, the term has been narrowly construed, and that interpretation includes the activation or manipulation of any of the controls necessary to put the vehicle is motion.

Wherefore, Plaintiff requests that the judgment of the Circuit Court be reversed and that the matter be remanded for further proceedings.

Respectfully submitted this 18th day of July, 2005.

Becker, French & DeMatthew



John A. Becker
Attorney for Plaintiff-Appellant
State Bar Number 01009488

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

Desk Top Publishing or Other Means (proportional serif font, min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max. of 60 char. pr line). The text is 13 point type and the length of the brief is 1,223 words.

Dated this 6th day of July, 2005.

John A. Becker
State Bar No. 01009488