COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP423 **Cir. Ct. No. 2015CV73**

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

BETH L. BAKER AND SCOTT BAKER , HUSBAND AND WIFE,

PLAINTIFFS-APPELLANTS,

V.

WILSON AUTO COLLISION, INC., A WISCONSIN CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marinette County: JAMES A. MORRISON, Judge. *Affirmed*.

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

¶1 SEIDL, J. Beth and Scott Baker[1] appeal a summary judgment dismissing their personal injury claims against Wilson Auto Collision, Inc. (Wilson). The Bakers argue Wilson acted negligently and violated WIS. STAT. § 125.07(1)(a) (2013-14)[2] by creating a work environment that permitted drinking by employees, including Jeffrey Steele, an underage employee who, after consuming alcohol at the shop, drove his vehicle and struck a vehicle operated by Beth Baker, causing her severe injuries. Pursuant to the holding in ***Nichols v. Progressive Northern Insurance Co***., 2008 WI 20, 308 Wis. 2d 17, 746 N.W.2d 220, we conclude that public policy considerations preclude the Bakers' common-law claims given the absence of any evidence Wilson actively, directly, and affirmatively provided alcohol to Steele, and that the Bakers' statutory claim fails. We affirm.

BACKGROUND

¶2 The first count of the Bakers' complaint alleged that Wilson was negligent per se for committing one or more violations of WIS. STAT. §§ 125.07(1)(a)1. and 4.[3] Those statutes prohibit adults from procuring,

[1] Throughout this decision we variously refer to Beth Baker as "Beth" and to both Bakers as "the Bakers."

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

[3] WISCONSIN STAT. § 125.07 provides in relevant part:

> (1) ALCOHOL BEVERAGES; RESTRICTIONS RELATING TO UNDERAGE PERSONS.
>
> (a) *Restrictions*. 1. No person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.
>
> ….

(continued)

dispensing, or giving away alcohol beverages to minors, or intentionally encouraging or contributing to others committing those actions. The second count of the complaint alleged common-law negligence based on allegations that Wilson knowingly permitted storage of unsecured alcohol beverages and illegal underage consumption of alcohol on its property. The Bakers alleged Wilson had the duty to take reasonable steps to prevent alcohol beverages that it owned and controlled from being possessed and consumed by underage persons, such as Steele. The Bakers alleged Wilson's statutory violations and common-law negligence led to Steele's intoxication and the resulting accident and injuries to Beth.

¶3 Wilson answered and moved for summary judgment based upon the following undisputed facts. During work hours on December 20, 2013, Steele, a twenty-year-old employee of Wilson, noticed an unopened bottle of an alcohol beverage sitting on the counter top in the kitchen area where the employees take their lunch and other breaks. According to Steele, a green envelope was placed next to the bottle and it possibly had a ribbon affixed to it. Steele assumed the bottle was a gift to Wilson from one of its customers, and that a Wilson employee had placed the bottle on the counter top in the kitchen area.

¶4 After clocking out of work at 3:49 p.m., Steele stayed at the shop to work on his own truck. Sometime between approximately 4:00 and 4:19 p.m., Steele opened the bottle of alcohol beverage and filled an approximately

4. No adult may intentionally encourage or contribute to a violation of [WIS. STAT. § 125.07(4)(a) or (b)].

eight-ounce cup. Steele drank the beverage while working on his truck.[4] Wilson's owner, Kevin Wilson, was not on the premises at the time Steele consumed the alcohol. The only other Wilson employees who may have been present in the shop at the time Steele consumed the alcohol were the wrecker driver, David Steinbeck, and Darrin Mitchem, who may have stayed at the shop for ten to fifteen minutes after clocking out at 3:51 p.m. to drink a single beer prior to going home.

¶5 According to Steele, he "stole" the alcohol, as no one gave him permission to take the alcohol beverage from the bottle. Once Steele finished drinking the beverage and working on his truck, he moved his truck outside and filled the alcohol bottle with water so it would not appear that any alcohol had been taken from the bottle. According to Steele, he left the shop between approximately 4:30 and 5:00 p.m. Although Steele did not bring any alcohol from the shop with him, he indicated that he may have drank some alcohol from a bottle already in his truck while driving home. On his way home, Steele's vehicle struck Beth's vehicle, causing her injuries.

¶6 The Bakers also submitted factual materials, some of which were disputed, that they contend showed a "culture prevalent at Wilson's [that] was one steeped in alcohol." Wilson permitted employees who were of legal drinking age to store alcohol in Wilson's refrigerator and to drink alcohol on the property after work. Kevin Wilson personally joined the employees who were of legal drinking age in consuming alcohol, doing so as frequently as once per month. Kevin

[4] While the Bakers allege the bottle from which Steele drank was owned by Wilson, the facts are unclear as to exactly who put the bottle on Wilson's counter and who actually owned the bottle. Nevertheless, whether Wilson in fact owned the bottle at the pertinent time is not material to our analysis. *See infra* ¶25.

Wilson acknowledged he knew alcohol consumption was going on and he was okay with it if "their [sic] of age." He also knew about the employees' practice of leaving leftover beer or liquor in the refrigerator.

¶7 Steele was Wilson's only underage employee. No special precautions were taken to prevent Steele from physically accessing the alcohol stored on Wilson's premises. Most of the Wilson employees denied Steele was with them when they would consume alcohol at Wilson after work. However, one former employee, Nathan Baldwin, stated that he witnessed Steele drink alcohol somewhere between ten and twenty times with other employees at Wilson. Baldwin did not specify if he knew who provided the alcohol that Steele drank on those occasions.[5]

¶8 After completing their first ninety days of employment, Wilson permitted employees to use the shop at any time. Additionally, Wilson permitted its employees to work after-hours on their own vehicles at the shop. According to Steele, he was permitted to be the only person on the Wilson property and left in charge to lock up.

¶9 The circuit court concluded that the material facts in this case were undisputed and substantially similar to those in ***Nichols***. Therefore, in accordance with the holding of our supreme court in that case, the court granted Wilson

[5] While some of the facts concerning drinking at Wilson's shop prior to the date of the accident are disputed, we later determine only Steele's drinking on the day of the accident is relevant to our analysis. *See infra* ¶16.

summary judgment dismissing the Bakers' complaint, including both the negligence per se and common-law negligence claims.[6] The Bakers now appeal.

DISCUSSION

¶10 We independently review a circuit court's grant of summary judgment, using the same methodology as the circuit court. ***Malzewski v. Rapkin***, 2006 WI App 183, ¶11, 296 Wis. 2d 98, 723 N.W.2d 156. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2015-16). When applying this standard, we construe all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523. However, "the 'mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'" ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48 (1986)).

¶11 We begin our discussion by analyzing the Bakers' negligence per se claim based on alleged violations of WIS. STAT. § 125.07(1)(a). We then analyze the Bakers' common-law negligence claim and whether our supreme court's decision in ***Nichols*** is applicable here.

[6] The third count of the Bakers' complaint—which the circuit court also dismissed—alleged a loss of consortium on behalf of Beth's husband, Scott Baker. The Bakers describe this claim as derivative of their other claims in this case, which it is. *See* ***White v. Lunder***, 66 Wis. 2d 563, 574, 225 N.W.2d 442 (1975). Therefore, we do not separately analyze the dismissal of this claim because Scott's claim rises and falls on the merits of Beth's claim.

I. Negligence per se

¶12 As mentioned previously, the first count of the Bakers' complaint alleged that Wilson was negligent per se when it violated WIS. STAT. § 125.07(1)(a)1. and § 125.07(1)(a)4., leading to Steele's intoxication and the ensuing accident.[7] Furthermore, the Bakers assert the immunity from civil liability provided in WIS. STAT. § 125.035(2) is unavailable to Wilson because it was: (1) a "provider" of alcohol to Steele as defined in § 125.035(4)(a); (2) knew or should have known Steele was underage; and (3) the alcohol provided to Steele was a substantial factor in causing Beth's injuries. *See* WIS. STAT. § 125.035(4)(b).

¶13 The Bakers argue Wilson procured alcohol for Steele on the date of the accident in violation of WIS. STAT. § 125.07(1)(a)1. because: (1) some Wilson employees in the past had purportedly permitted Steele to drink alcohol on the Wilson premises; (2) on the date of the accident, Steele consumed alcohol from a bottle Wilson "owned"; and (3) no special precautions were taken to prevent

[7] In ***Nichols v. Progressive Northern Insurance Co***., 2008 WI 20, 308 Wis. 2d 17, 746 N.W.2d 220, our supreme court explained:

> The circuit court dismissed the Nichols' complaint, because it agreed with the Niesens that the Nichols' reliance on Wis. Stat. §§ 125.07(1)(a)3. and 125.035 (2003-04) was misplaced, and also because it agreed with the Niesens that the Nichols had not stated a claim for common-law negligence. The Nichols did not allege a violation of § 125.035 in any of the three versions of their complaint, so there was no need for the circuit court to address that statute. The court of appeals affirmed the circuit court's holding that none of those statutes could provide the basis for civil liability against the Niesens, and the Nichols did not seek review of that ruling before [the supreme court].

Id., ¶7 (footnote omitted).

Steele from physically accessing alcohol stored on Wilson's premises, including the bottle of alcohol Wilson "owned" and Steele used on the day of the accident.

¶14 The Bakers' first claim therefore requires us to interpret certain portions of WIS. STAT. ch. 125. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting ***Seider v. O'Connell***, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). In general, statutory language is given its common, ordinary, and accepted meaning. ***Id.*** "[S]tatutory language is interpreted 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." ***Id.***, ¶46.

¶15 Although "the statutes do not define the word procure" in WIS. STAT. § 125.07(1)(a)1., our supreme court has determined that it means to "bring about," "obtain," or "acquire." ***Miller v. Thomack***, 210 Wis. 2d 650, 661-62, 563 N.W.2d 891 (1997). Thus, in ***Miller***, our supreme court held that for a person to procure alcohol for an underage person under § 125.07(1)(a)1. in the context of contributing funds to purchase alcohol, the person must contribute the funds with "the intent of bringing about the purchase of alcohol beverages for consumption by an underage person." ***Miller***, 210 Wis. 2d at 667. The record here fails to either demonstrate or permit a reasonable inference that the bottle of alcohol beverage was obtained, acquired, possessed, or "owned" by Wilson with the intent of it being supplied to, or consumed by, Steele.

¶16 The Bakers are correct that the factual materials submitted in relation to the motion for summary judgment give rise to a reasonable inference that some Wilson employees *in the past* periodically permitted Steele to drink

alcohol on the Wilson premises, even though Wilson's owner, Kevin Wilson, did not himself permit employees who were underage to drink alcohol on the premises. In addition, the Bakers argue Wilson took no special precautions in the past to prevent Steele from physically accessing alcohol stored on Wilson's premises. Nonetheless, while the record here indicates the bottle of alcohol at issue may have been gifted to Wilson, there is no evidence Kevin Wilson or any employee other than Steele was aware of its presence at the shop. There is no evidence to suggest that the alcohol Steele consumed *on the date of the accident* was obtained or acquired by Kevin Wilson with the intent or knowledge that it would be supplied to Steele. We conclude the Bakers have therefore failed to demonstrate Wilson procured alcohol for Steele in violation of WIS. STAT. § 125.07(1)(a)1.[8]

¶17 The Bakers next contend Wilson violated WIS. STAT. § 125.07(1)(a)4., which provides that "[no] adult may intentionally encourage or contribute to a violation of sub. (4)(a) or (b)."[9] Specifically, they contend Wilson intentionally encouraged Steele to consume alcohol on the date of the accident by: (1) permitting Steele to consume alcohol on Wilson's premises in the past; (2) taking no special precautions to prevent Steele from physically accessing alcohol stored on Wilson's premises; and (3) permitting Steele to close up the

[8] The Bakers argue Wilson was a "provider" as that term is defined in WIS. STAT. § 125.035(4)(a) and, as a result, the immunity from civil liability provided in § 125.035(2) is unavailable to Wilson. However, we have already concluded that the Bakers have failed to demonstrate that Wilson procured alcohol to Steele in violation of WIS. STAT. § 125.07(1)(a). Therefore, the Bakers have also failed to demonstrate that Wilson was a "provider" under § 125.035(4)(a), and we need not address the immunity provision.

[9] Wilson does not argue that, as a corporation, it is not an "adult" and, therefore, not potentially liable under that statute. We therefore do not reach that question in this appeal. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (recognizing "we will not abandon our neutrality to develop arguments" for the parties).

shop by himself. First, regardless of whether Wilson (or its employees) encouraged Steele to consume alcohol in the past, there is no evidence to suggest Wilson encouraged Steele to consume alcohol *on the date of the accident*. Second, we do not equate an employer's failure to take special precautions to prevent an underage employee from accessing alcohol on its premises with "intentionally encouraging" an underage person to consume alcohol. Likewise, we do not equate an employer's decision to permit an underage employee to close up the business at the end of the day alone with "intentionally encouraging" an underage person to consume alcohol. We conclude the Bakers have failed to demonstrate Wilson violated § 125.07(1)(a)4. on the date of the accident.

II. Common-law negligence

¶18 The second count in the Bakers' complaint alleged a claim for common-law negligence. Specifically, the Bakers alleged Wilson knowingly permitted storage of unsecured alcohol beverages and illegal underage consumption of alcohol on its property, which led to the accident. The Bakers also contended Wilson had the continuing duty to take reasonable steps to prevent alcohol beverages that it "owned" and controlled from being possessed and consumed by underage persons like Steele.

¶19 The circuit court dismissed the Bakers' common-law negligence claim based on our supreme court's decision in ***Nichols***. In ***Nichols***, the vehicle in which the Nichols were traveling was struck by another vehicle driven by Beth Carr that had crossed the highway's center line. ***Nichols***, 308 Wis. 2d 17, ¶4. The Nichols alleged that the accident and resulting injuries were caused by Carr's "failure to properly manage and control the vehicle she was operating, due in part to the voluntary ingestion by her of intoxicating beverages" at "a large gathering of underage high school students" who congregated and consumed alcohol at a

residence owned by the Niesens. ***Id.***, ¶¶4-5. Michael Shumate "or one or more adult residents of his household[,]" not the Niesens, were alleged to have provided the alcohol that Carr consumed on the Niesens' property. There was no allegation that Shumate was at the Niesens' property. ***Id.***, ¶6. The Nichols alleged that the Niesens "knowingly permitted and failed to take action to prevent the illegal consumption of alcohol beverages by underage persons, including ... Carr on premises under their control contrary to Section 125.07(1)(a)3." and that "the Niesens were aware that the minors on their property were consuming alcohol." ***Id.***, ¶5. The Nichols contended that the Niesens "had a duty to supervise and monitor the activities on their property" and that they were negligent because they failed to do so. ***Id.***

¶20 The supreme court affirmed the circuit court's dismissal of the Nichols' complaint based upon public policy grounds. The court first stated that it assumed without deciding the court of appeals was correct in holding that the Nichols had stated a common-law negligence claim. ***Id.***, ¶19. The court went on to cite well-established law that, even if a plaintiff adequately establishes all four elements of a common-law negligence claim, Wisconsin courts have "reserved the right to deny the existence of a negligence claim based on public policy reasons ...." ***Id.***

¶21 In turning to its public policy analysis, the ***Nichols*** court stated

> it is instructive to note what is not alleged by the Nichols. The Nichols do not allege that the Niesens provided alcohol to Carr, that the Niesens were aware that Carr (specifically) was consuming alcoholic beverages, that the Niesens knew or should have known that Carr was intoxicated, or that the Niesens knew or should have known that Carr was not able to drive her motor vehicle safely at the time of the accident. We note that there also is no allegation by the Nichols that the Niesens aided, agreed to assist, or attempted to aid Carr or any other person in the procurement or consumption of

> alcohol on premises under their control. There also are no allegations that the Niesens knew in advance that any underage individuals would be drinking.

Id., ¶20.

¶22 Based upon those facts, the court then analyzed the six well-recognized public policy factors to determine whether recovery against a negligent tortfeasor may be denied: (1) when the injury is too remote from the negligence; (2) when the injury is too wholly out of proportion to the tortfeasor's culpability; (3) when in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; (4) when allowing recovery would place too unreasonable a burden upon the tortfeasor; (5) when allowing recovery would be too likely to open the way to fraudulent claims; and (6) when allowing recovery would have no sensible or just stopping point. ***Id.***, ¶¶22-27. While the court discussed the arguments by both parties on each of the six public policy factors, it did not expressly accept or reject factors one through five. ***Id.***

¶23 Instead, the ***Nichols*** court concluded that "here perhaps the most significant[] public policy factor upon which recovery against a negligent tortfeasor may be denied in the context of a claim of negligent supervision by a property owner of minors and their possible consumption of alcohol provided by another is when 'allowing recovery would have no sensible or just stopping point ....'" ***Id.***, ¶27. The supreme court concluded that this sixth factor precluded liability against the Niesens. ***Id.*** The court went on to explain:

> We agree with the Niesens and BRMIC that allowing recovery here would have no sensible or just stopping point. As this court noted in ***Stephenson*** [***v. Universal Metrics, Inc.***, 2002 WI 30, 251 Wis. 2d 171, 641 N.W.2d 158,] allowing liability under such circumstances would provide too much potential for the out of control growth of liability, which would "run counter to the legislative enactments regarding immunity." ***Id.***, ¶50 (footnote omitted). *Liability for injuries that are caused by an*

> *underage, intoxicated individual has always been premised upon the affirmative acts of a defendant, such as procuring, furnishing, or dispensing alcohol for that underage individual. Liability has never been premised on the conduct that the Nichols alleged. See, e.g.,* ***id.***; ***Smith v. Kappell***, 147 Wis. 2d 380, 433 N.W.2d 588 (Ct. App. 1988).

Id., ¶30 (emphasis added). Similarly in this case, holding Wilson liable for Steele's consumption of alcohol under circumstances where Wilson did not procure, furnish, or dispense alcohol to Steele would provide no sensible and just stopping point to liability for injuries caused by intoxicated minors.

¶24 The Bakers argue the facts in ***Nichols*** are materially distinguishable from this case. They first argue that the underage person in ***Nichols*** consumed alcohol that was *not* owned by the defendant parents, whereas here Steele consumed alcohol that *was* "owned" by Wilson. In addition, the Bakers argue ***Nichols*** involved alcohol consumption at a residence, whereas here the consumption was in a workplace. These are distinctions without a difference to our analysis.

¶25 As to the Bakers' first point, whether Wilson "owned" the bottle of alcohol Steele consumed is not material to our public policy analysis. There was no showing that Kevin Wilson was even aware of the bottle's presence at the shop, and Kevin Wilson did not directly give the bottle to Steele. In fact, Steele acknowledged he stole the alcohol given that no one gave him permission to use it, and then watered the liquor bottle to make it appear untouched. While the record shows the bottle was on a counter in the shop's kitchen, that does not raise a reasonable inference that Wilson or Kevin Wilson possessed or controlled the alcohol that Steele consumed to any greater extent than the homeowners in ***Nichols*** possessed or controlled the alcohol that Carr consumed. The record does not show that Kevin Wilson, owner of the premises, was aware that Steele was

consuming alcohol beverages at the shop on the day of the accident. Indeed, Kevin Wilson was not on the premises at the time Steele consumed the alcohol, a fact even more supportive in applying the public policy analysis than in ***Nichols***, where the homeowners were present when the teens consumed alcohol.

¶26 The Bakers have not submitted evidence from which a factfinder could reasonably conclude that Wilson or Kevin Wilson in any way aided, agreed to assist, or attempted to aid Steele or any other person in the procurement or consumption of the alcohol by Steele. There also is no showing that Kevin Wilson knew in advance that Steele would be drinking at his shop on the day of the accident. The record does not show that Kevin Wilson knew or should have known that Steele was intoxicated or was unable to drive his vehicle safely at the time of the accident. These facts are entirely consistent with those in ***Nichols***, and they support application of the public policy determination in ***Nichols*** that imposing liability under these circumstances would have no sensible or just stopping point.

¶27 Second, the Bakers argue this case is distinguishable from ***Nichols*** because Steele consumed alcohol at his place of work, rather than at a residence. They argue there is "a reasonable inference that an employee who does not live at the workplace will drive away from the shop when he leaves and if he has been drinking he will drive away intoxicated." However, under the public policy analysis in ***Nichols***, the type of premises on which the alcohol was consumed was not determinative. In ***Nichols***, it was just as likely that underage guests who did not live at the Niesen residence would drive away after drinking alcohol. Here, alcohol was consumed by Steele after his work was finished. As stated in ***Nichols***, "[n]either the legislature nor this court have expanded liability to social hosts who have not provided alcohol to minors." ***Id.***, ¶33. We conclude public policy

prevents a common-law negligence claim against an employer for injuries resulting from a minor's consumption of alcohol on its property when the employer did not provide the alcohol, just as much as public policy prevents such a claim against a social host.

¶28 The facts here may show there was a "culture … at Wilson's … steeped in alcohol." However, the court in ***Nichols*** did not make any exception to its public policy analysis for a so-called "culture of alcohol." We decline to do so here. Wilson can have no common-law liability to the Bakers without a showing that Wilson actually provided alcohol to Steele, or that Kevin Wilson aided, agreed to assist, or attempted to aid Steele in the consumption of alcohol on the day of the accident.

¶29 There is no evidence from which a factfinder could find or reasonably infer that Wilson procured or provided alcohol to Steele, or that Kevin Wilson aided, agreed to assist, or attempted to aid Steele in the consumption of alcohol—at least not any more than the Niesens did for Carr in the ***Nichols*** case. Therefore, based upon ***Nichols*** and the same public policy considerations the supreme court expressed therein, we affirm the circuit court's summary judgment dismissing the Bakers' common-law negligence claim against Wilson.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.