COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2007AP2582 **Cir. Ct. No. 2007CV2135**

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

THE ESTATE OF JOSHUA REIF, BY ITS PERSONAL REPRESENTATIVE, JOHN W. REIF, AND MARY REIF,

PLAINTIFFS-APPELLANTS,

V.

AUTOMOTIVE & TRUCK SERVICES, INC., D/B/A DENNIS' TOWING,

DEFENDANT-RESPONDENT,

NAVIGATOR'S INSURANCE,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. The Estate of Joshua Reif, by his parents, appeal from the order of the circuit court that dismissed their complaint against Automotive & Truck Services, Inc. The Reifs argue on appeal that the circuit court erred when it determined that the Reifs' claims are governed exclusively by the Worker's Compensation Act, WIS. STAT. ch. 102 (2005-06),[1] and when it determined that Joshua's death was caused by an accident. Specifically, the Reifs argue that since the tasks Joshua was assigned to perform violated the child labor laws, then they should not be limited to recovering only under the Worker's Compensation Act. Because we conclude that the circuit court did not err, we affirm.

¶2 This case involves tragic, but undisputed facts. In December 2005, Joshua Reif was seventeen-years old and a student at Waukesha West High School. As a student, he participated in an apprentice program through Automotive & Truck Services. The school informed Automotive that because Joshua was under eighteen-years old, there were limitations by law on the type of duties he could perform. Specifically, the school told Automotive that Joshua could not tow vehicles, and the school was told by Automotive that he was not towing vehicles. In fact, however, Automotive did have Joshua tow vehicles. On December 6, 2005, Joshua towed two vehicles that had been in an accident. When he returned to the impound lot with the vehicles, he began to unhook them from the tow truck by himself. Joshua reached under one of the vehicles to release the hook. The vehicle fell onto Joshua, pinning him. Joshua died from mechanical asphyxiation.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 The Reifs sued Automotive and its insurance company. Instead of answering, Automotive moved to dismiss the complaint. The circuit court held a hearing, and granted the motion. The court held that Joshua's death was the result of an accident "within the meaning of the code." The court further found that towing was incidental to Joshua's employment. And third, even though Automotive conceded that it had violated the child labor laws, the worker's compensation law provided the exclusive remedy for this injury.

¶4 The Reifs argue first that the circuit court erred when it determined that Worker's Compensation provides the exclusive remedy under these circumstances. They argue that the purpose of Worker's Compensation conflicts with the purpose of the child labor laws and that Worker's Compensation provides a special remedy against employers who hire children illegally, but should not apply to employers who hire children to perform activities that violate the child labor laws.

¶5 The Worker's Compensation Act provides that it is the exclusive remedy for an employee against an employer, WIS. STAT. § 102.03(2), when: the employee sustains an injury growing out of and incidental to work; at the time of the injury, both the employee and the employer are subject to the Act; the injury is not self-inflicted; and the injury arises out of the employee's employment. Sec. 102.03(1). Under the regulations of the Department of Workforce Development, which enforce the child labor laws, a minor may not be employed as a driver of a tow truck. WIS. STAT. § 103.66; WIS. ADMIN. CODE § DWD 270.12(21)(b)8.a. (Aug. 2005). There is no dispute in this case that Joshua was driving a tow truck in violation of that regulation. The issue presented is whether the violation of the regulation takes the employer out of the exclusivity provision of the Worker's Compensation Act. We agree with the circuit court that there is nothing in

Wisconsin law that abrogates the exclusivity provision of the Worker's Compensation Act under these circumstances.

¶6 The issue of whether a claim is subject to the exclusive remedy provision is a question of law that we review de novo. ***Lentz v. Young***, 195 Wis. 2d 457, 468, 536 N.W.2d 451 (Ct. App. 1995). The Worker's Compensation Act is a "legislative compromise between the interests of employers, employees and the public in resolving compensation disputes regarding work-related physical or mental harms." ***Peterson v. Arlington Hospitality Staffing, Inc.***, 2004 WI App 199, ¶11, 276 Wis. 2d 746, 689 N.W.2d 61. The compromise requires that employers pay a fixed amount and relinquish their common-law defenses in tort. ***Id.***, ¶12. The employee, in turn, is allowed to recover regardless of fault, but relinquishes his or her right to sue the employer. ***Id.*** The exclusive remedy provision is "an integral feature" of the compromise reached. ***Id.***

¶7 Amendments to the Act are proposed by the Worker's Compensation Advisory Council, composed of representatives of labor, industry and insurance. ***Id.***, ¶13. The Act is "an evolving public policy decision arrived at by the legislature after weighing the competing policy considerations now presented by the representatives on the advisory council." ***Id.***, ¶14. We must both enforce the Act's goal of compensating injured workers, while exercising care to not upset the delicate balance of interests. ***Id.***

¶8 In determining whether the Worker's Compensation Act provides the exclusive remedy to an injured worker, the courts consider whether the act that caused the injury was intentional or accidental. An employer may not use the Worker's Compensation Act to shield him or herself from liability for an intentional act. ***Lentz***, 195 Wis. 2d at 470. In ***Lentz***, the court determined that an

employer's intentional sexual harassment of an employee was not an accident under the Worker's Compensation Act, and hence the Act was not the exclusive remedy. ***Id.*** at 473. The exception, however, is a narrow one that is limited to its facts and applies only when the employer is a sole proprietor and has intentionally caused the injury. *See* ***Peterson***, 276 Wis. 2d 746, ¶20.

¶9 If the conduct was an accident, however, then the Act provides the exclusive remedy. An accident is a "fortuitous event unexpected or unforeseen by the *injured person*." ***Jenson v. Employers Mut. Cas. Co.***, 161 Wis. 2d 253, 264, 468 N.W.2d 1 (1991) (citation omitted). Whether conduct is an accident is viewed from the perspective of the injured party. ***Id.*** "[I]f the result of the act is unexpected or unforeseen, from that perspective the injury is by accident." ***Id.*** at 264-65.

¶10 In this case, the circuit court considered the incident from Joshua's perspective and concluded that he certainly did not foresee that pursuing this part of his employment would lead to his untimely death. From the perspective of the employee, and as defined by the case law, therefore, this was an accident. We agree. Because it was an accident, then Worker's Compensation provides the exclusive remedy.

¶11 The Reifs also ask the court, in essence, to carve out a public policy exception for an employer who violates the child labor laws. As we noted in ***Peterson***, however, were we to adopt such an exception: "we would potentially upset the delicate balance of interests the legislature and members of advisory council have striven to achieve." ***Peterson***, 276 Wis. 2d 746, ¶15. This we decline to do. "The legislature with its input from the experts on the advisory council and the public is in a far better position than this court to fashion a public

policy exception to the exclusivity provision." ***Id.*** In this case, we once again defer to the legislature and the advisory council.

¶12 In support of their argument in the circuit court, the Reifs cited to a number of cases from other states. These cases primarily considered the issue of whether worker's compensation is the exclusive remedy when a child is illegally employed. *See, e.g.*, ***Roszek v. Bauerle & Stark Co.***, 282 Ill. 557, 560, 118 N.E. 991 (1918) (underage child was not bound by the Worker's Compensation Act). In their brief to this court, the Reifs cite to ***Garcia v. Gusmack Restaurant Corp.***, 150 N.Y.S. 2d 232 (N.Y. Cty. 1954). In that case, the court held that an employee who was assaulted by the president of the corporation who employed him could recover under the common law. ***Id.*** at 233. The court stated that the Worker's Compensation Act did not apply because the Act addressed accidental injuries and not intentional wrongs. ***Id.*** at 234. In this case, however, we have concluded that Joshua's death resulted from an accident.

¶13 We conclude that Joshua's death was an accident as defined by the cases. We further conclude that there is nothing in Wisconsin law that takes the actions of an employer who legally employs a child but has that child perform tasks that are prohibited by the child labor laws outside of the exclusivity provision of the Worker's Compensation Act. As the circuit court noted, while the result in this case may do injustice to Joshua's parents, it is part of the compromise worked out by the legislature. We affirm the order of the circuit court.

By the Court.—Order affirmed.

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