**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 14, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-1385** **Cir. Ct. No. 01 CV 7744**

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

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**ELFRIEDE LARSON AND**
**DAVID J. LARSON,**

**PLAINTIFFS-APPELLANTS,**

**HEALTHCARE RECOVERIES, INC.,**
**A FOREIGN INSURANCE CORPORATION,**

**INVOLUNTARY-PLAINTIFF,**

**V.**

**TOWER INSURANCE COMPANY, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Reversed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Elfriede and David Larson appeal from the circuit court's grant of summary judgment to Tower Insurance Company, Inc., dismissing their complaint. The Larsons argue that the circuit court erred in concluding that their common-law negligence action for the injuries Elfriede suffered in a car accident was barred by the provisions of the Wisconsin's Worker's Compensation Act. The Larsons are correct and, therefore, we reverse.

## I. BACKGROUND

¶2 At approximately 8:00 a.m. on September 3, 1998, Marilyn Rotter, president of Happy Cookers, Inc., an off-site catering business, picked up Elfriede Larson, a part-time Happy Cookers' employee, to take her to a catering job at Congregation Beth Israel in Milwaukee. On the way to the job, Rotter stopped at a grocery store for an unspecified purpose while Larson waited in the car. After leaving the store, Rotter and Larson decided to stop for coffee at a McDonald's on the way to the temple where they were to begin their work sometime between 10:00 and 10:30 a.m. On the way to McDonald's, at approximately 9:05 a.m., the car accident occurred injuring Larson.

¶3 The Larsons sued Tower Insurance Company, the carrier for Rotter's automobile insurance, and Happy Cookers' worker's compensation insurance. Tower Insurance answered denying liability because "Larson[] was an employee of a business owned and operated by ... Rotter, known as the Happy Cooker[s], Inc., and, as such, [Larson's] sole remedy is worker's compensation under Chapter 102 of the Wisconsin Statutes." Granting summary judgment to Tower Insurance, the court concluded that at the time of the injury, Larson was performing services

growing out of and incidental to her employment, pursuant to WIS. STAT. § 102.03(1)(c)(1) and (2) (1999-2000)[1]; and that she was a "traveling employee," pursuant to WIS. STAT. § 102.03(1)(f), thus rendering worker's compensation her exclusive remedy. Accordingly, the court dismissed the Larsons' negligence action against Tower Insurance Company.

## II. ANALYSIS

¶4 The Larsons contend that the circuit court erred in concluding that worker's compensation was the exclusive remedy, thus precluding their negligence claim against Tower Insurance, Rotter's car insurer. Specifically, they argue that the court erred in concluding that: (1) Elfriede was a traveling employee; (2) she was in the course of her employment when going for coffee; and (3) Rotter was her employer, not co-employee, and, therefore, that her suit did not fall within the exception for co-employees who negligently operate a motor vehicle not owned or leased by the employer. We conclude that even if the circuit court was correct in determining that Larson was a traveling employee and that she was performing services growing out of or incidental to her employment, she and Rotter were co-employees of the corporation and the car was not owned or leased by the employer; thus, under the exception in WIS. STAT. § 102.03(2), the Larsons' complaint survives summary judgment.[2]

¶5 We review an order granting summary judgment *de novo* using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis.

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

[2] ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground").

2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate 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). Here, the relevant facts are undisputed and, therefore, we only address whether Tower Insurance was entitled to summary judgment as a matter of law in light of WIS. STAT. § 102.03(2). *See* WIS. STAT. § 802.08(2). Construction of a statute and its application to a particular set of facts present questions of law that we review *de novo*. ***Minuteman, Inc. v. Alexander***, 147 Wis. 2d 842, 853, 434 N.W.2d 773 (1989).

¶6 Generally, an employee's exclusive remedy for a job-related injury lies under the Wisconsin's Worker's Compensation Act. The rule of exclusivity and its exceptions are found in WIS. STAT. § 102.03(2), which provides, in pertinent part:

> [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 [an] action against any co[-]employee for an assault intended to cause bodily harm, or against a co[-]employee for negligent operation of a motor vehicle not owned or leased by the employer, or against a co[-]employee of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employees under a collective bargaining agreement or a local ordinance.

WIS. STAT. § 102.03(2). Section 102.03(2), therefore, bars common-law recovery for damages caused by a negligent co[-]employee except under the circumstances described in the statute.

¶7 Ruling on the motion for summary judgment, the circuit court concluded:

> Rotter was the president and sole shareholder of Happy Cookers, Inc. As such, she is considered the employer of Plaintiff. In addition, although there is no evidence that transportation was specifically required as part of Plaintiff's employment contract, Plaintiff testified that Rotter typically picked her up on the way to catering events and was driving the vehicle at the time of the accident. Further, the vehicle was insured in the name of Happy Cookers, Inc. Therefore, Plaintiff was being transported by her employer to her employment, in a vehicle insured to her employer (Happy Cookers, Inc.) as part of her employment....
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> ... Plaintiff argues that the worker's compensation statute is inapplicable because Rotter as a co-employee provided transportation, pursuant to § 102.03(2). However, as noted, the court considers Rotter the employer. In addition, the section does not limit the right of an employee to bring action against a co-employee for negligent operation of a motor vehicle not owned or leased by the employer. See § 102.03(2). As discussed, Rotter as president of Happy Cookers, Inc. is the employer and the vehicle here was owned by Rotter and insured in the name of Happy Cookers, Inc. Accordingly, Plaintiff's claim does not fall under this exclusion.

We disagree.

¶8 WISCONSIN STAT. § 102.03(2) provides exceptions to the exclusivity of the Worker's Compensation Act. As applicable here, "[t]his section does not limit the right of an employee to bring [an] action against any co[-]employee ... for negligent operation of a motor vehicle not owned or leased by the employer …." At the time of the accident, Happy Cookers, Inc., as a "close corporation," pursuant to Ch. 180 of the Wisconsin Statutes, was the legal entity that employed Rotter and Elfriede Larson. *See* ***Marlin Elec. Co. v. Indus. Comm'n***, 33 Wis. 2d 651, 657-58, 148 N.W.2d 74 (1967) (a corporation is by legal fiction a person under the terms of worker's compensation statute). Marilyn Rotter, the president

of the corporation, was Elfriede Larson's "boss" in the vernacular sense, but she was not her "employer" in the legal sense. As a fellow caterer, Rotter was Larson's co-employee; Happy Cookers, Inc., was their employer. *See* ***id.*** at 659 (corporate officer may be an employee of a corporation if such officer performs work performed by employees).

¶9 Moreover, at the time of the accident, Rotter was operating her personal automobile. Tower Insurance has not submitted any evidence establishing that the car was leased either by or to the employer. Instead, Tower, relying on ***Ross v. Foote***, 154 Wis. 2d 856, 454 N.W.2d 62 (Ct. App. 1990), contends that like the leased vehicle in ***Ross***, the vehicle here, by virtue of the name of its insured, Happy Cookers, Inc., was "owned" by the Happy Cookers, Inc. We reject this contention.

¶10 In ***Ross***, the court held that the statutory exception to the co-employee immunity rule did not apply to a claim for injuries sustained in a car accident involving co-employees riding in a rental car during a business trip to Italy. ***Ross***, 154 Wis. 2d at 858, 862. After the car accident involving the rental car and the defendant-employee Foote, the injured plaintiff-employee Ross sued Foote, claiming that he, not the employer/corporation, was the lessee of the vehicle for purposes of WIS. STAT. § 102.03(2). ***Id.*** at 858-59. After a thorough examination of the employment relationship, this court determined that Foote, the corporate executive who had rented and driven the car, was acting within the scope of his employment and as an agent for the corporation at the time he signed the rental agreement. ***Id.*** at 860-61. In reaching this conclusion, we noted:

> The record undisputedly show[ed] that Foote was acting within the scope of his employment and as [the corporation/employer's] agent when he rented the vehicle. The entire Italian excursion was employment related.

> Foote was authorized to rent vehicles for employment related purposes. Foote rented the Hertz Italiana vehicle not only in accord with this authorization but also at the express direction of [the corporation/employer's] CEO and Chairman. Foote reasonably expected that he would be reimbursed by [the corporation] for the rental expense and, in fact, he was.
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> These facts inexorably lead us to conclude that Foote: (1) leased the vehicle for [the corporation/employer's] benefit; (2) contracted as [the employer's] agent; and (3) incurred an expense which [the employer] was obligated to, and did, reimburse.

***Id.*** Based on this detailed examination of the employee/employer relationship, we concluded that the corporation "leased" the vehicle, thus precluding the co-employee from maintaining a common-law negligence action under WIS. STAT. § 102.03(2). ***Id.*** at 862. The record in the instant case, however, does not lead us to the same conclusion.

¶11 Here, Tower has not submitted any evidence establishing that Happy Cookers, Inc., "owned" or exercised dominion or control over the car, either by financing its expenses or by paying for its repairs. In fact, the certified copy of Rotter's motor vehicle title established that Rotter owned the car. *See* WIS. STAT. § 340.01(42) ("owner" for purposes of financial responsibility is the person who holds legal title to vehicle), and ***State v. Kirch***, 222 Wis. 2d 598, 604-07, 587 N.W.2d 919 (Ct. App. 1998) (owner is person who has dominion and control over vehicle). Moreover, nothing in the record indicates that anyone other than Rotter paid the operating and maintenance expenses on the car.

¶12 Only by ignoring Happy Cookers, Inc.'s status, and the settled law clearly distinguishing a corporation from its officers for purposes of liability, could the court conclude that Rotter was the employer rather than a co-employee. Further, only by ignoring WIS. STAT. § 340.01(42), which provides that an owner

of a vehicle is one "who holds the legal title of a vehicle," could the court conclude that the car, by virtue of its insurer, belonged to the corporation rather than to Rotter. Consequently, irrespective of whether the circuit court was correct in determining that Larson was a traveling employee or that she was performing services growing out of and incidental to her employment, she and Rotter were co-employees of the corporation; thus, under the exception in WIS. STAT. § 102.03(2), the Larsons may pursue their common-law negligence action.

B*y the Court.*—Judgment reversed.

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