COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2180 **Cir. Ct. No. 2015CV5875**

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

CAITRIA THIELE,

PLAINTIFF-APPELLANT,

V.

RONNIE L. ROBINSON AND HUSH LLC D/B/A BOOTZ SALOON AND GRILL,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

ABC INSURANCE COMPANY,

DEFENDANT,

V.

AUTO-OWNERS INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Kessler, Brash and Dugan, JJ.

¶1 KESSLER, J. Caitria Thiele appeals an order of the circuit court granting summary judgment to third-party defendant Auto-Owners Insurance Company. We affirm.

BACKGROUND

¶2 This appeal stems from allegations brought by Thiele against Ronnie Robinson, Hush LLC, d/b/a/ Bootz Saloon and Grill (Bootz), and ABC Insurance Company.[1] The sole issue on appeal is whether a general commercial liability policy issued by Auto-Owners Insurance Company (Auto-Owners) to Bootz provides coverage for Thiele's claims.

¶3 Thiele's complaint alleged seven causes of action—four against Robinson directly and three against Bootz. As to Robinson, Thiele alleged: (1) assault; (2) battery; (3) false imprisonment; and (4) intentional infliction of emotional distress. As to Bootz, Thiele alleged: (1) negligent supervision; (2) violation of WIS. STAT. § 101.11 (2015-16)[2] for failing to provide a safe work environment; and (3) negligent infliction of emotional distress.

¶4 The allegations in the complaint are as follows:

- From March 26, 2014, through August 2014, Thiele was an employee of Bootz, first as a waitress and then as a bartender.

[1] Thiele's complaint named ABC Insurance Company because at the time the complaint was filed, it was unknown that Auto-Owners Insurance Company provided general liability coverage for Bootz.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

- At all times during Thiele's employment, Robinson was her direct supervisor and had an ownership interest in Bootz.
- Robinson often pressured Thiele, who was under twenty-one years of age, to consume alcohol while she was tending bar.
- Throughout the course of Thiele's employment, Robinson made continuous sexual advances towards Thiele, including, but not limited to, grabbing, touching, and kissing Thiele.
- Thiele informed Robinson that his advances were unwanted, yet Robinson's behavior continued.
- Robinson's behavior escalated in that he harassed Thiele through text messages and phone calls, both while Thiele was working and after hours.
- Robinson forced Thiele to engage in unprotected sex at least six times, with two of those encounters taking place on Bootz property.
- On August 8, 2014, while Thiele was working a day shift at Bootz, Robinson convinced Thiele to join him for dinner, promising Thiele that he would drop her off at home after dinner. Fearing for her job, Thiele agreed. Robinson dropped Thiele off at home after dinner, followed her into her apartment, removed her clothes and forcibly had unprotected sex with Thiele.
- As a result of the unprotected sex, Thiele became pregnant. Thiele ultimately terminated her pregnancy.
- On August 23, 2014, Robinson physically attacked Thiele and a friend outside of Thiele's apartment. Thiele sustained injuries. Robinson was arrested and issued a municipal citation.

¶5 Robinson and Bootz filed a third-party complaint against Auto-Owners, alleging that the commercial general liability policy issued by Auto-Owners to Bootz provided coverage for Thiele's negligent supervision and negligent infliction of emotional distress claims. As relevant to this appeal, the Auto-Owners policy provides different types of general liability coverage: (1) "Coverage A. Bodily Injury and Property Damage Liability," and (2) "Coverage B. Personal Injury and Advertising Injury Liability." Coverage A, as relevant to this appeal, provides coverage for bodily injuries caused by an "occurrence," defined by the policy as "an accident, [i]ncluding continuous or repeated exposure to substantially the same general harmful conditions." Coverage A excludes coverage for claims falling under the Worker's Compensation Act (WCA).[3] Coverage B, as relevant, provides coverage for personal injuries caused "by an offense arising out of your business" and is also subject to several exclusions.

¶6 Auto-Owners disputed coverage and moved to bifurcate and stay all liability proceedings until coverage was determined. Thiele did not oppose the motion.

¶7 Thereafter, Auto-Owners filed a Motion for Summary and Declaratory Judgment, arguing that it did not provide coverage for any of Thiele's claims against either Bootz or Robinson. As to Thiele's claims against Bootz, Auto-Owners argued that: (1) worker's compensation was the exclusive remedy for negligence claims against an employer and that Coverage A excluded coverage for cases covered under worker's compensation; (2) Thiele's remedy for her

[3] The policy exclusions state: "This insurance does not apply to: … **D. Worker's Compensation and Similar Laws.** Any obligation of the Insured under a worker's compensation, disability benefits or unemployment compensation law or any similar law." (Some formatting altered.)

claims of sexual harassment was administrative and could only be pursued under the Wisconsin Fair Employment Act; and (3) a liquor liability exclusion under Coverage A barred coverage. As to Thiele's claims against Robinson, Auto-Owners argued that there was no coverage for any of the claims because Robinson's actions were all intentional and/or criminal and did not constitute an "occurrence" under Coverage A.

¶8 Thiele argued, as relevant to this appeal, that: (1) worker's compensation did not provide her exclusive remedy because Robinson was also a co-owner of Bootz;[4] (2) Bootz's negligent supervision of Robinson constituted an "occurrence" under Coverage A; and (3) none of the policy exclusions cited by Auto-Owners applied to the facts of her case.

¶9 Following a hearing, the circuit court granted Auto-Owners's motion, finding that Thiele's assault, battery, and intentional infliction of emotion distress claims all stemmed from intentional acts and were therefore not covered under the terms of the policy. During the hearing, the circuit court and the parties engaged in a lengthy exchange about Thiele's false imprisonment claim. The circuit court found that Thiele's claim fell under a Coverage B policy exclusion. The court also concluded that Robinson's conduct was outside of the scope of his employment either as a manager or an owner of Bootz.

¶10 The circuit court found that Thiele's claims of negligent supervision and negligent infliction of emotional distress against Bootz fell under the WCA, which was Thiele's exclusive remedy, and, in addition, the Auto-Owners policy expressly excluded any claims falling under the WCA. Thiele appeals.

[4] It is undisputed that Robinson owns one percent of Bootz.

DISCUSSION

¶11 Thiele argues that the circuit court erred in granting summary judgment in favor of Auto-Owners because: (1) there is a genuine issue of material fact as to whether the WCA precludes Thiele's negligence claims against Bootz; (2) Coverage A of the Auto-Owner's policy covers Thiele's negligent supervision claim against Bootz; and (3) Coverage B covers Thiele's false imprisonment claim against Robinson.[5]

Standard of Review

¶12 We independently review a grant of summary judgment, using the same methodology as the circuit court. *See* ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if 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). "Whether to grant a declaratory judgment is addressed to the circuit court's discretion." ***State Farm Fire & Cas. Co. v. Acuity***, 2005 WI App 77, ¶6, 280 Wis. 2d 624, 695 N.W.2d 883. However, when the exercise of that discretion turns on the interpretation of an insurance policy, which is a question of law, we conduct an independent review. *See* ***id.***

¶13 A court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). A "material fact" is one that "affects the resolution of the

[5] Thiele's brief discusses her "false imprisonment, humiliation and sexual harassment" claims; however, the pleadings only state a claim for false imprisonment. Accordingly, that is the claim we consider.

controversy." ***Clay v. Horton Mfg. Co., Inc.***, 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992). A dispute is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citation omitted).

I. The WCA is Thiele's Exclusive Remedy for her Negligence Claims Against Bootz.

¶14 Thiele contends that the WCA is not her exclusive remedy as to her negligence claims against Bootz for two reasons: (1) there is a genuine issue of material fact as to whether two of the conditions necessary for the application of the WCA exclusivity provision are present; and (2) where a co-employee/owner injures an employee, the WCA cannot be the injured party's only remedy.[6]

¶15 WISCONSIN STAT. § 102.03(1), the worker's compensation statute, provides:

> Liability under this chapter shall exist against an employer only where the following conditions concur:
>
> **(a)** Where the employee sustains an injury.
>
> **(b)** Where, at the time of the injury, both the employer and employee are subject to the provisions of this chapter.
>
> **(c)**1. Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment.
>
> ….
>
> **(d)** Where the injury is not intentionally self-inflicted.
>
> **(e)** Where the accident or disease causing injury arises out of the employee's employment.

WISCONSIN STAT. § 102.03(2) includes an exclusive remedy provision, whereby an injured employee is precluded from "maintaining a negligence action against

[6] Thiele's safe place claims against Bootz are not at issue in this appeal.

his or her employer and fellow employees." ***Weiss v. City of Milwaukee***, 208 Wis. 2d 95, 103, 559 N.W.2d 588 (1997). The statute provides:

> Where such conditions exist 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.

Sec. 102.03(2).

¶16 Here, Thiele contends that there are two disputed conditions in WIS. STAT. § 102.03(1) necessary for the application of the WCA exclusivity provision. Those conditions are: (1) whether she was performing services growing out of and incidental to her employment at the time of her injuries; and (2) whether the accident causing her injuries arose out of her employment.

¶17 "The statutory clause 'performing service growing out of and incidental to his or her employment' is used interchangeably with the phrase 'course of employment.'" ***Weiss***, 208 Wis. 2d at 104 (citation omitted). "Both phrases refer to the 'time, place, and circumstances' under which the injury occurred." ***Id.*** at 104-05 (citation omitted). "'An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he [or she] is fulfilling his [or her] duties or engaged in doing something incidental thereto.'" ***Id.*** at 105 (citation omitted; brackets in ***Weiss***).

¶18 As to whether claims "arise out of" one's employment, the Wisconsin Supreme Court's explanation of WIS. STAT. § 102.03(1)(e) is clear:

> The "arising out of" language of § 102.03(1)(e) refers to the causal origin of an employee's injury. However, "arising out of his or her employment" is not synonymous with the phrase "caused by the employment." In interpreting § 102.03(1)(e), we have adopted the "positional risk" doctrine:

> [A]ccidents arise out of employment if the conditions or obligations of the employment create a zone of special danger out of which the accident causing the injury arose. Stated another way, an accident arises out of employment when by reason of employment the employee is present at a place where he is injured through the agency of a third person, an outside force, or the conditions of special danger.
>
> However, when the origin of the assault is purely private and personal, and the employment in no way contributes to the incident, the positional risk doctrine does not apply.

Weiss, 208 Wis. 2d at 107 (quoted sources and internal citations omitted; brackets in ***Weiss***).

¶19 Thiele cites facts from which she contends a jury could find that the relevant conditions are not present. These include: being forced into multiple non-consensual sexual situations by Robinson; being forced by Robinson to consume alcohol while on duty; and being forced by Robinson to return to Bootz property after closing the bar for the night so that he could sexually assault her. We conclude that Thiele's negligence claims against Bootz are all rooted in her allegation that Bootz failed to properly train and supervise Robinson in his duty as a bartender and manager. The allegations thus are in relation to her position as an employee and Robinson's position as her co-employee and employer. Accordingly, Thiele's claims against Bootz (but not necessarily her claims against Robinson) all relate to incidents that took place in her capacity as a Bootz employee.

¶20 Thiele also contends that Robinson's role as a partial owner of Bootz precludes the WCA from being her exclusive remedy. Thiele relies on our decision in ***Lentz v. Young***, 195 Wis. 2d 457, 536 N.W.2d 451 (Ct. App. 1995), to support her claim that Robinson's ownership interest in Bootz precludes WCA

exclusivity. In ***Lentz***, Connie and Tom Lentz (Lentz) brought a tort action against Connie's employer, David Young. ***Id.*** at 462. Young was the sole owner of the restaurant. ***Id.*** at 470. Connie alleged that while working for Young as a waitress, Young continuously engaged in offensive conduct, such as touching or grabbing Connie, and making sexually explicit comments. ***Id.*** at 462-63. Lentz sued Young. ***Id.*** at 462. The circuit court found that the WCA was Lentz's exclusive remedy because all of Connie's injuries were work-related and because the conduct giving rise to her injuries took place at work. ***Id.*** at 464. We reversed the circuit court, concluding that Young's actions were intentional, and thus not the type of accidental conduct that falls within the purview of the WCA. ***Id.*** at 473.

¶21 Subsequent case law, however, has limited ***Lentz*** to the facts of the case, holding that "[***Lentz***] is simply a narrow exception *that applies when the employer is a sole proprietor and has intentionally caused the employee's injury*." *See* ***Peterson v. Arlington Hosp. Staffing, Inc.***, 2004 WI App 199, ¶20, 276 Wis. 2d 746, 689 N.W.2d 61 (emphasis added). Accordingly, we conclude that ***Lentz*** is distinguishable and inapplicable here. In ***Lentz***, the plaintiffs pled intentional claims against an employer—a sole proprietor—which we concluded were not accidental within the purview of the WCA. The issue on appeal here, however, is whether Thiele's *negligence* claims against her employer—an LLC—are covered under the employer's general commercial liability policy. Wisconsin case law, and courts interpreting Wisconsin case law, have expressly stated that an employee's negligence claims against a co-employee or employer are precluded by the exclusivity provision of the WCA. *See* ***Peterson***, 276 Wis. 2d 746, ¶12 (explaining that the purpose of the WCA is to "establish[] a system under which workers, in exchange for compensation for work-related injuries regardless of fault, would relinquish the right to sue employers and would accept smaller but

more certain recoveries than might be available in a tort action"); ***Busse v. Gelco Express Corp.***, 678 F. Supp. 1398, 1400 (E.D. Wis. 1988) (holding that a plaintiff's negligent infliction of emotional distress claim against her employer alleging continuous sexual harassment by co-workers was barred by the exclusivity provision of the WCA); ***Johnson v. Hondo, Inc.***, 125 F.3d 408, 418 (7th Cir. 1997) (holding that an employee's negligent supervision and retention claim against his employer, stemming from alleged sexual harassment by co-workers, "[fell] squarely within the reach of [WIS. STAT.] § 102.03(2)"). Accordingly, we must also conclude that Thiele's negligence claims against Bootz are exclusively the subject of the WCA and that the WCA is her exclusive remedy against Bootz. Consequently, the Auto-Owners policy here does not provide coverage for such claims.[7]

II. Coverage B Does Not Provide Coverage for Thiele's False Imprisonment Claims Against Robinson.

¶22 Thiele contends that the "Coverage B" section of the Auto-Owners policy provides coverage for her false imprisonment claims against Robinson.

¶23 Coverage B covers damages arising from a "personal injury" or an "advertising injury." The policy defines "personal injury" as something "other than 'bodily injury' arising out of," as relevant here, "False arrest, detention or imprisonment[,]" or "Discrimination, humiliation, sexual harassment and any violation of civil rights caused by such discrimination, humiliation or sexual harassment." Such an injury must be caused by an offense arising out of the insured's business.

[7] Because we conclude that the exclusivity provision of the WCA precludes coverage for Thiele's negligence claims against Bootz, we need not address whether Coverage A of the Auto-Owners policy provides coverage for those claims.

¶24 Auto-Owners contends that Robinson was *not* an insured under the policy, because his alleged actions towards Thiele were not within his duties as a manager or owner. Auto-Owners also contends that multiple exclusions within Coverage B bar Thiele's claims for coverage.

¶25 The policy defines "who is an insured":

> A limited liability company, you are an insured. Your members are also Insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

Employees are also insureds "but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." Therefore, we must determine whether Robinson's actions were within the scope of his employment. [8]

¶26 "[A]n employee's conduct is not within the scope of his or her employment if it is too little actuated by a purpose to serve the employer or if it is motivated entirely by the employee's own purposes (that is, the employee stepped aside from the prosecution of the employer's business to accomplish an independent purpose of his or her own)." ***Olson v. Connerly***, 156 Wis. 2d 488, 499-500, 457 N.W.2d 479 (1990). In ***Olson***, the supreme court reiterated that "[t]he scope[-]of[-]employment cases of this court have always deemed significant the employee's intent at the time the acts in question were committed." ***Id.*** at 497-98. In ***Block v. Gomez***, 201 Wis. 2d 795, 549 N.W.2d 783 (Ct. App. 1996), we relied on ***Olson*** to conclude that "if the employee fully steps aside from conducting the employer's business to procure a predominantly personal benefit, the conduct falls outside the scope of employment." ***Block***, 201 Wis. 2d at 806.

[8] We emphasize that this opinion only deals with the scope of insurance coverage under the Auto-Owners policy. We do not determine issues of Robinson's personal liability towards Thiele for the allegations in her complaint.

In ***Block***, Denise Block brought various causes of action against her drug abuse therapist, Anthony Gomez, alleging that Gomez started a sexual relationship with her that included various sexual activities taking place during her counseling sessions. ***Id.*** at 799-800. Block argued that because Gomez's conduct occurred within the scope of his employment, Gomez's employer was vicariously liable for Gomez's actions. ***Id.*** at 802. We concluded that Gomez's conduct did not fall within the scope of his employment, in part, because Gomez sought to "procure a purely personal benefit; that is, a sexual relationship with Block." ***Id.*** at 807.

¶27 We are bound by this case law. We cannot conclude that Robinson's conduct fell within the scope of his employment either as an employee or as a partial owner of Bootz. All of Robinson's alleged conduct was obviously to further his personal interest (a sexual relationship) and not in the interest of Bootz. Robinson "stepped aside from his … business to achieve an independent purpose of his own." *See* ***Olson***, 156 Wis. 2d at 501. Robinson's alleged false imprisonment was to "procure a purely personal benefit; that is, [sexual contact with Thiele.]" *See* ***Block***, 201 Wis. 2d at 807. Accordingly, viewing the allegations most favorably to Thiele, we cannot conclude that Robinson's conduct fell within the scope of his employment.

¶28 For the foregoing reasons, we affirm the circuit court.

By the Court.—Order affirmed.

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